CEYLON OXYGEN CO. LTD.
v.
FAIR TRADING COMMISSION AND ANOTHER

COURT OF APPEAL.
DR. RANARAJA, J.
C.A. 932/94
APRIL 30, 1996.

Fair Trading Commission Act, No. 1 of 1987 sections 11, 14, 15 – Monopoly situation – Anti-competitive practice – Jurisdiction to inquire into predatory pricing and discriminatory pricing.

The appellant Company was investigated by the respondent Fair Trading Commission (FTC) with respect to the existence of a monopoly situation or anti-competitive practice in the supply of oxygen. The FTC formed an opinion that the appellant had resorted to anti-competitive practice of entering into written agreements for the supply of gases/products in bulk to its customers containing a provision that the buyers must purchase his total requirements from the appellant.

On appeal it was argued that the FTC did not hold a fair and proper inquiry and the agreements complained of are not anti-competitive. Further having made the appellant understand that it was investigating into complaints relating to predatory pricing and discriminatory pricing it could not have changed the scope of the inquiry into anti-competitive practices without due notice to the appellant.

The Commission commenced the investigation on a complaint made by Industrial Gases (Pvt) Ltd., that the appellant Company was resorting to unfair trade practices to their detriment. The FTC investigation focussed on predatory/discriminatory pricing, exclusive dealings discriminatory refutes/ discounts in its pricing policies. It was argued that the Commission has come to a finding that there was no evidence to establish predatory/discriminatory pricing but the said agreements amounts to an anti-competitive practice; further that the FTC has commenced inquiries not on any of the three matters specified in section 11(a) (b) and (c) – which deals with the prevalence of any anti-competitive practice.

Held:

(1) *Ex facie* the FTC has acted outside the scope of section 11 in commencing its investigation.

***Per* Ranaraja, J.**

"If an investigating body commences an inquiry without jurisdiction. Whatever decision it may arrive at the conclusion of that investigation, that patent defect of lack of jurisdiction will render the entire investigation improper and unfair".

(2) The FTC has declared the agreements between the appellant and the five customers null and void, inoperative and any agreements of a similar nature entered into with its customers to be deemed null and void and inoperative. There is no evidence, that these parties apart from the appellant were heard. Section 15 does not empower the respondent to make such orders without hearing the parties to such agreements.

APPEAL from an Order of the Fair Trading Commission.

Romesh de Silva P.C. for petitioner.

Alan Thambinayagam S.C. for respondents.

Cur. adv. vult.

April 30, 1996.

DR. RANARAJA, J.

The appellant company, Ceylon Oxygen Ltd., was investigated by the respondent Fair Trading Commission under the provisions of section 11 of the Fair Trading Commission Act, No. 1 of 1987, purportedly with respect to the existence of a monopoly situation or anti competitive practice in the supply of Oxygen. At the conclusion of the investigation, the Commission acting under section 15 of the said Act, formed the opinion that the appellant had resorted to **anti competitive practice** and proceeded to direct the appellant;

(a) **To terminate** the anti-competitive practice of entering into written agreements for the supply of gases/products in bulk to its customers containing a provision that the buyer must purchase his total requirements from the appellant. The Commission **directed** any agreements of such a nature entered into by the appellant be **deemed null, void and inoperative.**

(b) to **refrain** from entering into similar agreements.

(c) The Commission also decided to closely monitor the activities and market behaviour of all manufacturers and distributors of gases and related products to ensure fair and effective competition.

The appellant has filed this appeal to have the order of the respondent set aside *inter alia*, on the grounds,

(a) the respondent did not hold a fair and proper inquiry.

(b) The agreements complained of are not anti competitive.

Section 14 of the Act defines "anti competitive" practice to mean a situation "where a person in the course of business, pursues a course of conduct, which of itself or when taken together with a course of conduct pursued by a person associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in Sri Lanka or the supply or securing of services in Sri Lanka."

Section 15 requires the Commission at the conclusion of the investigation, *inter alia,* where the anti competitive practice is likely to operate against the public interest, (1) the adjustment of contracts, whether by discharge or reduction of any liability or obligation or otherwise, (2) the termination of any anti competitive practice in such manner as may be specified in the order, (3) such other action as the Commission may consider necessary for the purpose of remedying or preventing the adverse effects of any anti competitive practice.

Thus in the instant case the Commission had to satisfy itself on the evidence placed before it that, (a) the appellant in the course of its business of production and distribution of Oxygen, by entering into written agreements for the supply of gases/products in bulk to its customers had intended or was likely to have the effect of restricting, distorting or preventing competition in connection with the production and supply of Oxygen in Sri Lanka,

(b) that the practice adopted, even though anti competitive was against the public interest,

(c) that the Commission had the power to make the orders referred to.

In deciding whether an anti competitive practice is likely to operate against the public interest, the Commission is required to take into account all matters relevant to the matter under investigation having special regard to the desirability of,

(a) maintaining and promoting effective competition between the persons supplying the gases/products,

(b) promoting the interest of consumers in respect of the price and quality of the supplies,

(c) promoting through competition, the reduction of costs, the development and use of new techniques and facilitating the entry of new competitions into existing markets.

The Commission has come to a finding that the appellant had entered into written agreements with bulk purchasers of gases/products beginning in October 1993 with (1) City Cycle Industries, (2) Asian Electricals, (3) Hiat Steel (Pvt) Ltd, (4) Ceylon Steel Corporation, (5) Colombo Dockyards, but that they do not afford sufficient evidence to establish predatory pricing or discriminatory discounts or rebates. However it expressed the view that the provisions in the said agreements that the buyer must purchase the total requirements from the appellant amounts to an anti competitive practice. The Commission has based its opinion on the evidence of witness Wijesekera that the clause which requires the buyer to purchase the total requirements was inserted with a view to securing the market share of the appellant. The Commission determined that such a clause would have the effect of preventing any competitor from selling its products to the buyers concerned. It had totally ignored the requirement that the Commission must also consider whether such a practice was likely to operate against the public interest.

The main complaint of the appellant is that the Commission at the commencement of the investigation having made the appellant understand that it was investigating into complaints relating to predatory pricing and discriminatory pricing could not have changed the scope of the inquiry into anti competitive practices without due notice to the appellant.

Learned State Counsel has submitted that the respondent had called upon the counsel for the appellant to make submissions with regard to anti-competitive practice and exclusive dealings on 3.6.94. This Court, although briefed with the proceedings up to page 10, has not been provided with proceedings recorded thereafter on that date. However proceedings of 14.7.94 support the State Counsel's submissions that the appellant's Counsel was asked to make submissions on anti competitive practice.

But what is important is whether the respondent had the jurisdiction at the inception of the investigation to inquire into predatory pricing and discriminatory pricing in the first place, under

the provisions of the Fair Trading Commission Act. It is to be noted the Commission may commence an investigation either on its own motion or on a complaint made to it by any person. The order of the respondent specifically states. "By a letter dated 7th February, 1994 Industrial Gases (Pvt) Ltd., complained to the Fair Trading Commission that Ceylon Oxygen Ltd, was resorting to unfair trade practices to their detriment." Thereafter the respondent for the purpose of investigation focussed on, (1) predatory pricing, (2) exclusive dealings, (3) discriminatory rebates or discounts in its pricing policies. In other words, it had commenced its inquiries not on any of the three matters specified in section 11 (a), (b) and more specifically, (c) which deals with the prevalence of any anti competitive practice.

It is clear therefore that *ex facie* the Commission has acted outside the scope of section 11 in commencing its investigation. If an investigating body commences an inquiry without jurisdiction, whatever decision it may arrive at the conclusion of that investigation, that patent defect of lack of jurisdiction will render the entire investigation improper and unfair.

There is a further reason besides the failure of the Commission to consider the aspect of public interest, why the order of the respondent cannot be allowed to stand. The Commission has declared the agreements between the appellant and the five customers referred to earlier null, void, inoperative and any agreements of a similar nature for the bulk supply of gases/products entered into by the appellant with its customers to be deemed null, void and inoperative. There is no evidence which shows that the parties to those agreements, apart from the appellant, were heard by the respondent and therefore the orders have been made in breach of basic rules of natural justice. Section 15 of of the Law does not empower the respondent to make such orders without hearing the parties to such agreements. The respondent had exceeded its powers in making those orders.

For the reasons given the order of the respondent is set aside. The appeal is allowed with costs.

Appeal allowed.