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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 17.02.2012

% Judgment delivered on: 23.02.2012

\+ **W.P.(C) 993/2012 & C.M. Nos. 2178-79/2012**

UNION OF INDIA ..... Petitioner
Through: Mr. Mohan Parasaran, ASG with Mr.Zoheb Hossain, Mr. Romil Pathak & Mr.Ashwani Bhardwaj, Advocates.

versus

COMPETITION COMISSION OF INDIA AND ORS ..... Respondents
Through: Dr. A. M. Singhvi & Mr. Rajeeve Mehra, Senior Advocates, with Mr.Amitabh Kumar, Ms. Divya Chaturvedi & Mr. Gautam Shahi, Advocates for the respondent No.2.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner-Union of India (UOI) through the Chairman, Railway Board, Ministry of Railways assails the order dated 03.05.2011 passed by the Competition Commission of India (Commission) in Case No. 64/2010, whereby the said Commission has rejected the petitioner's challenge to jurisdiction of the Commission to entertain the complaint on the basis of the information of respondent No. 2 under

Section 19(1) of the Competition Act, 2002 (the Act). The Commission has rejected the stand of the petitioner that it is not an 'enterprise' within the definition of the said term as contained in Section 2(h) of the Act. The petitioner also raised an objection to the maintainability of proceedings before the Commission by contending that an arbitration agreement existed between respondent No. 2 and the petitioner and, consequently, the proceedings before the Commission could not proceed and were liable to be referred to arbitration under Section 8 of the Arbitration & Conciliation Act, 1996. This objection too has been rejected by the Commission.

2. Respondent No. 2 approached the Commission under Section 19(1) of the Act, complaining against the Ministry of Railways and the Container Corporation of India (CONCOR), inter alia, alleging contravention of Section 4 of the Act. It is the case of respondent No. 2 that as per the Public Private Partnership (PPP) policy of the Indian Railways and the Permission for Operators to Move Container Trains on Indian Railways Rules, 2006 (CTO rules) a Model Concession Agreement was entered into between the Ministry of Railways and the parent company of the informant respondent No. 2 on 09.05.2008 for operating container trains over rail network in India for domestic traffic as well as for export & import traffic. According to the informant, it had invested Rs.550 Crores towards the project undertaken by it. It was alleged by the informant that the Ministry of Railways had abused

its dominant position through its various acts/conduct, viz, by increasing charges for various services; by not providing access to infrastructure such as rail terminals, etc; by imposing several restrictions on the carrying by the respondent No. 2 of certain categories of goods in alleged contravention of provisions of Section 4 of the Act.

3. The Commission, after perusing the information and the material filed in support thereof, and after considering the submissions made by the informant/respondent No. 2 was of the opinion that there existed a prima-facie case to order the Director General to investigate into the matter and, accordingly, the Commission passed an order to this effect under Section 26(1) of the Act on 24.01.2011.

4. The Director General in furtherance of the order took up the investigation into the matter and issued notice to the petitioner. The petitioner then preferred a writ petition before this Court to challenge the said notice by raising various jurisdictional pleas. The writ petition was dismissed by the Court on 23.03.2011 by observing that the petitioner may raise all the pleas urged in the writ petition, including the plea that the Commission has no jurisdiction to issue show-cause notice, before the Commission itself and the said issues shall be decided by the Commission.

5. Thereafter the petitioner moved an application dated 30.03.2011 before the Director General praying, inter alia, that the Commission

may decide the issue of jurisdiction first, and to consider the case thereafter on merits. Vide the impugned order it is this application of the petitioner, alongwith an application under Section 8 of the Arbitration and Conciliation Act, 1996 which have been rejected by the Commission.

6. The Commission rejected both the objections of the petitioner. It was held that the issues raised in the proceedings before it relate to the alleged abuse of dominant position by the Railways in contravention of the provisions of the Act, whereas the arbitration agreement covers the contractual obligations incurred and assumed by the parties. It was observed that the scope of the proceedings before the Commission was entirely different from the contractual obligations of the parties. The Commission also relied upon Section 60 of the Act which gives overriding effect to the provisions of the Act and over other laws. Section 62 of the Act provides that the provisions of the Act are in addition to, and not in derogation of, the provisions of any other law. The Commission by relying upon the aforesaid provisions of the Act also disposed of the plea raised by the petitioner regarding the exclusion of the jurisdiction of the Commission founded upon the provisions of the Railways Act, 1989.

7. The Commission thereafter considered the petitioner's submissions with regard to the definition of the expression 'enterprise' contained in Section 2(h) of the Act and the submission that the

petitioner is not an 'enterprise' as it is performing a sovereign function in running the Railways. While doing so, the Commission has relied upon the Supreme Court decisions in ***Bangalore Water Supply and Sewerage Board Vs. A. Rajappa,*** *(1978) 2 SCC 213;* ***N. Nagendra Rao & Co. Vs. State of A.P.,*** *(1994) 6 SCC 205;* and ***Common Cause Vs. Union of India,*** *(1999) 6 SCC 667.* It was held that the petitioner cannot be said to be performing a sovereign function. It is a Government Department engaged in an activity relating to rendering of service. It was, therefore, held that it is an 'enterprise' under Section 2(h) of the Act.

8. The first submission of Mr. Parasaran, learned ASG is that before the Commission, respondent No. 2 sought the setting aside of the rate circular No. 30/2010 and rate circular No. 25/2010; the grant of access to sidings (railway sidings as well as private sidings); to seek a direction to the Ministry of Railway group to discontinue abuse of the alleged dominant position, as aforesaid. Mr. Parasaran submits that the fixation of rates by the aforesaid circulars is done by the Railways in accordance with the provisions of the Railways Act and the Rules framed thereunder. The Railways Act and the Rules framed thereunder gives the power to the petitioner to fix the rates. He submits that the grievance of respondent No. 2 is with regard to the Haulage Charges fixed vide circulars dated 11.10.2006 & 29.10.2010. He also submits that under the statutory rules, namely the Indian

Railways (Permission for Operators to Move Container Trains on Indian Railways) Rules, 2006, Haulage Charges are notified and fixed by the Railways from time to time, which the operator is obliged to pay. Consequently, the Haulage Charges are statutorily determined. He submits that these are purely contractual disputes which the respondent No. 2 ought to raise before the Arbitrator in terms of the arbitration agreement contained between the parties. It is further submitted that the industrial policy dated 24.07.1991 specifically reserves the railway transport industry for the public sector which shows that the railway transport is being undertaken by the petitioner as a sovereign function.

9. Mr. Parasaran also refers to Clause 3.2 of the Concession Agreement dated 09.05.2008 to submit that the Government has the right to specify certain commodities, which ordinarily would be transported by Railway wagons in train load as notified commodities. Article 10.1 of the agreement is also relied upon to submit that the Railway Administration may, from time to time, uniformly on a non-discriminatory basis prescribe the Haulage Charges. It is, therefore, submitted that respondent No. 2 cannot have any grievance in respect of any of the aforesaid aspects and even if respondent No. 2 wishes to agitate any of its claims, the same are clearly referable to arbitration under the arbitration agreement.

10. On the other hand, Dr. Singhvi, learned senior counsel for the respondent No. 2, who appears on caveat, firstly, submits that the present petition is an abuse of the process of this Court inasmuch, as, the impugned order was passed as early as 03.05.2011. Thereafter the Director General was called upon to make a report. The petitioner participated in the investigation proceedings conducted by the Director General till November 2011, when the Director General came up with a detailed investigation report running into about 9,000 pages on 01.11.2011. On 13.12.2011, the hearing took place before the Commission. On 24.01.2012, the petitioner sought time to put in a reply. The Commission has now fixed the dates for final hearing on 28.02.2012 & 29.02.2012. It is at this stage that the petitioner has filed the present petition to stall the hearing before the Commission. He submits that the petitioner could have approached this Court soon after passing of the order dated 03.05.2011, but it has chosen not to do the same. He argues that the petitioner cannot, at this stage, seek to stall the final hearing before the Commission.

11. He further submits that the decision of the Commission is appealable before the Competition Appellate Tribunal under Section 53B of the Act. He also placed reliance on the following decisions in support of his submission that in relation to the Railways itself, the Supreme Court has taken the view that it is not discharging a sovereign function in the running of the Railways:

(i) ***Union of India & Another Vs. Sri Ladulal Jain,*** *AIR 1963 SC 1681;*

(ii) ***Chairman, Railway Board & Others Vs. Chandrima Das (Mrs) & Others,*** *(2000) 2 SCC 465.*

12. Having heard learned counsel for the parties, perused the impugned order and the decisions cited before me, I am of the view that there is no merit in this petition. The only issues which need consideration before this Court are, firstly, whether the existence of an arbitration agreement between the parties is a bar to the maintainability of the information and the proceedings arising therefrom before the Commission; and, secondly, whether the petitioner is an 'enterprise' within the meaning of the expression as defined in Section 2(h) of the Act.

13. The Commission has been set up with special focus *"to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto"*. (See the Preamble of the Act)

14. The Commission is not merely concerned with the aspect of breach of contract or with regard to implementation of the contract, its mandate is to ensure compliance of, inter alia, Sections 3 & 4 of the Act. The provisions of the Act are in addition to, and not in derogation

of, the provisions of any other law for the time being in force (Section 62). This provision is para materia with Section 3 of the Consumer Protection Act, which also states that the provisions of the Consumer Protection Act shall be in addition to, and not in derogation of any other provisions of law for the time being in force.

15. A similar objection was raised to maintainability of the consumer claim under the Consumer Protection Act on the ground that an arbitration agreement existed between the parties, and that the disputes arising out of a contract were referable to arbitration. The Supreme Court rejected the said argument in the face of Section 3 of the Consumer Protection Act in ***Fair Air Engineers (P) Ltd. Vs. N.K. Modi,*** *(1996) 6 SCC 385*, by observing as follows:

> *"It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words 'in derogation of the provisions of any other law for the time being in force' would be given proper meaning and effect and if the compliant is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available under Section 9 of the Code of Civil Procedure i.e. to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy."*

16. ***Fair Air Engineers*** (supra) has also been referred to and relied upon by the Supreme Court in its later decision in ***Secretary,***

Thirumurugan Cooperative Agricultural Credit Society Vs. M. Lalitha (Dead) through LRs & Others, *(2004) 1 SCC 305*. The scope of the proceedings, and the focus of its investigation and consideration is very different from the scope of an enquiry before an Arbitral Tribunal. An Arbitral Tribunal may not go into aspects of abuse of dominant position by one of the contracting parties. Its focus is to examine the disputes in the light of the contractual clauses. A contract may not be invalid or hit by Section 23 of the Contract Act, but the conduct of one of the parties may still fall foul of the provisions of the Act. Therefore, an informant may not get the desired relief before an Arbitral Tribunal, whose mandate is circumscribed by the contractual terms even if he were to raise issues of breach of Sections 3 and 4 of the Act before the Arbitral Tribunal. Moreover, the Arbitral Tribunal would neither have the mandate, nor the expertise, nor the wherewithal to conduct an investigation to come up with a report, which may be necessary to decide issues of abuse of dominant position by one of the parties to the contract. Therefore, the submission of learned ASG that the proceedings before the Commission are not maintainable, founded upon the arbitration agreement has no merit and is rejected as the said observations of the Supreme Court apply with equal force in relation to the provisions of the Competition Act.

17. Before I consider the submissions of the learned ASG in relation to the meaning of the expression ‘enterprise’ contained in Section 2(h) of the Act, I may note that by referring to the various reliefs sought by respondent No. 2 before the Commission; the clauses of the agreement between the parties and by reference to the statutory Rules aforesaid, the petitioner is confusing the issue arising for determination, i.e., whether the petitioner is an ‘enterprise’ under Section 2(h) of the Act. These submissions of Mr.Parasaran, really, touch upon the merit of the complaint and proceedings before the Commission. They do not have a bearing on the issue of jurisdiction of the Commission to conduct an investigation and deal with the information furnished by respondent No. 2. These are all defences that the petitioner may raise before the Commission in support of its defence that it is not abusing its position of dominance or that its agreement with respondent No. 2 is not in contravention of the provisions of Section 3(1) of the Act.

18. Section 2(h) of the Act defines the expression ‘enterprise’ in the following manner:

> *“2(h) “enterprise” means a person or a department of the Government who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the*

Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."

19. It is not the petitioner's contention that it is not a department of the Government. It is also not the petitioner's contention that it is not engaged in an activity relating to provision of services, inter alia, of transportation of goods by rail road. Therefore, unless the petitioner's aforesaid activity can be classified as *"relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence & space",* it cannot avoid being classified as an 'enterprise' under Section 2(h) of the Act. If it is an 'enterprise' under Section 2(h) of the Act, the Commission gets jurisdiction under Chapter IV of the Act.

20. The Commission has taken note of Section 54 of the Act, which provides that the Central Government may, by notification, exempt from the application of the Act, or any provision thereof, and for such period as it may specify in such notification, inter alia, *"any enterprise which performs a sovereign function on behalf of the Central Government or a State Government"* (See Section 54(c)). Pertinently, no notification has been issued by the Central Government in relation to the services rendered by the Indian Railways. Even in relation to an enterprise which is engaged in activity, including an activity relatable to the sovereign function of the Government, the Central Government

may grant exemption only in respect of activity relatable to sovereign functions. Therefore, an enterprise may perform some sovereign functions, while other functions performed by it, and the activities undertaken by it, may not refer to sovereign functions. The exemption under Section 54 could be granted in relation to the activities relatable to sovereign functions of the Government, and not in relation to all the activities of such an enterprise. Pertinently, there is no notification issued under Section 54 either under Clause (c), or under the proviso. This clearly shows that the Central Government does not consider any of the activities of the petitioner as relatable to sovereign functions.

21. Dr. Singhvi has pointed out and, in my view, rightly so that the Supreme Court has clearly held in ***Sri Ladulal Jain*** (supra) that when the Government runs the Railways for providing quick and cheap transport for people and goods and for strategic reasons, it cannot be said that it is engaged in an activity of the State as a sovereign body. Paragraphs 10 & 11 from this decision read as follows:

> *"10. The fact that the Government runs the railways for providing quick and cheap transport for the people and goods and for strategic reasons will not convert what amounts to carrying on of a business into an activity of the State as a sovereign body.*
>
> *11. Article 298 of the Constitution provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and cl. (6) of Art. 19 provides that nothing in sub-clause (g) of clause (1) of that Article shall prevent the State from making any law relating to the carrying on by the State or by a corporation owned-or controlled by the State, of any trade, business, industry or service, whether to the*

exclusion, complete or partial, of citizens or otherwise. These provisions clearly indicate that the State can carry on business and can even exclude citizens completely or partially from carrying on that business. Running of railways is a business. That is not denied. Private companies and individuals carried on the business of running railways, prior to the State taking them over. The only question then is whether the running of railways, ceases to be a business when they are run by Government. There appears to be no good reason to hold that it is so. It is the nature of the activity which defines its character. Running of railways is such an activity which comes within the expression 'business'. The fact as to who runs it and with what motive cannot affect it."

22. In ***Chandrima Das*** (supra), the Supreme Court held that the theory of sovereign power, which was propounded in ***Kasturi Lal Ralia Ram Jain v. State of U.P.,*** *AIR 1965 SC 1039*, has yielded to new theories and is no longer available in a welfare state. Functions of the Government in a welfare state are manifold, all of which cannot be said to be the activities relating to exercise of sovereign power. The functions of the State not only relate to the functions of the country or the administration of justice (which are recognized as sovereign functions), but they extend to many other spheres as, for example, education, commerce, social, economic and political activities. These activities cannot be said to be related to sovereign power. The running of Railways was held to be a commercial activity. The Supreme Court expressly rejected the reliance placed on the decision in ***Kasturi Lal*** (supra).

23. The decisions relied upon by the Commission are also germane. I also consider it appropriate to quote paras 26 to 30 of the impugned

order, which, in my view, correctly analyse the legal position. The same read as follows:

> *"26. In Bangalore Water Supply & Sewerage Board v. A. Rajappa, (1978) 2 SCC 213, a seven judges Bench of the Supreme Court while interpreting the term 'industry' as defined in Section 2(j) of the Industrial Disputes Act, 1947 exempted the sovereign functions from the ambit of industrial law. However, the Court confined only such sovereign functions outside the purview of law which can be termed strictly as constitutional functions of the three wings of the State, viz., executive, legislative and judiciary and not the welfare activities or economic adventures undertaken by government or statutory bodies.*
>
> *27. In N. Nagendra Rao & Co. v. State of AP, (1994) 6 SCC 205 the Supreme Court also approached the issue in the similar manner by observing that in welfare State, functions of the State are not only defence of the country or administration of justice or maintenance fo law and order but it extends to regulating and controlling the activities of people in almost every sphere – educational, commercial, social, economic and political etc. It further observed that demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. And thus, the court observed that barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the State cannot claim any immunity.*
>
> *28. Recently, the Supreme Court in Common Cause v. Union of India, (1999) 6 SCC 667 also quoted with approval its aforesaid view on the issue.*
>
> *29. From the analysis of case law on the question as to what constitutes 'sovereign' or 'non-sovereign' function, it appears that the courts have taken a very narrow view of the term 'sovereign function' by confining the same to strict constitutional functions of the three wings of the State. Welfare activities, commercial activities and economic adventures have been kept outside the purview of the term 'sovereign functions'.*

30. In the premises, it is held that only primary, inalienable and non-delegable functions of a constitutional government should quality for exemption within the meaning of 'sovereign functions' of the government under section 2(h) of the Competition Act, 2002. Welfare, commercial and economic activities, therefore, are not covered within the meaning of 'sovereign functions' and the State while discharging such functions is as much amenable to the jurisdiction of competition regulator as any other private entity discharging such functions."

24. I may also refer to the decision of the Supreme Court in ***Agricultural Produce Market Committee Vs. Ashok Harikuni & Another,*** *(2000) 8 SCC 61*. The Supreme Court held that sovereign functions in the new sense may have very wide ramifications, but essentially sovereign functions are primarily inalienable functions which only the State could exercise. In para 32, the Supreme Court held as follows:

"So, sovereign function in the new sense may have very wide ramification but essentially sovereign functions are primary inalienable functions which only State could exercise. Thus, various functions of the State, may be ramifications of `sovereignty' but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which covers its field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. In a given case even in subject on which the State has the monopoly may also be non-sovereign in nature. Mere dealing in subject of monopoly of the State would not make any such enterprise sovereign in nature. Absence of profit making or mere quid pro would also not make such enterprise to be outside the ambit of "industry" as also in State of Bombay & Ors. case (Supra)."

25. The petitioner has entered into a Concession Agreement under its PPP policy. It is, therefore, clear that respondent No. 2 is performing a commercial activity and rendering services for a charge, which, prior to the entering into the aforesaid agreement with the petitioner, was being performed by the petitioner. The petitioner is also carrying out an activity, viz. running the railways, which also has a commercial angle and is capable of being carried out by entities other than the State, as is the case in various other developed countries. It is, therefore, not an inalienable function of the State. Therefore, the submission of the petitioner that it is not covered by the definition of 'enterprise', has no merit and is rejected.

26. Accordingly, the present petition is dismissed leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

FEBRUARY 23, 2012
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