M/S. Pawan Hans Ltd vs Union Of India And Anr on 8 April, 2003

Equivalent citations: AIR 2003 SUPREME COURT 1427, 2003 AIR SCW 1878, 2003 CLC 434 (SC), (2003) 6 ALLINDCAS 440 (SC), 2003 (6) ALLINDCAS 440, 2003 (3) SCALE 692, 2003 (2) COM LJ 297 SC, 2003 (2) LRI 435, 2003 (4) ACE 451, 2003 (5) SCC 71, (2003) 3 JT 543 (SC), 2003 (3) SLT 136, 2003 (7) SRJ 486, (2003) 3 RECCIVR 649, (2004) 1 ICC 677, (2003) 3 SCALE 692, (2003) 5 INDLD 257, (2003) 3 CIVLJ 203, (2003) 2 MAD LJ 181, (2003) 3 SUPREME 242, (2003) 2 CORLA 321, (2003) 1 WLC(SC)CVL 632, (2003) 114 COMCAS 676, (2003) 2 CPJ 1

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Bench: Brijesh Kumar, B.N. Srikrishna

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           CASE NO.:
Appeal (civil)  4149 of 1995

PETITIONER:
M/s. Pawan Hans Ltd.

RESPONDENT:
Union of India and Anr.

DATE OF JUDGMENT: 08/04/2003

BENCH:
Brijesh Kumar & B.N. Srikrishna.

JUDGMENT:
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JUDGMENT BRIJESH KUMAR, J.

This is an appeal preferred by the complainant M/s.Pawan Hans Ltd. against the order of the Monopolies and Restrictive Trade Practices Commission (for short 'the Commission'), New Delhi rejecting the complaint preferred against the respondent no.2- M/s.Lokhandwala Construction Industries Ltd. (hereinafter to be referred to as 'respondent' only) under Section 10 of the Monopolies and Restrictive Trade Practices Act (for short 'the Act') for inquiry. The order refusing to initiate inquiry proceedings under Section 10(a)(i) of the Act has been dismissed as per the majority opinion of the Commission.

The complainant - M/s.Pawan Hans Ltd. needed some flats for its employees at Bombay and for that purpose issued a tender notice in Times of India dated 4.5.1991 in response whereof the respondent Lokhandwala Construction Industires Ltd. made an offer for sale of 40 flats at Kandiwali, Bombay.

The respondent, it is said, had also offered to sell some more flats in Green Meadows. Negotiations, in regard to the above flats, started between the parties. Offers and revised offers were exchanged between them. Apart from other conditions it is said to be agreed that price of the flat would be at the rate of 780 per sq.ft. of the saleable area. It is also said to have been given out that the respondent would be able to complete the construction within 12 months of receiving the letter of intent along with the first instalment. As against the advance payments which were to be made by the complainant, the respondent is said to have agreed to furnish bank guarantee on release of the amount by the complainant. The offer was valid up to 31.8.1991. Further correspondence, however, ensued raising the question regarding costs as quoted which also said to have included the cost of bank guarantee. The validity of the offer was extended up to 31.12.1991. The complainant is also said to have issued confirmation letter of intent dated 7.1.1992 for purchase of 40 flats. They had also written for providing bank guarantee towards 5% of the total consideration by January 25, 1992. But it appears that there has been one or the other query from either side regarding furnishing of the bank guarantee etc. It is said that the respondent had again by letter dated 10.4.1992 asked for some more time to provide bank guarantee. The complainant also furnished a draft Memorandum of Understanding to the respondent on 16.3.1992. Certain changes are said to have been suggested by the respondent in regard to furnishing of the bank guarantee. According to the complainant though the respondent had agreed to furnish unconditional bank guarantee regarding the advance release of amount by the complainant but by letter dated 18.5.1992 they wanted waiver of that condition. Ultimately the Memorandum of Understanding was not signed, nor bank guarantee was furnished by the respondent. Resultantly the deal fell through. According to the complainant the respondent avoided the agreement without any lawful cause but with a view to enhance the prices of the flats. It is further alleged in the complaint that the respondent in order to cause wrongful gain to itself and wrongful loss to the complainant had backed out to sign the Memorandum of Understanding. It is averred in the complaint "the respondent wants to take benefit of the enhanced prices of the flats. Had the respondent not assured the complainant to furnish the bank guarantee, the complainant would have negotiated with some other builder for purchase of the flats". According to the complainant, the respondent exercised pressure upon the complainant to pay the enhanced prices.

The case of the complainant on the basis of the facts indicated above in a nut-shell is that the respondent manipulated conditions of rendering services with a view to cause unjustified cost increase to the detriment of the complainant attracting Section 2(o)(ii) of the Act. Hence a prayer was made to institute an inquiry and pass an appropriate order including award of costs/damages so that government agencies like the complainant and others are prevented from being cheated by adopting the restrictive trade practices by the respondent. An application for interim injunction was also filed under Section 12(A) of the Act. The case of the respondent is that there was no agreement whatsoever between the parties for the bank guarantee for the flats in the building 'Reviera'. The complainant had itself corrected the draft of Memorandum of Understanding and made the counter-suggestions which never attained the stage of agreement between the parties. There has throughout been only negotiations, offers and counter offers. It was also indicated that the complainant could not be allowed to plead mistake by oversight as a ground of enforcing term of unconditional bank guarantee which was never agreed to between the parties. Some other pleas also seem to have been raised but suffice it to mention that one of them being that the complainant if at all could file a civil suit for specific performance of the agreement etc. but no case of restrictive trade

practice is made out merely on the allegation of refusal by the respondent to enter into an agreement with a term of unconditional bank guarantee. It was also pleaded that the case does not fall within the purview of Section 2(o) or Section 33 of the Act. One of the Members of the Commission, namely Shri N.C.Gupta, after detailed discussion, arrived at the following conclusions in paragraph 15 of his order holding that the complaint is not maintainable. Paragraph 15 of the order of Shri N.C.Gupta is quoted below :

> "i) The negotiations between the parties did not result into a concluded contract and as such there has been no agreement between the parties.
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> ii) No money whatsoever was paid or advanced by the complainant by way of consideration or otherwise in continuation or furtherance of the negotiations for purchase of the flats.
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> iii) After the negotiations broke down, the flats were sold by the Respondent to various persons as per details furnished by the Respondent for valuable consideration and therefore the legal rights of the subsequent purchasers in the property have come into being; and therefore no order whatsoever can be passed without adjudicating upon the rights of such persons and making them the parties to the proceedings.
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> iv) The flats were sold by the respondent to those purchasers at the same price at which negotiations for sale of the flats to the complainant were in progress. Therefore, there is no question of any restriction, limitation or distortion of competition or any manipulation on the part of the Respondent in terms of Section 2(o) of the MRTP Act.
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> v) There is no plea before us about any alleged restrictive trade practice in terms of Section 33 of the Act. The plea, whatsoever, is confined to the alleged practice in terms of Section 2(o) of the Act.
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> vi) Assuming without admitting that any right accrued in favour of the complainant as a result of such negotiations the same is a right of a civil nature and the proper remedy, if any, is by way of civil suit. The Commission has no jurisdiction in the matter."

According to the other Hon'ble Member of the Commission, at the initial stage it is only to be examined as to whether there was a prima facie case against the respondent for institution of a regular inquiry under the provisions of the Act or not. Considering the facts of the case, it has been observed that it was only on 18th May, 1992 that the respondent had approached the applicant to consider the modification in the terms relating to bank guarantee for the full value of the flat based on progressive payment plus a performance guarantee. But for the condition relating to guarantee, the respondent was prepared to sign the Memorandum of Understanding. The respondent had also given out that the applicant could send its confirmation within seven days and that the work which

had already commenced would be completed and they would be able to handover the possession by May 15, 1993. No letter of confirmation was received. Hence the respondent wrote another letter on June 1, 1992 in reference to earlier letter dated May 18, 1992 saying that since the period of two weeks had already elapsed and no confirmation of modification in the condition relating to bank guarantee was received, it would be presumed that modification was not accepted, in the circumstances it was not possible to execute the memorandum of understanding. Thereafter the respondent started selling the flats on June 8, 1992 at the rate of Rs. 650/- per sq. ft. The learned Member then observed that the above conduct of the respondent was suspicious as there could be no occasion to start selling the flats from June 8, 1992 without waiting for any reply from the applicant and that too at lesser price whereas agreed price to sell to the applicant was at the rate of Rs.800/- or Rs,780/- per sq. ft. In the opinion of the learned Member, the respondent had manipulated the condition of delivery of flat to the applicant in such a manner as to impose unjustified costs or restriction on applicant. The case, therefore, prima facie would squarely be covered under Section 2(o)(ii) of the Act. Therefore, it would be a fit case for inquiry.

The order of the Commission, however, was delivered by the Chairman of the Commission Justice A.N. Verma. He agreed with the view expressed by Shri N.C. Gupta and held that the complaint was liable to be dismissed. It was only a case of breach of condition of contract, if at all, and would not fall within the ambit of Section 2(o)(ii) of the Act. It has been observed as follows:-

> "A distinction must, in my view, be drawn between a mere refusal of non-fulfilment of a contractual obligation simplicitor without having any overtones of preventing or distorting competition in any manner and one involving a conscious and calculated manipulation of prices or conditions of delivery in such a manner as to impose unjustified costs or restrictions on the consumer, and, of course, gaining some advantage for itself. It is only the latter class of the cases which falls within the mischief of the provision of clause (ii) of Section 2(o) of the MRTP Act."

The learned Chairman, thereafter, considered the meaning of the word 'manipulation' and took note of the definition in Black's Law Dictionary, which has been quoted as follows:-

> "The aptest definition I could lay my hands on is that to be found in Black's Law Dictionary (Sixth Edition) in which manipulation is stated to mean :-
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> Manipulation:- Series of transaction involving the buying or selling of a security for the purpose of creating a false or misleading appearance of active trading or to raise or depress the price to induce the purchase or sale by others. Such acts are prohibited by Sec. 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A 781 j See also Wash sale.
>
> Term as used in provision in Securities Exchange Act of 1934 (15 U.S.C.A 78n (e) prohibiting use of manipulative practices in tender offers cannotes conduct designed to deceive or defraud investors by controlling or artificially affecting price of securities. Schreiber v. Burlington Northern. Inc. 472 U.S. 1, 4, 105 S. Ct. 2458, 2461,

86 L. Ed. 2nd 1".

In the above background, the Chairman also observed that there was no reason to disbelieve the explanation of the respondent declining to furnish unconditional bank guarantee in view of their previous experience with the applicant in regard to the flats in Green Meadows. He found that there was no question of manipulation on the part of the respondent in refusing to furnish the unconditional bank guarantee.

We feel it would be appropriate to peruse the definition of the word 'restrictive trade practice' as defined under the Act. It reads as follows:-

"Section 2(o) "Restrictive trade practice"

means a trade practice which has, or may have the effect of preventing, distorting or restricting, competition in any manner and in particular,

(i) which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions."

From the definition quoted above it is evident that the conduct of party complained against should be such which may have the effect of preventing , distorting or restricting, competition in any manner which may tend to obstruct flow of capital into the stream of production or may bring about manipulation of prices or conditions of delivery resulting in imposition on the consumers unjustified costs or restrictions. Any conduct or violation of a condition of a contract between two parties not resulting in the consequences enumerated above, obviously cannot amount to restrictive trade practice. In the case in hand the negotiations took place between two parties regarding sale and purchase of flats in "Reviera". Right from the initial stage there seems to have been some differences between the parties in relation to furnishing of the bank guarantee. In that regard letters were also exchange between them. The applicant wanted unconditional bank guarantee whereas the respondent was not agreeable for the same and wanted modification of that condition as suggested in the Memorandum of Understanding for providing bank guarantee on progressive payment and performance basis. On failure to reach to any consensus, the respondent wrote back that, in such a situation, it was not possible to execute memo of understanding. This is how the negotiations fell through and the contract could not be completed. Even for the sake of argument, it is accepted that the contract had been completed without signing of Memorandum of Understanding or any agreement, then too, it would be nothing more than a mere breach of a condition of an agreement which may, if at all, give rise to filing of a civil suit, for enforcing that condition of the contract, or in damages, or as it may be found to lie according to the law.

On facts, it is there on the record that the flats were sold by the respondent at a lower price as compared to the price which was being negotiated between the parties. There is no averment of facts

to substantiate the allegation in the complaint that respondent wanted to extract higher price from the applicant to benefit itself or to cause harm to the applicant. It is not understandable in what manner the complaint of the appellant was covered under Section 2(o)(ii) of the Act. It cannot be said that the conduct of the respondent was designed or manipulated in a manner so as to gain some advantage or profit to itself and to impose unjustified costs or restrictions on the applicant. The facts do not indicate any devious method adopted by the respondent which could be resulted in its own advantage and to the disadvantage of the other. It has been observed by the Commission that the respondent had the unpleasant experience of furnishing unconditional bank guarantee, in relation to the sale of flats in "Green Meadows". Instead of unconditional bank guarantee, they only wanted it to be based on progressive payment and performance guarantee. We may refer to a decision reported in 2002 (6) SCC p. 600, Haridas Exports Vs. All India Float Glass Manufacturer's Association and Ors., more particularly to observation made in paragraph 42 of the Judgment, which reads as follows: -

"Section 2(u) does state that "trade practice"

means any practice relating to the carrying on of any trade then it adds that such a trade practice would include anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders. The Act and the aforesaid section, in particular, is, therefore, concerned specifically with the incidence of the restrictive trade practice within India which in Section 2(o)(i) refers to the obstruction to the flow of capital or resources into the stream of production, while Section 2(o)(ii) talks of manipulation of prices or conditions of delivery or to affect the flow of supplies in the market but which must be such as to impose on the consumers unjustified costs or restrictions. To put it differently, mere manipulation of prices or conditions of delivery would not be a restrictive trade practice under Section 2(o)(ii) unless it is done in such a manner so as to impose on the consumers unjustified costs or restrictions. Lowering of prices cannot be regarded as imposing on the consumers unjustified costs or restrictions."

(Emphasis supplied) In the case in hand, admittedly, after negotiations failed, the respondent had sold the flats at a lower price to others. It is, thus, clear that no undue advantage was sought to be extracted by respondent by dropping the matter, much less from the applicant. There is no allegation that the respondent had demanded or expected higher price from the complainant. It is also not the case of the complainant that the respondent created such a situation which could compel the complainant to purchase the flats from the respondents on respondent's term to the detriment of the complainant. The applicant could also not compel the respondent to sign the Memorandum of Understanding on applicant's own terms. The respondent could validly suggest a change in draft Memorandum of Understanding sent by the complainant and if on that point the negotiations broke and the transaction fell through the case would not fall within the ambit of Section 2(o)(i) or (ii) of the Act. We may observe that the view taken on the point by the Chairman commends approval. Yet another decision on the point that may be referred to is reported in 1979 (2) SCC page 529, Mahindra and Mahindra Ltd. Vs. Union of India Anr., as also Telco Vs. Registrar of the Restrictive Trade Agreement (1977 (2) SCC page 55) observing that in absence of relevant and proper facts, mere use of words as used in the provision, would not be of any help and it would not constitute restrictive trade practice. In the present case we find that no such facts have been averred

which may be said to have constituted restrictive trade practice on the part of the respondent.

In view of the discussion held above, the appeal lacks merit and it is accordingly dismissed with costs.

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