

**In Re: Graphite India Ltd.**

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**Court :** Monopolies and Restrictive Trade Practices Commission MRTPC

**Decided On :** Jul-24-1975

**Judge :** J Nain, H Jhala

**Appellant :** In Re: Graphite India Ltd.

**Judgement** :

1. In this application the respondent has prayed that certain issues arising on the pleadings be tried as preliminary issues on the ground that these are issues of law and the case may be disposed of on these issues only. At the hearing of the application we suggested to the learned counsel appearing for the parties that all the issues be settled and thereafter we could hear the parties on the preliminary issues. Accordingly the following issues were settled: 1. Has the Commission jurisdiction to inquire into any restrictive trade practice upon its own information when such information is derived from a complaint made by a single consumer 2. Is any of the matters alleged in sub-paragraphs (i), (ii) and (iii) of the first recital of the notice dated 21st December, 1974, capable of "constituting a restrictive trade practice within the meaning of the said Act 3. Has the Commission jurisdiction to inquire into the respondent's alleged position as a monopolistic undertaking 4. Is the respondent indulging in any restrictive trade practice of the nature alleged in the notice dated 21st December, 1974 5. Are the reasons for quoting periods of delivery of 12 to 14 months those set out in paragraph 4 of the respondent's reply dated 7th March, 1975? 6. Is delivery dependent on various factors mentioned in paragraph 5 of the respondent's reply 7. Is the procedure for the distribution of the respondent's production as set out in sub-paragraphs (a), (b) and (c) of paragraph 5 of the respondent's reply (b) Do such prices impose any unjustified costs or restrictions on any consumer 9. (a) Is the respondent entitled to rely on the provisions of Section 38(1)(b) or 38(1)(h) of the Act (b) Are the particulars set out in paragraph 7 of the respondent's reply correct 10. Are the alleged trade practices prejudicial to the public interest 2. Mr. Jinwalla suggested that the first 3 issues be tried as preliminary issues and we agreed to do so.

3. The relevant facts leading up to the present application may be briefly stated. On 20th July, 1974, the Secretary of the Monopolies and Restrictive Trade Practices Commission (hereinafter for the sake of brevity referred to as "the Commission") received a complaint from M/s.

Hindustan Malleables and Forgings Ltd. stating that the respondent was the only producer of graphite electrodes in India having plants at Durgapur and Bangalore. It was alleged in the complaint that graphite electrodes were required for melting of steel in arc furnaces, that the respondent was quoting delivery after 12 to 14 months for supply of graphite electrodes which made it necessary to place orders for them at least 18 months in advance providing for the contingency of delay in supplies for any

reason whatsoever. It was alleged that the respondent had quoted a price of Rs. 12,230 per metric ton and had asked for 25% interest-free advance with order and a confirmed letter of credit for the balance 75%. It was alleged that letters of credit could not be obtained from banks without keeping a margin of 20% of the amount of the Letter of Credit. It was alleged that the respondent was a monopolistic undertaking and its practices were undesirable. The Commission was requested to take early action in the matter. It appears there was some correspondence between the Secretary of the Commission and the respondent on the one hand and between the Secretary of the Commission and Hindustan Malleables and Forgings Ltd. on the other.

Ultimately, on 29th August, 1974, the Commission decided to order a preliminary investigation by the Director of Investigation (hereinafter for the sake of brevity referred to as "the Director") under Regulation 19(2)(c) of the Monopolies and Restrictive Trade Practices Commission Regulations, 1974 (hereinafter referred to as "the Regulations").

4. On 14th October, 1974, the Secretary to the Commission received another complaint from the department of Industrial Development, Government of India, complaining about restrictive trade practices being indulged in by the respondent. The Commission also received information that the respondent was a dominant as well as a monopolistic undertaking in production and supply of graphite electrodes. On 26th October, 1974, this complaint was also referred to the Director for preliminary investigation.

5. The Director submitted his report of the preliminary investigation in respect of both complaints on 4th December, 1974, On the basis of the information contained in the report of the preliminary investigation and the aforesaid complaints the Commission decided to hold an inquiry under Section 10(a)(iv) and Section 37 of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter for the sake of brevity referred to as "the Act"), in respect of certain charges which appeared to the Commission to be prima facie disclosed.

The Commission also decided to find out if the respondent was a monopolistic undertaking in respect of production, sale and supply of graphite electrodes. Accordingly, on 21st December, 1974, the Commission issued a notice of enquiry to the respondent in respect of the following alleged restrictive trade practices : "(i) Quoting period of 12 to 14 months for the delivery of Graphite Electrodes necessitating the buyers to place orders round about 18 months in advance and requiring an interest-free advance deposit of 25% of the value of the order placed and for the balance 75% of value a confirmed irrevocable letter of credit payable at sight against documents, and thus impose conditions of delivery, etc., which obstruct the flow of supplies and resources into the stream of production and impose on the consumers unjustified costs.

(ii) Refusing to guarantee delivery and discriminating between buyers and buyers in the matter of sale and supply of Graphite Electrodes which may have the effect of preventing or restricting competition.

(iii) Maintaining prices at unreasonable levels relating to Graphite Electrodes in such a manner as to impose on the consumers unjustified costs or restrictions. Company's prices are reported to be higher than the imported material." 6. The respondent filed

its reply to the notice on or about 1st March, 1975. The Director filed his rejoinder on 23rd April, 1975. On 30th April, 1975, the Director took out a summons for directions under Regulation 74. On 19th June, 1975, the present application was filed.

8. Re Issue No. 1.--The first issue raised by the respondent is whether the Commission has jurisdiction to inquire into any restrictive trade practice upon its own information when such information is derived from a complaint made by a single consumer. We are afraid that the issue raised by the respondent is based on a wrong assumption of facts. It is true that initially the information was furnished by a single consumer, namely, M/s. Hindustan Malleables and Forgings Ltd., and also by the Central Government. But the complaints were referred for preliminary investigation to the Director of Investigation who appears to have collected information from several sources and made a report to the Commission. The Commission has started its inquiry on the basis of information derived from the aforesaid complaints and the report of its director under sec- Section 10(a)(iv), i.e., on the basis of the information received by the Commission.

9. The contention of the respondent is that Section 10(a) confers jurisdiction on the Commission to inquire into any restrictive trade practice in one of the four ways set, out in Clauses (i), (ii), (iii) and (iv). Clause (i) provides that the Commission may inquire into any restrictive trade practice upon receiving a complaint of facts which constitute such practice from any trade or consumers' association having a membership of not less than 25 persons or from 25 or more consumers. Mr. Jinwalla on behalf of the respondent contended that when the Commission received a complaint from a single consumer it was not open to it to act under Section 10(a)(iv) treating the complaint of a single consumer as information received by it or even to refer the complaint to its Director of Investigation for investigation and report and thereafter to treat the report as information and on the basis of such information to inquire into any restrictive trade practice. Mr.

Jinwalla contended that Section 10 should be read as a whole and on such reading Clause (iv) would not confer jurisdiction on the Commission to treat the complaint of a single consumer or the report of its Director as a result of preliminary investigation into the complaint of a single consumer as information under Clause (iv) on which an inquiry could be started. We are afraid we find no substance in this contention. Section 10(a)(iv) confers independent jurisdiction on the Commission to start suo motu inquiry on information received by it from any source whatsoever even if it be the complaint of a single consumer. In our opinion to take any other view would defeat the purposes of the Act. A consumer who has a complaint in respect of restrictive trade practices may not be a member of a consumers' association. There is hardly any consumer movement worth the name in this country and one would not expect a consumer to promote a consumers' association of more than 25 persons if he has got a grievance in respect of a restrictive trade practice. Similarly, if we were to impose on a consumer who has a grievance the task of finding at least 24 more persons having the same grievance, we would be making it impossible for him ever to approach the Commission in respect of an unfair trade practice. Such an interpretation would make the provisions of the Act nugatory. It will also not be an interpretation beneficent to the consumers. Clause (iv) also puts no restrictions on the Commission in respect of information received from any source. The Commission has also in this case taken the precaution to have a preliminary investigation conducted by one of its high officers to see that the respondent is not harassed by a frivolous complaint. To put fetters on the sources of information of the Commission

under Clause (iv) by linking it with Clause (i) would in our opinion not be justified on a true interpretation of Section 10. Clause (iv) is quite independent of the other clauses in Section 10(a).

10. In R. T. P. Enquiry No. 6 of 1973, In re Nylon Filament Yarn Agreement, [1975] 45 Comp Cas 646 (MRTPC). the Commission had ordered an inquiry to be held on a complaint received from a consumers' association which had only 23 members. This number falls short of the requirement of Section 10(a)(i). The facts stated in the complaint appeared to the Commission to be prima facie correct and without referring the matter to the Director of Investigation the Commission ordered an inquiry suo motu under Section 10(a)(iv), i.e., on the information received by the Commission from the complaint. The respondents took up the same contentions before the Commission as the present respondent has done and for reasons stated in its order dated the 5th March, 1974, the Commission rejected the contention of the respondents and held that it had jurisdiction to inquire into any restrictive trade practice upon information derived from any source even if such source be the complaint of less than 25 consumers. The reasoning of the Commission in the said order applies with equal force to the present case and we do not find it necessary to repeat the said reasoning in this order. The reasons given in the said order dated 5th March, 1974, apply equally well to this case.

11. The decision of the Commission in the above matter was challenged by the respondents in that case in the Delhi High Court in Writ Petition No. 1409 of 1974 (Nirlon Synthetic Fibres & Chemicals Ltd. v.R.D. Saxena). The said writ petition was dismissed by a Division Bench of the Delhi High Court consisting of Shankar and Chawla JJ. on 13th December, 1974, in limine, but after hearing both the parties. The order of the High Court is a speaking order and referring to the order of the Commission dated 5th March, 1974, the High Court observed as under, [1976] 46 Comp Cas 419 (Delhi). : "It was also urged that in the instant case a complaint was filed by the Crimpers Association on the basis of which the Commission issued the notice and because provisions of Section 11 of the Act were not complied with, the whole proceedings are void ab initio. We see no substance in this argument. Section 10 authorises the Commission to inquire into any restrictive trade practice not only upon receiving a complaint but also upon its own knowledge and information. It is true that the Crimpers Association had filed the complaint. But, thereafter, the Commission has taken upon the matter itself and we see no bar to its doing so. This aspect of the matter was fully gone into by the Commission in its order dated March 5, 1974, with which we agree." 12. It will thus appear that the order of the Commission dated 5th March, 1974, in R. T. P. Enquiry No. 6 of 1973 (Nylon Filament Yarn, In re),[1975] 45 Comp. Cas. 646 (MRTPC). has been upheld by a Division Bench of the Delhi High Court. The said decision is in our opinion binding on the respondent.

14. Re Issue No. 2.--Mr. Jinwalla contended on behalf of the respondent that the alleged restrictive trade practices with which the respondent was charged in the notice of enquiry were not capable of constituting restrictive trade practices within the meaning of the Act. Mr. Jinwalla stated that this plea was taken on demurrer. He argued that on the assumption that the facts stated in these charges were correct, they would not on a plain reading of the charges and Section 2(o) of the Act which denned restrictive trade practices constitute restrictive trade practices. Mr. Jinwalla gave the analogy of Order VII, Rule 11(a), of the Code of Civil Procedure, which provides that a plaint shall be rejected where it does not disclose a cause of action.

Regulation 77 of the Regulations of the Commission makes Order XI of the Code of Civil Procedure applicable mutatis mutandis to the proceedings before the Commission except in so far as the provisions thereof are inconsistent with the express provisions of these Regulations. There does not appear to be any such inconsistency with the Regulations. We may, therefore, take it that the provisions of Order VII, Rule 11, itself will apply as if the notice was a plaint.

15. It must be remembered that we have been invited to decide this question as a preliminary issue before evidence is led. Mr. Jinwalla conceded that charge No. (ii), i.e., discriminating between buyers and buyers in the matter of sale and supply of graphite electrodes which may have the effect of preventing or restricting competition may be a restrictive trade practice under Section 2(o) of the Act. He contended that the remaining charges were not restrictive trade practices. In our opinion Order VII, Rule 11(a), does not justify the rejection of any particular portion of a plaint or, in this case, the notice. Once it is admitted that any part of the charge against the the respondent is prima facie sustainable it cannot be said that the notice does not disclose a cause of action. The power to reject a plaint should not be exercised except in a clear case. A plea of demurrer, i.e., that the plaint or notice does not disclose any cause of action could be taken only when on that plea the plaintiff is wholly non-suited. Where there is a joinder of a number of causes of action on some of which at least a decree could be passed no plea of demurrer should be admitted and no order passed under Order VII, Rule 11(a). On the concession of Mr.

Jinwalla itself that discrimination between buyers and buyers in the matter of sale and supply of graphite electrodes may be a restrictive trade practice this issue as a preliminary issue could be answered in the affirmative.

16. Even apart from the above, in the first charge the allegation against the respondent is that the period of delivery quoted by it is 12 to 14 months necessitating the buyers to place orders about 18 months in advance and requiring an interest free advance deposit of 25% of the value of the order placed and opening of a confirmed irrevocable letter of credit for the balance 75% would by itself impose conditions on the buyer which may have the effect of preventing, distorting or restricting competition and impose on the buyer unjustified costs or restrictions. It is well known that interest rates at the moment are very high and it is alleged that no confirmed irrevocable letter of credit can be opened without a deposit of about 20% of the value of the letter of credit. This is apart from the interest free deposit of 25% for a period of over 18 months. Placing an order on the respondent would necessitate blocking up of a buyer's resources which a buyer with large capital may be able to afford and a poorer buyer or a buyer with lesser resources may not be able to afford. This would prevent the buyer with lesser resources from buying graphite electrodes and thus he would be thrown out of competition. Mr. Jinwalla contended that this may be the consequence of the contract between the buyer and the seller and there was freedom of contract in the country and the Commission has no business to interfere. We are afraid it is too late in the day to plead freedom of contract. The entire labour legislation in the country is intended to relieve labourers from an unequal contract with the employer. The entire rent and eviction control legislation relieves tenants from an unequal contract. Similarly, one of the purposes of the restrictive trade practices legislation is also to help the consumer out of an unequal situation of a contract with a seller in a market of shortages. It may be that at the final hearing the respondent may be able to make out a case that its terms are reasonable under the circumstances. But this can only be determined after evidence is led and a full

hearing has taken place. We are afraid this question cannot be determined on a demurrer.

17. We do not wish to go into the third charge at this stage. If the notice survives for inquiry even in respect of a part of a charge, all the charges must be gone into at the hearing and cannot be determined on a plea of demurrer.

18. Our answer to issue No. 2 is in the affirmative. The matters alleged in the notice are capable of constituting restrictive trade practices within the meaning of the Act. Whether under circumstances established before us at the end of the inquiry they do or do not constitute restrictive trade practices can only be determined in the final judgment.

19. Re Issue No. 3.--The issue is whether the Commission has jurisdiction to inquire into the respondent's alleged position as a monopolistic undertaking 20. The notice of enquiry states that it is alleged that the respondent is a monopolistic undertaking. Now it is true that a restrictive trade practice may be indulged in by any undertaking even if it is not a monopolistic undertaking. Therefore, for the purpose of determining whether the respondent is or is not indulging in restrictive trade practices the status of the respondent as a monopolistic undertaking is not material. These inquiries are carried on under Section 37 of the Act and investigations into restrictive trade practices are made under Sections 37(1) and (2). A reference to Section 37(4) will show that if during the course of an inquiry under Sub-section (1) of Section 37 the Commission finds that a monopolistic undertaking is indulging in restrictive trade practices it may after passing such orders under Sub-sections (1) and (2) with respect to restrictive trade practices as it may consider necessary submit the case along with its findings thereon to the Central Government with regard to any monopolistic trade practices for such action as that Government may take under Section 31.

For the purpose of Sub-section (4) where it appears to the Commission that an undertaking may be a monopolistic undertaking, in order to be fair "to that undertaking the notice of enquiry issued by the Commission states that even the status of the respondent as a monopolistic undertaking would be inquired into so that a finding on the point could be arrived at. The status of the respondent is material for that purpose and the Commission tries to conform to rules of natural justice by giving an opportunity to the respondent to lead evidence on the point and to hear the respondent on that issue. It is, therefore, clear that the Commission has jurisdiction to inquire into the respondent's alleged position as a monopolistic undertaking. We might perhaps mention that in its reply the respondent does not appear to have denied its monopolistic position in the manufacture of graphite electrodes. It has only said that the Commission has no jurisdiction to inquire into the respondent's alleged position as a monopolistic undertaking. However, a finding on that point can only be arrived at the final hearing. The answer to issue No. 3 is also in the affirmative.

21. All the three preliminary issues have been answered against the respondent. The respondent must, therefore, pay the costs of the hearing to the director fixed at Rs. 600.