

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF NOVEMBER, 2022

BEFORE

THE HON'BLE MRS. JUSTICE K.S. HEMALEKHA

WRIT PETITION No.24297/2012 (GM-RES)

BETWEEN:

1. THE KARNATAKA CHEMISTS AND
DRUGGISTS ASSOCIATION,
AN ASSOCIATION REGISTERED UNDER
THE SOCIETIES REGISTRATION ACT, 1860
HAVING ITS REGISTERED OFFICE
AT III FLOOR, LAKSHMI COMPLEX,
K.R. ROAD, OPP. VANIVILAS HOSPITAL,
BANGALORE - 560 002.
REPRESENTED BY PRESIDENT.
2. SRI K.E. PRAKASH
SECRETARY OF THE PETITIONER NO.1
S/O. ESHWARAPPA,
AGED ABOUT 55 YEARS,
208, C-G HOSPITAL ROAD,
DAVANAGERE.
3. SRI D.S. GUDDODGI
SECRETARY OF THE PETITIONER NO.1
S/O. SHANMUKAPPA,
AGED ABOUT 68 YEARS,
M/S. GUDDODGI PHARMACEUTICALS
NEAR MEENAXI CHOWK, TILAK ROAD,
GODBOLE MALA,
BIJAPUR - 586 101. ... PETITIONERS

(BY SRI MANMOHAN P.N., ADVOCATE)

AND:

1. COMPETITION COMMISSION OF INDIA,
HINDUSTAN TIMES HOUSE (3RD, 4TH AND 7TH FLOOR),
18-20, KASTURBA GANDHI MARG,

NEW DELHI – 110 001.
REPRESENTED BY ITS REGISTRAR.

2. THE DIRECTOR GENERAL ,
COMPETITION COMMISSION OF INDIA,
HAVING HIS OFFICE AT "B" WING,
HUDCO VISHALA, 14 BIKAJI CAMA PLACE,
NEW DELHI – 110 066.
3. THE ASSISTANT DIRECTOR GENERAL,
COMPETITION COMMISSION OF INDIA,
HAVING HIS OFFICE AT "B" WING,
HUDCO VISHALA, 14 BIKAJI CAMA PLACE,
NEW DELHI – 110 066.
4. SRI KAILASH GUPTA
PRESIDENT,
ALL INDIA CHEMIST AND DRUGGIST
AND DISTRIBUTORS FEDERATION,
NO.C32, CC COLONY,
DELHI – 110 007.

... RESPONDENTS

(BY SMT. POORNIMA HATTI, ADVOCATE FOR R-1 TO R-3;
R-4 IS SERVED)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226
AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO
RESTRAIN THE R-1 FROM CONTINUING WITH THE
PROCEEDINGS IN CASE NO.6/12 VIDE ANNEXURE-J AS
AGAINST THE PETITIONERS; AND QUASH THE ORDER DATED
28.06.2012 PASSED BY THE R-3 VIDE ANNEXURE-K.

THIS WRIT PETITION HAVING BEEN HEARD AND
RESERVED ON 04/11/2022 FOR ORDERS AND COMING FOR
PRONOUNCEMENT OF ORDER THIS DAY, THE COURT
PRONOUNCED THE FOLLOWING:

ORDER

The prayer in this writ petition is, seeking a writ of prohibition restraining the 1st respondent from continuing with the proceedings in Case Nos.6/2012 (Annexure – J) against the petitioner and to quash the order dated 28/06/2012 (Annexure – K) passed by 3rd respondent bearing No. DG/CCI/IW/1/40/2011, whereby, by order dated 28/06/2012, the Assistant Director General, Competition Commission of India has issued a notice directing the petitioner to provide requisite information latest by 08/07/2012, failing which, to comply with the direction issued by the office of Director, the petitioner was liable for penal action in terms of Section 43 read with Section 45 of the Competition Act, 2002 (hereinafter referred to as “the Act” for short).

2. The facts leading to filing of this writ petition is as under:

The petitioners states that 1st petitioner is the Karnataka Association of Chemists and Druggists ("Karnataka Association" for short) in the State of Karnataka and is an organization which protects the interest of its members and it is a registered society under the Karnataka Societies Registration Act, 1960 and 2nd petitioner is the Secretary and 3rd petitioner is the President of 1st petitioner/society. It is stated that a complaint was lodged against 1st petitioner/society under the provisions of the existing Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the "MRTP Act" for the sake of convenience) which was subsequently repealed as the Competition Act, 2002 and the matter was transferred to the 1st respondent who directed 2nd respondent to conduct an enquiry into the allegation and to submit a report in respect thereof. The 1st Respondent issued a notice dated 28/07/2010 calling upon 1st petitioner to furnish the information and 2nd and 3rd petitioners

were called upon to submit their personal account in the matter pending before the 1st respondent/Commissioner. It is also stated that the investigation was completed by the 2nd respondent and the report was submitted to the 1st petitioner filed written statement stating that 1st respondent does not have powers to direct 2nd respondent to conduct the supplementary investigation.

3. Under the said proceedings, notice was issued by the 1st respondent calling upon the petitioner to show-cause as to why penalty under Section 43 of the Act could not be levied for the alleged failure of the petitioner in not providing information without reasonable and justifiable reason. The 1st Petitioner and the office bearers, aggrieved by the notice calling upon the petitioners to show-cause as to why penalty cannot be levied in not providing the information, had filed Writ Petition No.19759/2011 and connected matters and sought to quash the notice

issued by 1st respondent and it is stated that on 11/11/2011 disposed of the writ petition with a direction to 1st respondent to consider the preliminary objection regarding jurisdiction under the Act and the Court also granted two weeks' time from the date of receipt of the order to file its objections and 1st respondent/Commissioner was directed to notify and hear the petitioner and then decide regarding the jurisdiction. The petitioner filed preliminary objections and the date was fixed for hearing by the 1st respondent/Commissioner. The 1st respondent-Commissioner without accommodating the petitioner to submit its say appears to have proceeded to pass order on 22/02/2011 holding that 1st respondent-Commissioner has jurisdiction. The petitioner, being aggrieved by the order dated 22/12/2011 passed by 1st respondent, filed W.P.No.2882/2012 before this Court and this Court on hearing, granted an interim order of stay. It is stated that in the interregnum the

4th respondent has filed complaint No.6/2012 against All India Organization of Chemists and Druggists ("AIOCD" for short), the 1st petitioner and several others making allegations stating that the petitioners have violated Section 3(4)(a) to (e) of the Act. The basis of the allegation against the petitioner is the complaint filed by the Belgaum District Chemists and Druggists Association which is the subject matter of Writ Petition.No.2882/2012 and on the basis of the complaint, the 1st respondent exercising the power under Section 26(1) of the Act, by its order dated 07/02/2012 directed the Director General to cause an investigation and submit report within a period of 60 days. The Director General in turn exercising its powers under Section 26(2) of the Act has issued notice to the petitioners to furnish requisite information. Aggrieved by the said notice seeking to furnish the requisite information, petitioners are before this Court.

4. *Per contra*, 1st to 3rd respondents/ Competition Commission of India filed statement of objections *inter alia* contending that the petition is not maintainable in law and hence, sought to dismiss the petition. It is submitted that Writ Petition 2882/2012, which is pending consideration before this Court is totally distinct and not connected to the present facts. It is stated in the objections that 1st respondent is a regulatory body constituted under the Act and in order to ensure healthy competition prevailing in the market for the benefit of the consumers and several persons/enterprise which falls under the purview of the Act gets proper freedom of trade in his/its business activity while carrying on such trade. It is submitted that the information was filed under Section 19(1)(a) of the Act by 4th respondent against the petitioner and the All India Organization of Chemists and Druggists alleging anti competitive behaviour of the opposite parties and a case was registered based

on the information provided by 4th respondent as Complaint No.6/2012 and would submit that the information is independent of any other proceeding and would stand on its own footing. It is submitted that 1st respondent on the basis of the material available on record held that *prima facie* case has been made out and accordingly vide order dated 07/02/2012 under Section 26(1) directed 2nd respondent/Director General, Competition commission of India to investigate the matter and it is stated that after receiving direction from 1st respondent vide order dated 07/02/2012, 2nd respondent has issued direction to 1st petitioner to furnish requisite information. However, the petitioner instead of furnishing the requisite information within thirty days, has filed the present writ petition before this Court and obtained an interim order under the guise of connecting the instant writ petition with W.P.No.2882/2012. It is submitted that an

information under Section 19(1)(a) of the Act can be filed by a person even if earlier a similar information is filed by any other person or organization under the provisions of the MRTP Act and would state that it is contrary to the provisions of the Act to assert that 1st respondent ought to have seized their proceedings against the petitioners herein merely because an information on the same lines were filed against the petitioner by another organization. Even assuming that the 3rd respondent filed complaint placing reliance on information of Belgaum Association against 1st petitioner in Complaint No.6/2012, the same is not relevant, as an enquiry needs to be conducted by 2nd respondent. It is submitted that the Complaint is at the stage of investigation by the 2nd respondent, and it is premature at this stage to hold or revert the allegation against 1st petitioner and has stated that the petitioner, instead of participating in the investigation has deliberately and *mala fidely* resorted

to dilatory tactics to stall the statutory proceedings before 1st respondent which is nothing but an abuse of process of law and sought to dismiss the petition.

5. It is submitted that under Section 19(1) of the Act the initiation of proceedings by any person or consumer association or trade association or State Government or statutory authority etc., and gives power to 1st respondent to initiate *suo moto* proceedings to conduct enquiry into the allegation and whether the allegation *per se* in the information is relevant or not for investigation. In light of this, it is stated that the petition deserves to be dismissed in *limine* with exemplary cost.

6. Heard learned counsel for the parties.

Contention of the petitioner:

7. It is the submission of the learned counsel that the proceedings under the Competition Act by the respondent against the 1st petitioner in Complaint

No.6/2012 is only on the basis of an information and allegations filed under Section 19(1) of the Act on the basis of mere reference in Case No.C-175/2009/DGIR/27/28 is apparent on the face of it and on perusal of the earlier order the basis which is relied by the respondent for initiating the proceedings against the petitioner are identical and the petitioner cannot be vexed twice for the same cause and the present proceedings initiated is unsustainable.

8. The allegation is basically in the nature of unfair trade practices which has to be before the Consumer Protection Act, 1986 and cannot be under the umbrella of the Competition Act and cannot be dealt with by 1st respondent.

9. The learned counsel for the petitioners would submit that the proceedings initiated by the respondent on the very same set of facts would be a gross abuse of process of law and if the respondents

are not prohibited in proceeding against the petitioner, the petitioner would be put to hardship to undergo rigorous punishment under the Act and when the proceedings under the Act entails penal consequences.

10. According to the learned counsel, the investigation initiated by the 2nd respondent itself is not maintainable pursuant to an order under Section 26(1) of the Act when the Competition Commission of India-1st respondent itself lacks jurisdiction and the order of investigation is a drastic measure and the CCI ought to have considered that on similar allegation, the present allegation is not maintainable and suffers from want of jurisdiction and sought to allow the petition.

Contention of the respondents:

11. *Per contra*, learned counsel appearing for the respondents would contend that the petition has been filed under misconception regarding jurisdiction

of the Competition Commission of India and the scope of Section 26(1) of the Act, 2002 which is authoritatively laid down the three Judges Bench of the High Court in ***Competition Commission of India vs. Sail [(2010) 10 SCC 744]***

12. According to the learned counsel, the motion set out is unstoppable process and necessarily culminates into an adjudication against an entity against whom an enquiry is initiated. According to the learned counsel, under Section 26 of the Act, discloses comprehensively and thoughtfully constructed step by scheme and contemplates not only a fair hearing to the concerned party at an appropriate stage, but also categorized by an inherent jurisdiction by which proceedings may communicate in closure and the filing of the writ petition on a notice on account of a Director General to furnish necessary documents is at a premature stage and an undue interference with the process particularly with an order which entails no civil

consequence and awaits an investigation report by the Director General is still at a very premature stage. It is submitted by the learned counsel that the Director General has just issued the summons to the petitioners to appear and file their requisite information and even assuming that such a notice has been issued does not account to an allegation having to be proved. It is just a notice to the petitioners to appear and file their requisite information and until an enquiry or an investigation is done the Director General cannot come to a conclusion. According to the learned counsel, the Apex Court has clearly stated at para No.71 the intimation received complaining of violation of the provisions of the Act set out in motion the mechanism stated under Section 26 of the Act and the Commission is required to form an opinion whether or not there exist the *prima facie* case and accordingly would contend that the impugned notice does not call for any interference in the hands of this

Court. According to the learned counsel, the powers of Director General is a fact finding authority and it is usually has access only to the information provided by the informant or information available in public domain through a preliminary conference if any and therefore, it would be best in the interest of the petitioners itself to provide all necessary documents including that the similar allegation has been proved in favour of the petitioners and the same could be brought to the notice of the Director General and on consideration of the same, the Director General would pass the orders and the filing of the petition challenging the notice seeking production of the documents is at a premature stage and thus, sought to dismiss the petition.

13. Having heard learned counsel for the parties, the only point that arises for consideration is:

“Whether the filing of the petition is premature when a notice is ordered by the Director

General to the petitioner to appear and file the documents as required by the said office dated 02/04/2012 to carry out the investigation as directed by order dated 07/02/2012 directing the DG to cause an investigation in the matter and to submit the report in respect of the petitioners on the basis of the allegations submitted by 4th respondent?"

14. The controversy was raised by the informant - Kailash Gupta on 19/01/2012, President of All India Chemists Distributors Federation wherein as per Annexure – J filed under Section 19(1) of the Act before the Competition Commission of India. According to the informant, the petitioners were indulged in anti competitive unfair trade practices, which are violative of Sections 2, 3 and 4 of the Act and the informant stated that AIOCD is compelling the Association of Manufacturers to enter into memorandum of understanding with them and such memorandum of understanding was based on the unreasonable demands of AIOCD, which are being

used to arm twist the market to its advantage. The informant has also stated that AIOCD and its affiliate associate was collecting product information service charge (PIS) from the manufacturers for every drug that is introduced in the market. The amount is collected to give information to the public about the product and it is alleged in the information that AIOCD and its office is engaged in an unjustified characterization of its supply and distribution of pharmaceutical products. The informant has further stated that the trade organization has created a company under the name and was acting in a manner which is contravention of Section 6(1) of the Competition Act. Pursuant to the filing of the information under Section 19 (1) of the Act, CCI directed 2nd respondent under Section 26(1) of the Act to conduct investigation into the alleged contravention of the Act by the petitioners herein. It is relevant to

note that the informant has stated at para No.12(a) as under:

"12. KARNATAKA:

(a) Belgaum Chemists & Druggists Association has since filed a complaint with the Competition Commission complaining about the stoppage of essential supplies by Eli-Lilly & Co., Micro Laboratories Bangalore, Unsearch (Unichem Division) who were all insisting on NOC. The basis of the said complaint was the recommendation of the local state level association affiliated to AIOCD insisting on NOC for appointing its stockist. It may be highlighted that Eli-Lilly & Co., is a manufacturer of life saving drugs for oncological ailments and hence disruption of supplies would gravely prejudice the public at large. The issue is under investigation before the Competition Commission, Copies of the letters enclosed to the complaint of the Belgaum Chemists & Druggists Association are filed as **Annexure 1/12 (collectively).**"

15. The petitioner in this writ petition has sought a prayer seeking a prohibitory order against 1st respondent from continuing with the proceeding in

Complaint No.6/2012 produced at Annexure – J and to quash the order dated 28/06/2012 passed by 3rd respondent at Annexure – K. The proceedings have been initiated by the Commissioner under the Competition Act and on 07/02/2012, the Commissioner acting under Section 26(1) of the Act has ordered as under:

“13. The DG is directed to cause an investigation to be made into the matter and to submit a report within a period of 60 days from the receipt of this order. If a similar matter is already under investigation of the DG, the DG may club the matters for purpose of investigation.”

16. On this basis, Assistant Director General has issued notice to the petitioner directing the petitioner to file requisite information and further directed that failure to comply with the direction to submit the information would render a penal action in terms of Section 43 read with Section 45 of the said Act. The said notice reads as under:

"No.DG/CCI/IW/1/40/2011 DATED: 28.06.2012
REF YOUR LETTER NO.KCDAGS/58/12 DATED
27.06.2012 REQUESTING FOR EXTENSION OF TIME
TO FURNISH INFORMATION / DOCUMENTS AS
REQUIRED VIDE THIS OFFICE NOTICE DATED
02.04.2012 AS THE INVESTIGATION REPORT HAS
TO BE SUBMITTED WITHIN PRESCRIBED TIME
YOUR REQUEST FOR 30 DAYS EXTENSION IS NOT
ACCEDED TO HOWEVER YOU ARE GRANTED AN
EXTENSION OF 10 DAYS TIME ACCORDINGLY YOU
ARE NOW DIRECTED TO FILE REQUISITE
INFORMATION LATEST BY 08.07.2012 IT MAY BE
MENTIONED HEREIN THAT FAILURE TO COMPLY
WITH THE DIRECTION AS ABOVE MAY RENDER
YOU LIABLE FOR PENAL ACTION IN TERMS OF
SECTION 43 READ WITH SECTION 45 OF THE
COMPETITION ACT, 2002."

17. Perusal of the notice depict that it is a notice directing the petitioner to furnish the necessary documents to hold an investigation under Section 26(1) of the Act, which is at the preliminary stage of passing the order under Section 26(1) of the Act and relatively the Director General would be handicapped inasmuch as it usually has access only to the information furnished by the informant or information

available in public domain and on information available through preliminary conference if any under Regulation 17 CCI Regulations 2009 and thus, the notice issued by the Deputy Director is for a thorough fact finding exercise to be done and to be able to collect and assimilate all the credible data and information to analyze and render its findings. Therefore, the notice ordered to the petitioner is for the purpose of conducting enquiry and conducting investigation for proceedings under Section 26(1) of the Act and it is not an order in conclusion and it is just a show-cause notice to the parties by invoking Section 43 of the Act, failing which, the penalty is said to be levied, if the same is not in compliance with the direction.

18. In light of the reasons stated supra, the petition filed by the petitioner is premature and the same cannot be interfered at this stage. The writ petition is ***disposed of*** reserving liberty to the

petitioners to submit their objections along with the information and documents to 2nd respondent within a period of four weeks from the date of receipt of a copy of this order. On such information, material and explanation being submitted by petitioner, 2nd respondent shall proceed to pass orders by affording opportunity to the petitioners in accordance with law and the entire proceedings to be completed within a span of four weeks from the date of furnishing the information. It is needless to mention that this Court has not expressed any opinion on the merits or demerits of the case and if any, it is to the extent of disposal of the petition only. All the contentions of both the parties are kept open.

19. Accordingly, writ petition stands ***disposed*** in the above terms.

**SD/-
JUDGE**

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