

**MONOPOLIES AND RESTRICTIVE TRADE
PRACTICES COMMISSION,
NEW DELHI**

IA 42/2008
RTPE 27/2008

CORAM

Hon'ble Justice O.P. Dwivedi
Chairman

Shri MMK Sardana
Member

IN THE MATTER OF:

Association of Outsourcing Professionals
No. 39/2, Near Dairy Circle, Sagar Motors,
Bannerghatta Road,
Bangalore - 560029.

.....Applicant

Vs.

1. Bangalore International Airport Ltd.
36, Cunnigham Road, Bangalore-560 052.

2. Union of India
'B' Block, Safdarjung Airport,
New Delhi - 110003.

.Respondents

Appearances: Shri B.C. Thir Uvengadam, Advocate for the
Applicant

**ORDER OF THE BENCH DELIVERED BY HON'BLE
CHAIRMAN**

Complainant has filed this complaint u/s 31, 32,
33 of the MRTP Act alleging that "Concession
Agreement" entered into between R1 & R2 dated 5th
July, 2004 creates a monopoly in favour of R1 and

amounts to monopolistic/restrictive trade practice and as such attracting section 31,33 of the MRTP Act.

Alongwith the complaint, the complainant also filed an application u/s 12A dated 17th May, 2008 seeking a restraint order against the respondent from closing the HAL airport at Bangalore.

When we took up the matter first time on 21st May, 2008 we did not pass any interim order. In the meantime, the old airport became inoperative vide notification dated 16th May, 2008 issued by Government of India. Therefore, the application for ad-interim injunction became infructuous. Thereupon another application u/s 12A dated 26.5.08, seeking ex-parte mandatory injunction directing re-opening of the HAL airport at Bangalore, was filed.

We have heard learned counsel for the complainant on the question of maintainability of the complaint as well on the 12A application.

Concession Agreement referred to above refers to the opening of new airport at Bangalore and closure of

the existing airport in clause 5.2.2 and 5.5.1(ii) of the agreement which reads as under:-

"5.2.2 – No new or existing airport(except for Mysore and Hassan airports) shall permitted by GOI to be developed as, or improved or upgraded into. Domestic airport within an aerial distance of 150 kilometres of the airport before the twenty-fifth anniversary of the airport opening date."

"5.5.1 (i)-----

(ii) From and with effect from the date on which Airport Opening occurs GOI will ensure that the Existing Airport shall not be open or available for use for commercial civil aviation operations and shall no longer be classified as a civil enclave under the AAI Act, 1994."

Even if it is presumed, for the sake of arguments that the agreement under question permits any monopolistic and restrictive trade practice, Section 32(b)(iii) and section 33(3) of the Act clearly bars the jurisdiction of this Commission from taking cognizance as government of India is a party to it. Section 32(b)(iii) and 33(3) read as under:-

32. Monopolistic trade practice to be deemed to be prejudicial to the public interest except in certain cases- For the purposes of this Act, every monopolistic trade practice shall be deemed to be prejudicial to the public interest, except where-

(a)----(b)----(i)---(ii)---

(iii) - to give effect to the terms of any agreement to which the Central government is a party, by a written order, permits the owner of any undertaking to carry on any such trade practice."

33(3)-No agreement falling within this section shall be subject to registration in accordance with the provisions of this Chapter if it is expressly authorized by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement."

The main contention of the complainant is that the the said agreement cannot be said to be an agreement to which government of India is a party. In this

connection our attention was drawn to clause 18.13 of the Concession Agreement which reads as under:-

"18.13 Sovereign Immunity

GOI unconditionally and irrevocable:

agrees that the execution, delivery and performance by it of this Agreement and those agreements and other documents comprising the Security to which it is a party constitute private and commercial acts rather than public or governmental acts;"

Learned counsel for the complainant vehemently contended that when the agreement itself stipulates that the said agreement cannot be said to be public, governmental act it follows that the protection u/s 32(b)(iii) and 33(3) is not available in this case.

Having given our thoughtful considerations to the submissions made by the learned counsel for the complainant, we are unable to be persuaded by the arguments tendered by the complainant. The agreement is clearly between the Government of India and BIAL.

Even though the agreement may be of commercial nature, it needs to be emphasised that Government of India remains a party to it by virtue of signing the agreement. What is intended by clause 18.31 is that the agreement will not be considered to be Sovereign Act of the Government. This contention of the complainant, is therefore, not tenable.


Next contention of the Learned Counsel for the applicant was that no written order has been issued by Government of India as required u/s Section 32(b)(iii) permitting the undertaking carrying of such monopolistic trade practice. We find that on record there is a notification no. SO117(E) dated 16th May, 2008 issued by Government of India regarding opening of the new airport and the closure of the existing airport. It is sufficient to meet the requirements under section 32(b)(iii) of the MRTP Act.

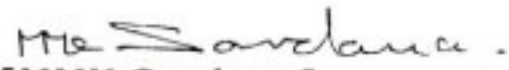
On the same rationale the agreements would be saved from the taint of RTP in terms of Section 33(3).

In view of our discussion above, we hold that this complaint is not maintainable and no notice be issued

to the respondent. Accordingly the complaint is dismissed and interim application is also dismissed.

Pronounced in the open court on 01st July, 2008.


[Justice O.P. Dwivedi]
Chairman


[MMK Sardana]
Member