



BEFORE THE

APPELLATE BENCH

COMPETITION COMMISSION OF PAKISTAN

IN RE: FECTO BELARUS TRACTORS (PVT.) LIMITED
(APPEAL NO. 14/2009)

Date of hearing: February 15, 2010

Bench Members: Mr. Khalid A. Mirza
Chairman

Ms Rahat Kaunain Hassan
Member (Legal)

On behalf of
Fecto Belarus Tractors (Pvt.) Ltd
The Appellant:

Mr. Mohammad Raheel Kamran Sheikh
Advocate, assisted by
Mr. Mohammad Saeed

Shahzad Trade Links: Mr. Amer Raza Naqvi
Advocate

ORDER

1. This Appeal was filed on December 18, 2009 against the Order dated October 02, 2009 passed by a single Member (herein after referred to as the '**Impugned Order**') whereby the complaint filed by Fecto Belarus Tractors (Pvt.) Limited (the "**Appellant**") was dismissed in terms of the recommendations in the Enquiry Report dated 29-09-2009. It was held in the Impugned Order that the complainant failed to make out any violation of Chapter II of the Competition Ordinance, 2009 (hereinafter referred to as the '**Ordinance**'); therefore, proceedings under Section 30 of the Ordinance could not be initiated. Hence, the complaint was dismissed.

2. Hearing in the subject Appeal was held on February 15, 2010. The Counsel for the Appellant and Shehzad Trade Links (hereinafter referred to as '**STL or Respondent**') argued the matter at length. Briefly, as per the submissions of the Appellant's Counsel, the Appeal raises the following grounds:
 - (a) The Appellant filed a complaint against STL before the Competition Commission of Pakistan (hereinafter referred to as the '**Commission**') on 11-08-09 for entering into an agreement with M/s Minsk Tractor Works in violation of Section 4 of the Ordinance;

 - (b) On 13-08-2009, a copy of the complaint was sent to STL who was asked by the Commission to submit comments within (7) seven days of receipt of the notice;

- (c) Hearing was convened on 20-08-2009 for arguments on the application for interim relief filed by the Complainant/Appellant and on request of STL hearing was adjourned to 01-09-2009 for reply of Respondent;
- (d) STL assailed the proceedings before the High Court of Sindh at Karachi in Constitutional Petition No. 1822/2009. The Honourable Sindh High Court vide its Order dated 27-08-09 was pleased to suspend the operation of the Order of the Commission initiating proceedings on complaint;
- (e) Thereafter, vide letter dated 5-10-2009 the Complainant/Appellant was informed that the complaint as per the recommendations made in the Enquiry Report dated 29-09-2009, was disposed of;
- (f) The Impugned Order was not provided along with the letter dated 05-10-2009 and subsequently the Impugned Order was provided on November 19, 2009, therefore, the Appeal is also well within the period of limitation for appeal;
- (g) The Enquiry has been conducted and the Impugned Order has been passed in violation of the injunctive Order of the Honourable Sindh High Court at Karachi;
- (h) The Appellant/Complainant was never informed about any hearing in the Enquiry by the Enquiry Officer. Neither the Appellant was joined in the Enquiry conducted by the Enquiry Officer nor was it confronted with the Enquiry Report before passing of the Impugned Order, therefore, the principles of the natural justice has been violated and on

this score alone the Impugned Order is liable to be set aside;

- (i) The conclusions arrived at by the Enquiry Officer are based on conjectures, surmises and unverified information and the Appellant was not provided any opportunity to confront such information and controvert the same with evidence;
- (j) The imputations have been cast on the Appellant and conduct thereof has been criticized without allowing it to join the proceedings and giving it adequate reasonable opportunity to refute such baseless findings. The Appellant has been palpably condemned unheard, which renders the impugned Order manifestly unwarranted by law; In this regard, the Appellant has placed reliance on [1966] 1 All.E.R P.C. 545, [1966] 3 All E.R. P.C. 863, [1982] 1 All E.R. P.C 35, [1984] 3 All E.R. C.A. 201, PLD 1964 SC 410 and 1994 SCMR 1299.
- (k) The Enquiry Officer has proceeded with enquiry in patent violation of the provisions of the Ordinance and the rules made there under.

3. Submissions made by the Counsel for STL, briefly are as follows:

- (a) The complaint was malicious, frivolous and vexatious and no prima facie evidence was produced, which warranted any enquiry under the provisions of the Ordinance, therefore, the complaint was misconceived and was rightly dismissed;

- (b) The Impugned Order was passed on October 02, 2009 and the appeal was filed on December 18, 2009, therefore, the appeal is time barred;
- (c) The Injunctive Order passed by the Honourable Sindh High Court was only applicable to the extent of proceedings for passing of interim Order under Section 32 of the Ordinance;
- (d) The Appellant was supposed to provide the evidence, however, no evidence was provided by the Appellant to substantiate its claim, therefore, the complaint was rightly rejected;
- (e) The product in question did not fall within the relevant market under the provisions of the Ordinance, and evidence was produced to substantiate the same, therefore, the complaint was rightly rejected;
- (f) In addition to the above, the Order for initiation of Enquiry is also in violation of the provisions of the Ordinance and an appeal was also filed against that Order, however, upon rejection of complaint, such appeal was withdrawn. It is submitted that the appeal impugning the Order for initiation of Enquiry and appointment of Enquiry Officer may also be heard along with this appeal.

4. Prior to addressing the main issue, we would like to address the objection taken by STL, regarding the appeal being time barred. We note that under the provisions of Section 41 of the Ordinance, the limitation for filing appeal is (30) thirty days from the date of passing of the Order. The Appellant has emphasized that, although the decision of was communicated on 05-10-2009; however copy of the Impugned Order was only provided on November 19, 2009 and the Appeal

was filed on December 18, 2009, therefore, the Appeal is well within the limitation of (30) thirty days. The Counsel for STL argued that the Impugned Order was passed on October 2, 2009 and the Appeal was filed on December 18, 2009, therefore, the Appeal is barred by limitation. The perusal of the record reveals that, although the Order was passed on October 02, 2009 and intimated vide letter bearing no. 05-10-2009, but copy of the Order was only provided on November 19, 2009 to the Appellant. Therefore, in our considered view the Appeal has been filed within the limitation period of (30) thirty days.

5. Proceeding now to the core issue; whether or not Appellant being the complainant ought to have been provided an opportunity of hearing prior to passing of Impugned Order? The Counsel for the appellant argued that adverse remarks against the Appellant are made in the Enquiry without providing an opportunity of hearing and to defend the same. It was further submitted that the Enquiry Report and the Impugned Order are also in sheer violation of the injunctive order of the Honourable Sindh High Court. He further added that by giving adverse remarks the Enquiry Officer has gone beyond its mandate under the provisions of the Ordinance to conduct enquiry. It was maintained that the enquiry may have recorded the finding that no violation is made out under the Ordinance but concluding that the complaint was frivolous was not warranted on behalf of the enquiry officer. Moreover, the Counsel argued that it is for the Commission to form an opinion whether the complaint is frivolous or vexatious or based on any sufficient facts prior to the initiation of the enquiry; once the enquiry is initiated it negates the frivolity of the complaint in terms of Section 37 (2).

6. In response to the above, the Counsel for STL submitted that the complaint was vexatious and was rightly dismissed. He added that he is not aware whether the Complainant was given an opportunity of hearing or to present evidence. As for the injunctive order of the Honourable Sindh High Court, the Respondent's Counsel's stance was that it was only to the extent of interim order to be passed under Section 32 of the Ordinance, for which a notice of hearing was issued to them. He added that, under the scheme of the Ordinance no order under Section 32 can be passed prior to initiation of the proceedings under Section 30 of the Ordinance. The Bench asked the Appellant to explain how any violation of the Honourable Court's order is made out but the Appellant did not press this ground further.
7. The Counsel for the Appellant was confronted with the letter dated 04-09-2009, which was addressed to the Complainant by the Enquiry Officer and he was informed to provide certain information. However, no reply of the said letter was received from the complainant. The Counsel expressed lack of knowledge regarding the letter and stated that the said letter was not brought to his knowledge by his client.
8. After hearing the arguments of the parties and perusal of record, the aforesaid issue can be addressed keeping in view the provisions of Section 37 of the Ordinance, which read as under:

37. Enquiry and studies.- (1) *The Commission may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Ordinance.*

(2) *Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates.*

(3) *The Commission may outsource studies by hiring consultants on contract.*

(4) *If upon the conclusion of an inquiry under sub-section (1) or sub-section (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30.*

9. Keeping in view the provisions of Section 37 of the Ordinance, it is relevant to point out that the Commission may initiate enquiries in the following three instances:

- (i) On its own (*Suo motto*);
- (ii) Upon Reference made by the Federal Government; and
- (iii) Complaints.

10. The Commission has consistently observed that in conducting an enquiry, opportunity of hearing is not mandatory. However, we do appreciate that this is a case of first instance, where allegedly such opportunity has not been provided *albeit* the enquiry has been initiated upon the complaint of the Appellant himself. While on the record there is a letter addressed to the Complainant requesting for information, yet the fact remains that the Appellant did not get an opportunity to make out his case. In our considered view it would be in the interest of justice to

provide the Appellant an opportunity of hearing prior to passing the Order; resulting in the disposal of the complaint. As to the Appellant's contention regarding the merits in the findings of the Enquiry Report we are remanding the matter to the Member (C, M&T.A) who may after giving both the parties an opportunity of hearing, pass an Order afresh as deemed appropriate under the circumstances.

11. We must make a distinction that when an enquiry results into initiation of proceedings under Section 30 of the Ordinance, the Ordinance statutorily provides an opportunity of hearing; hence an opportunity of hearing during the enquiry is not mandatory. However, as stated above, the Impugned Order has been passed in the matter where upon complaint filed by the Appellant, the enquiry records adverse findings against the Complainant/Appellant and the Impugned Order relying upon such findings, disposes of the complaint without providing an opportunity of hearing. This could perhaps be because of the fact that the Ordinance or the rules regulations, thereunder, do not specifically provide the procedure for disposal of complaints, where enquiry is concluded with the findings that it does not merit initiation of proceedings under Section 30 of the Ordinance.

12. Upon consideration of the entire matter, we are of the considered view that where a complaint has been filed and the findings of an enquiry do not indicate any *prima facie* violation and/or give any adverse findings against the complainant, it would be only fair and in accordance with the principles of natural justice that prior to the disposal of the complaint an opportunity of hearing be given to the complainant.

- 13.** The Counsel for STL repeatedly argued that an appeal was filed by them impugning the Order of appointment of Enquiry Officer and initiation of Enquiry, which may please be heard along with this appeal. The Counsel further added that after the rejection of the complaint, the appeal was withdrawn, however, since the Bench is now hearing the appeal of the Complainant against the impugned order, therefore, his withdrawn appeal may be treated as revived and be heard and decided along with this appeal.
- 14.** The Counsel for STL has failed to provide any valid ground for treating such request as tenable; however, whatever objections STL may have, it can be raised before the concerned Learned Single Member of the Commission to whom the case is remanded.
- 15.** In view of the above, this appeal is accepted and disposed of accordingly.

KHALID A. MIRZA
CHAIRMAN

RAHAT KAUNAIN HASSAN
MEMBER (LEGAL)

Islamabad the March 16th 2010