

*M/s Arora Medical Hall, Ferozepur (Informant)*

v.

*Chemists & Druggists Association, Ferozepur (CDAF) and Others (Opposite Party)*

**CASE NO 60/2012**

**Nature of Infringement:** Limiting and Controlling the Supply of Drugs in the relevant market by way of anti-competitive agreement and Abuse of Dominant position.

**Legal Provisions:** Section 3(1), Section 3(3)(b), Section 4, Section 19 (1)(a); Section 27; Section 19(3); Section 48 of the Competition Act, 2002.

**Order:** Order Passed under Section 27 of the Competition Act, 2002.

**Key Words:** Association of Enterprises, No Objection Certificate, Boycott, Membership.

### **FACT OF THE CASE**

The informant involved in the case is a registered partnership firm dealing in the wholesale trade of medicines in the Ferozepur district of the State of Punjab and holds the wholesale dealership of various drugs companies including Ranbaxy, Abbott Piramal, Abbott India, Ozone, Sun Pharma, Hetero, Johnson & Johnson, Pfizer, etc. the informant alleges the contravention of Sections 3 and 4 of the Competition Act, 2002, by the Opposite Party No. 1, i.e. Chemists & Druggists Association, Ferozepur (hereinafter referred to as 'CDAF') and by the Opposite Parties Nos. 2 to 8, i.e. the office-bearers of CDAF.

The grounds on which allegation of contravention of Sections 3 and 4 had been levelled against the Opposite Parties are as follows:

- 1) As per the rules of the CDAF, it has been alleged, the chemists/druggists have to mandatorily take a No Objection Certificate (NOC) and Letter of Credit (LOC) from the CDAF before taking distributorship for medicines of a company in Ferozepur city. A payment of Rs. 2100/- has also to be made for procuring such NOC and LOC. This rule was objected to by the informant, consequent to which it was expelled from the primary membership of CDAF in the year 2010;
- 2) It has also been alleged by the informant that since 2010, the CDAF was looking for an opportunity to eliminate the competition in the relevant market, i.e. the pharmaceutical drugs supply market in Ferozepur, which it got in the form of an error committed by the informant in some of the bills of the retailers. Pursuant to this, CDAF circulated a letter on 22.05.2012 among its members calling a general body meeting to be held on 23.05.2012 to discuss the above said issue. Although the meeting was called in order to discuss the measures to be taken against the informant, it was not invited to attend the meeting. On 26.05.2012, CDAF passed a resolution calling for a boycott of the informant. The contents of the resolution are as follows:
  - (a) CDAF has given 2-3 days' time to the informant to clear his position before taking further action.
  - (b) CDAF has resolved to boycott the informant.

- (c) CDAF has directed its members to stop purchasing goods from the informant immediately and also warned that if any chemist defied this decision, it will be fined Rs. 11, 000/-.Case No. 60 of 2012 Page 4 of 32
- (d) Directed the members not to make pending payments of the informant without checking the bills.
- (e) Directed all the whole-sellers to stop dealings with the particular retailers who continue to purchase goods from the informant.

Therefore, it has been alleged by the informant that the activities of the Opposite Parties are creating barriers to new entrants in the market and eliminating existing competitors out of the market, and hence, are guilty of violating Sections 3 and 4 of the Competition Act, 2002. The informant prayed for the following reliefs:

- (i) To pass an order for investigation into the matter;
- (ii) To pass an order for granting interim relief in the matter;
- (iii) To direct the opposite parties to pay the costs and damages suffered by the informant; and
- (iv) Any other order which the Commission may deem fit.

The Commission directed DG to investigate into the matter, consequent to which DG carried out the investigation and submitted the investigation report to the Commission. The report of DG indicated that the practices of CDAF are in contravention of the provisions of the Act. The report states that CDAF has limited and controlled the supply of drugs and medicines in Ferozepur district of Punjab, by virtue of the resolution boycotting the informant. Such resolution was also stated by the report to be a restriction on the freedom of trade, not only of the informant but also of the other wholesalers and retailers in Ferozepur as well as pharmaceutical companies supplying their products in the relevant market. In addition to the aforesaid effects of the resolution, it also resulted in the elimination of competitors from the market. The report stated that the rule of CDAF regarding NOC and LOC is also a tool for limiting and controlling the supply of drugs and medicines in Ferozepur.

DG was directed by the Commission to conduct a supplementary investigation regarding the role of the individual office-bearers of CDAF in the decision-making. In the supplementary investigation report, it was concluded by DG that the office-bearers of CDAF were equally involved in the anti-competitive decisions and practices of the CDAF.

In reply to the report of DG, the Opposite Parties denied all the charges of indulging in anti-competitive practices. It was stated on their behalf that CDAF is a voluntary association and its membership is not a pre-condition for the undertaking of the business activities in the Ferozepur city. The Opposite Parties stated that the informant has been, in the past, accused of misusing its monopoly in the market. Some retailers had also filed an FIR under Section 420 of the Indian penal Code against the informant, accusing him of issuing computerised bill, charging high prices and without deducting the amount for expired drugs and medicines returned by such retailers, which is the usual business practice. The Opposite

Parties stated that in the wake of such activities of the informant, they were compelled to call a general meeting against the informant, wherein it was boycotted.

It was also stated on behalf of CDAF that its decision did not attract the application of Section 3(3) of the Competition Act, 2002. It is because Section 3(3) applies only to a case wherein the decision has been taken by an association of enterprises which are engaged in identical or similar trade of goods or provision of services, but CDAF consists of wholesalers and retailers as its members, who function at different levels of the production chain.

As regards NOC, the Opposite Parties stated that it was on the lines of the recommendation of the Mashelkar Committee Report that the associations of pharmacists and druggists should play a role in the prevention of circulation of spurious drugs in the market. It was further stated on behalf of the Opposite Parties that it is the pharmaceuticals companies which ask for NOC from the chemists and druggists in order to prevent the unhealthy competition in the market and creation of excess supply in the market. Thus, NOC was projected by the Opposite parties as a mechanism to ensure efficient distribution of drugs in the market.

#### **COMMISSION'S DECISION**

The Commission came to the conclusion that the decisions of CDAF did, in fact, result in limiting and controlling of supply of medicines in Ferozpur and elimination of competition in the market. The fact that as a result of the boycott, the sales of the informant had fallen from Rs. 223.18 lakhs to Rs. 39.71 lakhs, was also considered by the Commission to be an indicator of the fact that there has been a limiting and controlling of supply of drugs in the market. The Commission also concluded that CDAF is an association of enterprises engaged in similar trade, and being so, Section 3(3) of the Act is very much applicable to the present case.

On the issue of NOC, the Commission inferred that it is clear from the relevant circular that no one can start a business in Ferozpur without getting an NOC from CDAF. This, according to the Commission, amounted to limiting and controlling of the supply of medicines in Ferozpur. Thus, the conduct of CDAF is hit by Section 3(3) of the Act and once an agreement as mentioned in Section 3(3) is shown to exist, it is to be presumed that the agreement has had an appreciable adverse effect on the competition, unless rebutted by the Opposite Party. As per the Commission, the Opposite Party in the present case was not able to rebut the presumption stated above and being so, the conduct of the opposite party association was held to be anti-competitive being in contravention of the provisions of sections 3(3)(b) read with section 3(1) of the Act.

The Commission, therefore, passed a cease and desist order against the opposite parties and imposed a fine at the rate of 10% of the average income and receipts of the preceding three years