

COMPETITION COMMISSION OF INDIA

Case No. 20 of 2013

Date: 31/05/2013

In Re:

Saint Gobain Glass India Ltd.
33A, 3rd Floor, RR-V Building, SIDCO Industrial
Estate, Guindy, Chennai-600032, Tamil Nadu
Through Mr. P. Ram Kumar, Dhall Law Chambers

Informant

And

Gujarat Gas Company Ltd.
2, Shanti Sadan Society, Near Piramal Garden, Ellisbridge,
Ahmedbad-380006

Opposite Party

CORAM:

Mr. Ashok Chawla,
Chairperson

Mr. H.C. Gupta,
Member

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M.L. Tayal
Member

Mr. Justice S.N. Dhingra {Retd.}
Member

Mr. S.L.Bunker
Member

Order under Section 26(1) of the Competition Act, 2002

Sezal Glass Ltd. (SGL) had entered into a Gas Supply Agreement (GSA) with Opposite Party on 15.6.2007 for supply of natural gas to its float glass plant

in Jhagadia, Gujrat. This GSA was amended by the parties on 23.1.2009, 4.4.2010 and 27.1.2011. On 31.5.2011, informant bought the float glass plant of SGL as a going concern on a slump sale basis. As per the terms of GSA between SGL and Opposite Party, the informant was required to procure an NOC from Opposite Party and was also required to sign an undertaking containing certain commitments to ensure uninterrupted gas supply from Opposite Party. The informant entered into a tripartite assignment and novation agreement on 30.9.2011 with OP and SGL. It is contended by the informant that the informant was forced to agree to unfair and exploitative conditions contained in the amended agreement. However, this allegation of the informant cannot be true as the informant had purchased float glass plant as a going concern and before purchasing must have got conducted due diligence and must have known the terms and conditions of GSA. The informant was at liberty not to purchase the plant and not to get itself bound by the terms and conditions of GSA.

2. However, the informant has approached the Commission on the issue of abuse of dominance by Opposite Party on the ground that the clauses contained in the GSA (as amended on 23.1.2011 and applicable now) to be abusive.

3. The main grievances of the informant concerning GSA are as under:-

- (i) **Long Term Contract:** The period of gas supply contract initially agreed between SGL and Opposite Party was seven years. It was subsequently changed to 12 years from the date of initial contract by the amended agreement dated 27.1.2011.
- (ii) **No exit clause:** There was no exit clause allowing the buyer to move out of the contract or to terminate the agreement. While the original GSA gave the buyer a right to terminate the agreement by giving one year notice, the amended agreement introduced a clause which took away this right of exit from the buyer.

(iii) **Minimum Guarantee Off-take liability:** The informant alleged that GS contained a clause of minimum Guaranteed Off-take of the gas on the part of the buyer, even when the buyer may not require that much quantity of the gas. The informant gave certain facts for the period June, 2007 to February, 2009 which are not relevant for the purpose of this case and are not being considered. The Competition Act came into force in May, 2009 where after this agreement was amended twice by the consent of parties. Therefore, the facts prior to May, 2009 are not required to be considered in case of alleged abuse of dominance.

(iv) **Right of first refusal:** The amended agreement dated 27.1.2011 is stated to have introduced a new clause 22 by which it is provided that if there was an increase in demand on the part of the informant. The informant was to give opportunity to the Opposite Party to supply the increased demand of the gas and the buyer could approach other suppliers only if the Opposite Party refused to meet the additional demand of the buyer. The buyer was supposed to give a written proposal to the Opposite Party to meet the additional demand and the Opposite Party was to decide in this regard in a period of 180 days and if the Opposite Party agreed to supply the additional demand, the buyer was bound to buy the additional quantity of gas only from the Opposite Party.

It is contended by the informant that aforesaid provisions of the GSA (as amended) were abusive of the dominant position of the Opposite Party. The aforesaid clauses were foisted initially upon SGL and later on the informant through a tripartite agreement, due to the dominance of the Opposite Party.

4. The Commission in its earlier order in case No. 50/2012, Gujarat Textile Processor Association and Gujarat Gas Company and Case No. 2/2011, Govt. of Gujarat and Gujarat Gas Company had observed that the Opposite Party was

enjoying a position of monopoly in the transmission and distribution on segment of Compressed Natural Gas in the geographical area of south Gujarat. As per the facts given by the informant, the Opposite Party's market share in supply of Compressed Natural Gas excluding the supply of gas under administrative price mechanism by way of allocation by Central Government was 80%. Thus, there is no doubt that the Opposite Party was a dominant player in the relevant market of supply and distribution of piped natural gas to industrial and commercial establishments. The supply of natural gas through pipeline owned by Opposite Party was only confined to south Gujarat as the pipelines do not go beyond three districts of South Gujarat, namely, Valsad, Surat, Bharuch. The Commission considers that prima facie the Opposite Party was a dominant player in the relevant market of supply and distribution of compressed natural gas (other than covered by allocation policy) in South Gujarat.

5. A perusal of the GSA as amended in January, 2013 would show that prima facie the allegations of the informant seem to have force. The GSA initially was for a period of seven years and by amendments it was changed to 12 years and the exit clause already in the agreement for the buyers to move out of the contract was deleted. The agreement also provided for a minimum guarantee off-take liability and also provided for right of first refusal to the seller. Generally, a long term downstream agreement reduces, if not eliminates the ability to choose its suppliers by a customer as the customer stands tied for the stipulated period to the supplier. Such an agreement reduces the potential for competitive market structure to emerge as it largely results in foreclosure of the market for a long period for competing supplier. Such a clause prima facie constitutes an abuse of dominant position. Although there may be circumstances justifying such clause but it is a matter of investigation in each case. Such a clause also restricts entry of alternate suppliers to the market.

6. The absence of exit clause again restricts a buyer from moving out of the contractual relationship with one player to the other player, who was more

competitive. The seller having unilateral right to terminate the contract is in an advantageous position whereas the buyer having no right to terminate the contract and to enter into another agreement with other competitors is at a disadvantage. This also is a competition issue and such a clause may be abusive of the dominant position. Similarly, the right of the first refusal given in the contract to the Opposite Party in case of demand of additional quantities on the part of the buyer is another competition constraint and prima facie seems to be an abusive clause, as it prevents the buyer from approaching the other firms, simultaneously for seeking additional quantities of gas, at better & competitive terms & conditions.

7. In view of foregoing discussions, the Commission is of the opinion that prima facie the clauses of GSA, as pointed out by the informant, appear to be abusive of dominant position by the Opposite Party and the matter requires detailed investigation.

8. The Secretary is directed to send a copy of this direction passed under section 26(1) to the office of the DG. DG shall investigate the matter about violation of the provisions of the Competition Act. In case the DG finds opposite companies in violation of the provisions of Competition Act, it shall also investigate the role of the persons who at the time of such contravention were incharge of and responsible for the conduct of the business of the opposite parties so as to fix responsibility of such persons under section 48 of the Competition Act. DG shall give opportunity of hearing to such persons in terms of section 48 of the Competition Act. The report of DG be submitted within 60 days from receipt of the order.

9. Nothing stated in this order shall tantamount to a final expression of opinion on merit of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

10. The Secretary is directed to communicate this order as per regulations to the parties.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(H.C. Gupta)
Member

Sd/-
(Dr. Geeta Gouri)
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