



COMPETITION COMMISSION OF INDIA
Case No. 01 of 2018

In Re:

Indian National Shipowners' Association ('INSA')
22 Market Tower – F, Cuffe Parade,
Mumbai – 400005, Maharashtra

Informant

And

Oil and Natural Gas Corporation Limited ('ONGC')
Deendayal Urja Bhawan, 5A, Nelson Mandela Marg,
Vasant Kunj, New Delhi - 110070

Opposite Party

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. U.C. Nahta
Member

Order under Section 33 of the Competition Act, 2002

1. The present order shall dispose of the prayer made by the Informant in the interim application filed on 21.05.2018 under Section 33 (hereinafter referred to as 'the Application') of the Competition Act, 2002 (hereinafter referred to as 'the Act') for grant of Interim Relief. The Informant has, *inter-alia*, prayed for a direction to restrain ONGC (hereinafter referred to as 'the Opposite Party') from taking any action, or threatening to terminate the 'Charter Hire Agreement' (hereinafter referred to as 'CHA') entered into with the member companies of the Informant till disposal of the present matter.
2. Briefly, the Commission passed the directions in this case under section 26(1) of the Act on 12.06.2018 holding that *prima facie*, the Opposite Party is dominant in



the relevant market and was abusing its dominant position in violation of section 4 of the Act. After preliminary conference held on 17.05.2018, the Informant filed the instant Application, which was considered by the Commission in its ordinary hearing held on 12.06.2018.

3. Bereft of details, the Informant, in the information, has *inter alia* alleged that the Opposite Party has abused its dominant position through imposition of unfair terms and conditions in the CHA entered into between the successful bidders and the Opposite Party. The CHA, which is in the nature of a boiler plate contract, sets out the terms and conditions that governs the contractual relationship between the Opposite Party and the successful bidders. The main clause which has been alleged to be one-sided and unfair is Clause 14.2 (reproduced below) of the Special Contract Conditions (hereinafter, referred to as ‘SCC’), *i.e.* unilateral right of termination without assigning any reason:

“Clause 14.2: Notwithstanding anything contained herein the Charterer shall have its exclusive right to terminate the contract for the chartered vessel operating under the contract by giving to the Contractor thirty (30) days written notice without assigning any reason therefor. However, this clause would apply after first 12 months of the contract. Nevertheless, in case of performance of the Contractor not found satisfactory, provisions of clause 18.4 of general conditions of contract shall apply.”

4. The Commission, vide its order dated 12.06.2018 passed under Section 26(1) of the Act, *prima facie* held the Opposite Party to be dominant in the relevant market, *i.e.* ‘market for charter hire of Offshore Supply Vessels (OSVs) in the Indian Exclusive Economic Zone (EEZ)’. Further, based on the material placed on record and arguments made by the parties, the Commission was of the view that the very stipulation of Clause 14.2 of the SCC is one-sided as it gives an unfettered right to a



dominant party to use it in its favour without giving any reciprocal right to the other party. Further, the manner in which the termination notices were sent and then consequently withdrawn by the Opposite Party on receiving a reduced offer from the members of the Informant, indicates the imperious approach adopted by the Opposite Party. Thus, the Commission held that Clause 14.2 of the SCC and the manner in which it was invoked by the Opposite Party *prima facie* amounted to abuse of dominant position in contravention of the provisions of Section 4(2)(a)(i) of the Act. Accordingly, the Commission directed the DG to carry out a detailed investigation into the matter and submit a report within 60 days.

5. In the Application, the Informant contended that there exists a strong *prima facie* case in favor of the Informant warranting for grant of Interim Relief. Further, balance of convenience was also claimed to be in its favour. The Informant also stated that if the Interim Relief is not granted, irreparable damage will be caused to the members of the Informant.
6. The Commission has perused the Application in the light of the provisions of the Act. The principles for deciding the interim relief application under Section 33 of the Act have been laid down by the hon'ble Supreme Court in *CCI v. SAIL (2010 CompLR 0061 SC)* (hereinafter referred to as 'the SAIL order'), wherein it was held that while recording a reasoned order under Section 33 of the Act, the Commission shall, *inter alia*, ensure fulfilment of the following conditions:
 - a) *record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed;*
 - b) *it is necessary to issue order of restraint and*
 - c) *from the record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there*



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is definite apprehension that it would have adverse effect on competition in the market

7. On the first element, the Informant has explained how it has a strong *prima facie* case for grant of Interim Relief. In this regard, the Commission notes that the order of the Commission dated 12.06.2018 under Section 26(1) of the Act clearly brings out how Clause 14.2 of the SCC and the manner in which it was used by the Opposite Party from 2016 to 2018 *prima facie* amounted to abuse of dominant position. During the preliminary conference, though the Opposite Party tried to justify its conduct by arguing the existence of special circumstances for invoking the termination clause in the year 2016, the Commission found the facts available on record to the contrary. The Commission noted that attempts to obtain reduction in rates were again made by the Opposite Party through verbal demands in late 2016 and 2017. Further, the additional information furnished by the Informant, *vide* its application dated 11.04.2018, cited instances of continuance of such conduct on the part of the Opposite Party even in the year 2018. Thus, the Commission found no merit in the claim of the Opposite Party that the invocation of Clause 14.2 by it in the year 2016 was a one-time phenomenon in view of the special circumstances and, hence, held such invocation to be *prima facie* abusive.
8. In order to prevent further perpetration/invocation of the condition which was apparently abusive, the Commission *vide* its order dated 08.05.2018 directed the Opposite Party to furnish an undertaking to the effect that it will not be invoking Clause 14.2 of the SCC, in any manner, against the Ship-owners until the date of preliminary conference *i.e.* 17.05.2018. That undertaking is already on record.
9. Thus, the Commission is satisfied that an act in contravention of the provisions of the Act has been committed and continues to be committed, and hence the first element exists in the present case.



10. The second element, *i.e.*, the balance of convenience also seems to lie in Informant's favour. The Commission has already discussed in detail in its *prima facie* order dated 12.06.2018 that the OSVs hired by the Opposite Party from the ship-owners, namely Anchor Handling Tug Supply Vessels (AHTSVs) and Platform Supply Vessels (PSVs), are of special nature. As these vessels are designed and equipped to perform specific functions, they do not seem to be interchangeable unless they are repurposed to be used for a purpose other than for which they are specifically designed. Thus, in such a scenario, early termination of CHA by the Opposite Party is capable of causing hardship to the ship-owners as the OSVs will lie idle in the Indian EEZ. Second criteria, hence, seems to be satisfied given the facts of the present case.
11. Further, the third element, *i.e.* irreparable loss, also seem to support the Informant's case. In cases where the potential injury liable to be caused because of the alleged abusive conduct of the Opposite Party cannot be quantified in terms of money, Interim Relief ought to be granted. In this regard, the Commission notes that the Opposite Party controls more than 80% of the market for charter hire of OSVs in the Indian EEZ. Thus, an early termination of their services by the Opposite Party will lead to a situation where they may not have alternative procurers/buyers for their services. This will lead to uncertainty of the deployment of OSVs in the Indian EEZ and, in the long run, may adversely affect the OSV businesses in India. The Commission is of the view that such effect may not be quantifiable in terms of money and hence, irreparable. Thus, the third criteria also seems to be satisfied.
12. Based on the aforesaid discussion, the Commission finds that this is a fit case to grant interim relief. However, given the relief sought in the Application, the Commission notes that the undertaking filed by the Opposite Party on 08.05.2018, which is on record, will address the concern. Thus, the Commission directs that the undertaking filed by the Opposite Party pursuant to the direction given by the Commission *vide* order dated 08.05.2018, to the effect that it will not invoke Clause



14.2 of the SCC, in any manner, against the Ship-owners, will remain operative till further order. The application stands disposed of accordingly.

13. The Secretary is directed to inform the parties, accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(Sudhir Mital)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Date: 15/06/2018