

Competition Commission of India

Case No. 1/28 (C-97/2009/DGIR)

Dated: 09.05.2012

M/s Royal Energy Ltd.

- Informant

1. M/s Indian Oil Corp. Ltd.
2. M/s Bharat Petroleum Corp. Ltd.
3. M/s Hindustan Petroleum Corp. Ltd.

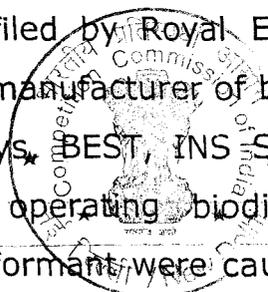
- Opposite Parties

As Per R. Prasad (dissenting)

Order under Section 27 of the Competition Act

In this case I have a different view and therefore I am passing a separate order. The facts of the case are that on the receipt of the information the Commission formed a prima facie view under Section 26(1) of the Competition Act that there appeared to be a case of contravention of the Competition Act and for this reason the Commission referred the matter to the Director General for investigation. The Director General in this case after conducting an investigation came to the conclusion that no evidence of price-fixing resorted to by the oil marketing companies, which are the OPs, has been found in this case. But the DG has recommended that there are competition concerns in the matter of policy and therefore these issues need to be taken by the Commission with the concerned authorities.

2. The complaint in this case was filed by Royal Energy Ltd., the informant stating that it was the largest manufacturer of biodiesel in India and was associated with Indian Railways, BEST, INS Shivaji etc. as a vendor of biodiesel. It was also operating biodiesel pumps in Maharashtra. As the products of the informant were causing a threat to



the three OMCs namely Indian Oil, BPCL and HPCL, they approached the clients of the informant and told them that they would be supplying biodiesel blended oil to them directly. As the OMCs were to purchase biodiesel at a predetermined price of Rs.26.50 per litre against the market price of Rs.31/- per litre. The informant has alleged that this is a monopolistic trade practice which would lead to the elimination of competitors, abuse of market power, preventing and reducing competition, limiting technical development and adoption of unfair and deceptive trade practices. The informant has also referred to Circular NO. P-45011/17/2009 by which the Ministry of P&NG requested the State Governments to eliminate the sale of biodiesel in the market. It is been stated that this has been done at the instance of the OMCs who did not want any competition. The action of the Ministry of P&NG was to limit and reduce the supply of biodiesel in the market and this was an anticompetitive practice.

3. The Commission after the receipt of the DG report came to the conclusion that as the DG had not found any violation of the Competition Act it was not necessary for the Commission to call the OPs. The Commission called the informant for its comments on the report of the DG but no comments were received from the informant. Therefore, the Commission came to the conclusion that as there was no case of violation of the Competition Act, the case needs to be closed without hearing the OPs.

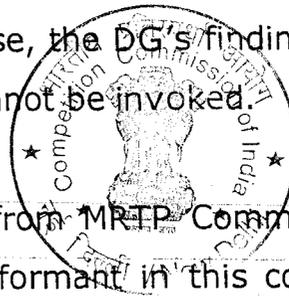
4. In my view if there are no competition concerns then no advisory can be sent to any authority. Therefore if a case is closed then even an advisory cannot be sent to the authorities. It is also my view which I have held earlier in some orders that a case cannot be closed without going through the procedure laid down in Section 26 of the Act and explained by the Supreme Court in the case of SAIL Civil appeal no. 7779 of 2010. Though the Supreme Court in the SAIL case was not required to

decide this issue, it gave an opinion on Section 26 which is reproduced as under (page 13 of the order):-

In terms of Section 26(3), the Director General is supposed to take up the investigation and submit the report in accordance with law and within the time stated by the Commission in the directive issued under Section 26(1). After the report is submitted, there is a requirement and in fact specific duty on the Commission to issue notice to the affected parties to reply with regard to the details of the information and the report submitted by the Director General and thereafter permits the parties to submit objections and suggestions to such documents. After consideration of objections and suggestions, if the Commission agrees with the recommendations of the Director General that there is no offence disclosed, it shall close the matter forthwith, communicating the said order to the person / authority as specified in terms of Section 26(6) of the Act. If there is contravention of any of the provision of the Act and in the opinion of the Commission, further inquiry is needed, then it shall conduct such further inquiry into the matter itself or direct the Director General to do so in accordance with the provisions of the Act.

In view of the reasoning given by the Supreme Court and the provisions of the Act, it is necessary to hear the parties, in cases where the D.G. has recommended closure, before closing the case under Section 26(6) of the Act. As this procedure has not been followed, I have no option but to disagree with the majority view. Further without hearing the concerned parties, the Commission cannot come to the conclusion that a case of contravention is made out or not. Otherwise, the DG's findings would be final and the provisions of Section 26(7) cannot be invoked.

5. This case was received on transfer from MRTP Commission under Section 66 of the Competition Act. The informant in this complaint had



claimed itself to be India's largest manufacturer of bio-diesel and supplier of bio-diesel to many organisations. In addition to these activities the informant had its own retail bio diesel pumps in Maharashtra. The Government of India came out with a National Policy of Bio-fuels in 2003. In this policy it has been stated that the fossil fuels continue to play a dominant role in the energy scenario in India. In this policy, Government of India has stated that renewable energy was non-polluting and virtually inexhaustible. It was therefore the endeavour of the government in the policy to encourage the use of bio-fuels. In accordance with the policy by the year 2017 20% of both petrol and diesel were to be blended with by bio-fuels. The issue in this case is bio diesel and its marketing. In the national policy the government wanted that wastelands and degraded forests were to be used for the cultivation of plants for the production of bio diesel. Bio diesel is methyl or ethyl ester of fatty acids produced from vegetable oils both edible and non-edible or animal fat of diesel quality. The policy envisaged cultivation of wastelands which would ultimately lead to increase in rural employment. The policy also envisaged that there was a requirement for a minimum support price for seeds which would be used for the production of bio diesel. The policy also stated that the storage, distribution and marketing of bio-fuels would be with the OMCs. The pricing of bio-diesel was to be based on the prevailing retail diesel price. The policy also stated that the financial incentives would be given for the production of bio-fuels.

6. When the Commission took up the case for forming a prima facie opinion, it considered necessary to have the views of Ministry of Petroleum and Natural Gas as well as the Ministry of New and Renewable Energy. The Ministry of Petroleum and Natural Gas submitted a letter which is reproduced as under



Confidential

MOST IMMEDIATE

No. P-45011/47/2010-Dist
Government of India
MINISTRY OF PETROLEUM AND NATURAL GAS

Shastri Bhawan, New Delhi
Dated the 18th July, 2010.

**Sub: Information filed under Section 19(1)(a) of the
Competition Act, 2002.**

Sir,

I am directed to refer to Competition Commission of India's letter No. C-97/2009/DGIR (1/28)/8623 dt. 6th July, 2010 on the subject mentioned above and to give below the comments of this Ministry in the matter:

I. As per government of India (Allocation of Business) Rules 1961, the following activities relating to bio-fuels have been allocated to Ministry of Petroleum and Natural Gas:

- (i) Blending and blending prescription for bio-fuels including laying down the standards for such blending; and
- (ii) Marketing, distribution and retailing of bio-fuels and its blending products.

II. The BIS certification for Bio-diesel: B100 (IS 15607:2005) has defined it as a blend stock to be blended with High Speed Diesel (HSD) under the specification IS 1460. Diesel blended with 5% B:100 is included under ISI1460, which is high speed diesel.

III. As per the National Policy on Biofuels of Govt. of India, the responsibility of storage, distribution and marketing of biofuels has been assigned to the Oil Marketing Companies (OMCs) to be carried out through their existing storage and distribution infrastructure and marketing networks. Further, the fixation of Minimum Purchase Price (MPP) for bio-diesel is the mandate of the Biofuel Steering Committee and the National Biofuel Coordination Committee. Copy of the National Policy on Biofuels is enclosed.



IV. In accordance with provisions of Para I above and prior to notification of National Policy on Bio-fuels, Ministry of Petroleum & National Gas has made a Bio-diesel Purchase Policy in the year 2005 with the following features:-

- (i) **Specifications** – With effect from 01.01.2006, the OMCs shall purchase, through the its select purchase centres, bio-diesel (B:100), which meet the fuel quality standard prescribed in the Bureau of Industrial Standard (BIS) specification. The OMCs have been allowed to purchase BIS certified Bio-diesel only for blending with HSD to the extent of five percent, for ensuring conformity of bio-diesel blend stock (B:100) according to IS 15607:2005.
- (ii) **Procurement of bio-diesel through notified 20 purchase centres** – The purchase centres have been identified in consultation with the OMCs, viz the Indian Oil Corporation Ltd. (IOC), Hindustan petroleum Corporation Ltd. (HPC) and Bharat Petroleum Corporation Ltd. (BPC), on the basis of availability of minimum testing facilities for B100 and for blending in HSD to the extent of five per cent. Bio-diesel manufacturers interested in supplying bio-diesel to OMCs should approach the State Level Co-ordinator (SLC) pertaining to the state, and after assessment of production capacity and credibility of the prospective supplier by joint evaluation / certification by the industry team, samples would be tested and if these meet the prescribed BIS specifications, the supplier shall be registered as and authorized supplier.
- (iii) **Pricing by the Oil Marketing Companies** – As the mandate to sell bio-diesel for OMCs in B5, which is diesel blended with 5% bio-diesel, the pricing of B:100 for purchase gets linked to the RSP of diesel, as B5 is taxed at the same rate as diesel. In view of this, the viability of bio-diesel purchase for OMCs worked out at Rs.26.50/litre for B:100 to be blended 5% with diesel

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(IS1460). The contention of Royal energy Ltd., that B:100 is selling at a higher rate than this is not acceptable since B:100 is not meant for standalone sale as discussed in Para II above. The high rate is possible only on account of Sales Tax differential between HSD and B:100.

V. In exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955, this Ministry had issued the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and prevention of Malpractices) Order, 2005, which extends to the whole of India. The Clause 3(5) read with Clause 4 of the Motor Spirit and High Speed Diesel (Regulation of Supply, distribution and Prevention of Malpractices) Order, 2005, clearly stipulates as under:

Clause 3(5) – No person shall sell or agree to sell any petroleum product or its mixture other than motor spirit or high speed diesel or any other fuel authorized by the Central government in any form, under any name, brand or nomenclature, which can be and is meant to be used as fuel in any type of automobile vehicles fitted with spark ignition engines or compression ignition engines.

Clause 4 – Restriction on marketing of motor spirit and high speed diesel – No person, other than those authorised by the Central Government, shall market and sell motor spirit or high speed diesel to consumers or dealers.

VI. As the product biodiesel (B100) is meant to be a blend stock for diesel, which is covered under Clause 3(5) read with Clause 4 of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order 2005, Ministry of Petroleum and Natural Gas has the authority under EC Act as well as delegation of business rule to regulate the marketing of such products.

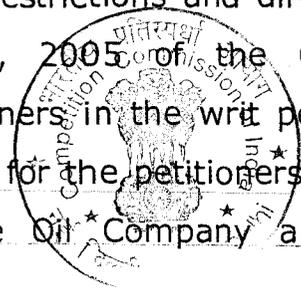
VII. This Ministry had issued letter dated 05.03.2009 on the basis of a field report made by Hindustan Petroleum Corporation Limited (HPCL) as



State Level Coordinator (SLC) of Andhra Pradesh in respect of usage of biodiesel (B100) as transportation fuel by private party thereby violating the provisions of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order 2005. The Ministry of Petroleum and Natural Gas takes strong objection to the contention of M/s Royal Energy Ltd. in its application dated 11.05.2009 that they are operating their own Retail Bio-Diesel pumps in Maharashtra. Operation of Retail Bio-Diesel pumps is in violation of policy as well as provisions of MS/HSD Control Order mentioned earlier and is an illegal act.

VIII. The Hon'ble High Court of Judicature at Allahabad by its Order dated 9th July 2009 passed in the case of Sukhpal Singh S/o Sardar Mohinder Singh, District Shahjahanpur, U.P. vs. Union of India, through it's Secretary, Ministry of Petroleum and Natural Gas, Govt. of India, New Delhi (W.P. No. 63299 of 2008) has in fact, made it clear that Section 36 of Biological Diversity Act, 2002, empowers the Central Government to develop National Strategies, plans etc. for conservation of biological diversity. When the Central Government has declared a Bio-diesel purchase Policy, 2005, the said purchase policy is thus clearly referable to power under Section 36 of the 2002 Act and the Bio-diesel Purchase Policy, 2005 is thus clearly referable to statutory source of power and the submission of the petitioner that Bio-diesel Purchase Policy has no statutory backing cannot be accepted.

The Hon'ble High Court of Judicature at Allahabad in its above said Order has further ordered that no error has been committed by the State authorities in stopping the dispensing units of the bio-diesel of the petitioners from running without following the restrictions and directions contained in the Bio-diesel Purchase Policy, 2005 of the Central Government. The relief claimed by the petitioners in the writ petitions cannot be granted. It shall, however, be open for the petitioners to get their product approved and certified by the Oil Company and get



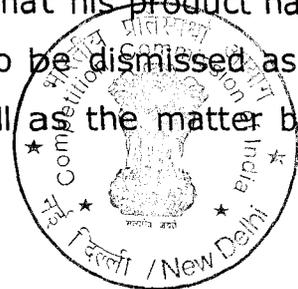
themselves registered for supplying the bio-diesel as per the specification after following the orders issued by the Central Government in this regard from time to time.

All the writ petitions were disposed off by the Hon'ble High Court of Judicature at Allahabad.

IX. M/s Royal Energy Ltd., Mumbai has filed Writ Petition (L) No. 1286 of 2009 Vs. Union of India in the Hon'ble High Court of Judicature at Bombay on the same issue, which is being contested by Union of India and as of date the matter is subjudice.

2. In of the above, there is no ambiguity in understanding the jurisdiction of Ministry of Petroleum and Natural gas over marketing of bio-diesel which is a bio-fuel. Further the contention of the company that it can retail Bio-diesel or sell directly to customers is not correct as B:100 is meant as blend stock and not for standalone sale as per BIS standards. The OMCs have declared a price of procurement of Bio-diesel as a means of promotion of the fuel and to provide an avenue for sale to the producers. It is for the producers to come up with products within the declared price. A high cost producer cannot insist that his product has to be purchased at his price. The complaint needs to be dismissed as the complainant is carrying out illegal activities as well as the matter being subjudice.

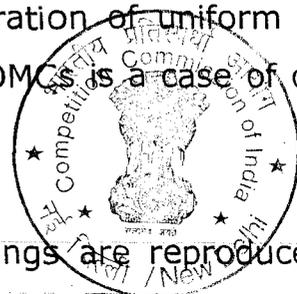
Yours faithfully,



(Rashmi Aggarwal)

Director

7. In 2005 Ministry of Petroleum and Natural Gas came up with a bio diesel purchase policy. The basis for the pricing of biodiesel was the fact that the price of bio diesel was to be fixed in accordance with the retail price of diesel. The price of bio diesel was fixed by the Ministry of Petroleum and Natural Gas at Rs.26.50 per litre. According to the informant the three OMCs informed their clients that they would be supplying diesel blended with bio-diesel directly. On the other hand according to bio diesel manufacturers the sale price of bio diesel could not be less than Rs.31 per litre. It was stated that it would be economically not possible to sell the bio diesel at a lower rate than Rs. 31/- per litre. In the meantime the informant contacted its clients and agreed to supply bio diesel to them. The buyers of bio diesel were mainly transporters, railways and other users. On 5th March 2009 the Ministry of Petroleum and Natural Gas came out with a circular that bio diesel was a transportation fuel and was covered under clause 3(5) of the Motor Spirit and High Speed Diesel Order of 2005. The relevant clause of the order stipulates that 'No person shall sell or agree to sell any petroleum product or its mixture other than motor spirit or high speed diesel or any other fuel authorized by the central government in any form, under any name, brand or nomenclature, which can be and is meant to be used as fuel in any tyre of automobile vehicles fitted with spark ignition engines or compression ignition engines. As a result of this order, the complainant as well as others have been denied opportunity to market their bio diesel at market price. Moreover, the oil companies have also stopped buying the same. Thus due to the above said policy of the Ministry the informant has alleged that it along with other bio-diesel manufacturer has been denied access to the market and that the declaration of uniform price though under the Government directives, by the OMCs is a case of cartel conduct.



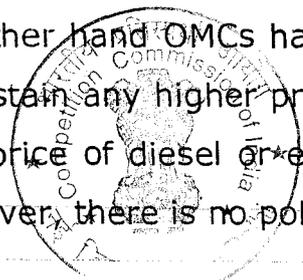
8. The DG investigated the case and his findings are reproduced as under:

i) DG has mentioned that the price of bio-diesel has been fixed on the basis of the National Bio-diesel Policy (NBP) and Bio-diesel Purchase Policy (BPP). It has been found that policy has not been notified in the Gazette. The policy has laid out the complete dynamics of operation of the production and marketing of the bio-diesel in India and the bio-diesel can be sold only to OMCs who are required to market it by blending it with diesel in prescribed ratio.

ii) DG has stated that the bio-diesel purchase price is fixed on the basis of ex-storage point price of HSD and since price of HSD is fixed by the Govt., the fixation of the bio-diesel price is done on similar lines by OMCs. The market analysis therefore shows that it is Govt. controlled where there is little scope of any market forces to operate independently in it.

iii) DG has averred that OMCs have not been independently determining the prices of bio-diesel and that prices are essentially being fixed on the basis of guidelines/policies of the government of India. Thus, he concluded that it is primarily on this account of predetermined methodology of fixing diesel price as per the Govt. Policy, that the OMCs have declared uniform purchase price of bio-diesel in the relevant period in question.

iv) Investigation has found that there has been no sale or purchase of bio-diesel by the OMCs. Because of the prices fixed by the OMCs on government directive, not a single litre of biodiesel was purchased by the OMCs for blending since the time of announcement of policy in 2006. According to the bio-diesel manufacturers, the cost of procuring the non-edible oil to manufacture bio-diesel is too high due to competition and thus cannot be supplied at the procurement prices offered and announced by the OMCs. On the other hand OMCs have opined that it is not economically feasible to sustain any higher price other than arrived based on ex storage point price of diesel or else under recoveries will be caused to them. Moreover, there is no policy to subsidise the bio diesel blending programme.

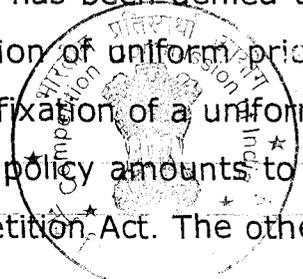


v) Investigation has held that the mere declaration of the uniform purchase price by the OMCs cannot ipso facto be construed as a cartel conduct as the said conduct is not relatable to independent economic decision for the purpose of seeking a greater share of the market or higher profits or reducing losses. Their conduct in fixation of uniform purchase price of bio-diesel is only in compliance to the provisions of the Bio-diesel Purchase Policy of 2005 and that of the National Policy on Bio-fuels and other directives of the Government regarding the fixation of uniform ex storage point price and retail selling price of diesel.

vi) DG has concluded that there was no evidence to substantiate and establish any kind of understanding/agreement of fixation of price of bio-fuel by OMCs. Thus, he found no violation of section 3 of the Act.

vii) No case is made out against the OMCs with respect of any discriminatory or unfair conduct in fixing price of bio-diesel in violation to Section 4 of the Act. However, DG has tried to bring to the notice of the Commission that despite the above' policy, sale of bio-diesel has been taking place in open market in small quantities, in violation of the National Policy on Bio-fuels and thus recommended that the Commission may take up the matter with the Ministry of Petroleum and Natural Gas to review their policy and mechanism of price fixation and sale of bio-diesel so as to promote competition in this market in India.

9. The DG has not discussed the order banning the marketing and transportation of bio diesel. Therefore to this extent the investigation is incomplete. The DG has also not given a finding on the order of Ministry of Petroleum and Natural Gas wherein market access has been denied to the bio diesel manufacturers. Regarding the declaration of uniform price for the purpose of bio diesel the issue is whether the fixation of a uniform price by the government of India through a national policy amounts to a fixation of price in violation of Section 3 of the Competition Act. The other

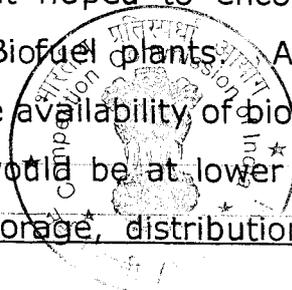


10. The issue to be seen is whether the fixation of such a price is in public interest or not. As these issues have not been discussed by the DG, his report is inconclusive and not correct and not in conformity with the provisions of the Act and regulations framed thereon.

10. Before discussing the issue further, it is necessary to consider the nature of biodiesel and its usage. The present diesel engines used for vehicles without any modification can be run on diesel blended with biodiesel to the extent of 20%. But there are engines which can be run entirely on biodiesel as fuel. Further biodiesel can be used for pumps or generators instead of diesel and it could compete as a fuel with diesel. Further biodiesel is not a petrochemical and it is mainly a fatty acid. In the National Policy for Biodiesel which has not been gazetted or promulgated till today, the following aims have been mentioned -

- (i) The Policy aims at mainstreaming of Biofuels and therefore envisions a central role for it in the energy and transportation sectors of the country in coming decades.
- (ii) The goal of the policy is to ensure that a minimum level of Biofuels becomes readily available in the market to meet the demand at any given time.

11. The Policy also mentions that the market for biodiesels would lead to the utilisation of degraded waste lands. It would help the farmers and landless labourers to provide the feedstock for biodiesel and would also help the corporate to undertake plantations. This in turn would lead to rural employment. The government hoped to support such efforts with minimum support price and to provide financial and fiscal measures to develop and promote Biofuels. The government hoped to encourage setting up of industries for the setting up of Biofuel plants. As the government realised that as in the initial years the availability of biodiesel would be in short supply, blending with diesel would be at lower level. According to the policy, the responsibility of storage, distribution and



marketing of Biofuels would rest with OMCs. But the policy does not state that other agencies cannot do this work of storage, distribution and marketing of Biofuels. As it was a new area of business, it is the government pious intention to give responsibility of this business in the OMCs. The Policy states that the minimum purchase price for biodiesel by the OMCs will be linked to the prevailing retail price. In the area of biodiesel 100% FDI was allowed for the use of biodiesel in India. Biodiesel was exempted from excise duty and customs duty relief was granted for importing plant and machinery. Under the allocation of business rules, for policy decision in respect of biodiesel was given to the Ministry of New and Renewable Energy. The standards for biodiesel have been fixed in the National Policy.

12. The Ministry of Petroleum and Natural Gas came out with a Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices Order, 2005 and this extended to the whole of India. Clause 3(5) read with clause 4 of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) order stipulated as under –

Clause 3(5) – No person shall sell or agree to sell any petroleum product or its mixture other than motor spirit or high speed diesel or any other fuel authorised by the Central Government in any form, under any name, brand or nomenclature, which can be and is meant to be used as fuel in any type of automatic vehicles fitted with spark ignition engines or compression ignition engines.

Clause 4 – Restriction on marketing of motor spirit and high speed diesel – No person, other than those authorised by the Central Government shall market and sell motor spirit or high speed diesel to consumers or deals.

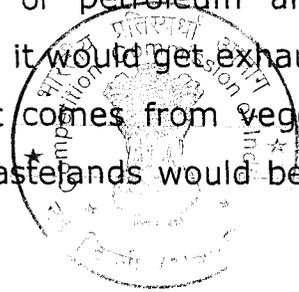
This order was issued under Section 3 of the Essential Commodities Act, 1955.



13. Under the Essential Commodities Act Section 2A defines essential commodity means a commodity specified in the schedule. Under Section 2A(2), the Central Government in public interest and reasons to be specified in the notification add or remove a commodity from the schedule. In the schedule 'petroleum and petroleum products' are mentioned at Item (5) but biodiesel is not mentioned in the schedule. Further, as already discussed, biodiesel is neither petroleum nor petroleum product. Further in public interest biodiesel has not been included in the schedule. Thus biodiesel cannot be subjected to the Essential Commodities Act and the order of 2005 cannot apply to it because biodiesel is neither motor spirit nor high speed diesel.

14. Some of the biodiesel manufacturers had setup biodiesel pumps from where a purchaser could purchase biodiesel. But then the Ministry of P&NG insisted that it be treated as a petroleum product and therefore asked the State Governments to enforce the Prevention of Malpractices Order 2005. Challenges were made to this order in the Allahabad High Court which upheld the order preventing the marketing and distribution of Biofuels in the State of Uttar Pradesh. In the State of Maharashtra, the order could not be implemented because the Bombay High Court held that as the National Policy on Biofuels was not gazetted, the policy was not in force and therefore did not have the exclusive mandate to market and distribute Biofuels. Therefore, the authorities were restrained from stopping the marketing of biodiesel in Maharashtra.

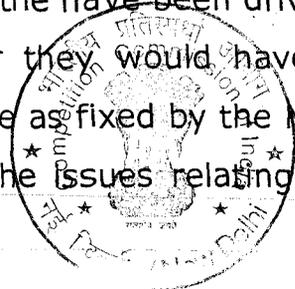
15. Biodiesel is more environment friendly than diesel. It creates very little pollution and much less than diesel. Thus biodiesel if it would have been available in plenty would have displaced diesel as fuel. Further diesel comes out of the fractional distillation of petroleum and as petroleum is a commodity which is not renewable, it would get exhausted. On the other hand biodiesel is renewable, as it comes from vegetable sources. The government has envisaged that wastelands would be used



for the plantation of jatropha and other plants. This would not only provide a green cover to the areas where the cultivation would be carried out but would also provide employment in the rural areas.

16. But by passing the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 the Ministry of Petroleum & Natural Gas has stopped the market of biodiesel from being created. If biodiesel could not be marketed and distributed by this order of 2005, then a market cannot grow. If there is no market, no one would produce biodiesel as it would not be profitable to produce a good which has no market. Thus, in the result, the market for an environment friendly fuel was killed even before its inception. This had an effect on rural employment and naturally economic development. If biodiesel was available, it could have replaced diesel in some areas even if it was not used as an additive to diesel.

17. The formula for the pricing of biodiesel has been given in the National Policy and it has to be based on the price of diesel. On this basis, biodiesel could be purchased at Rs. 26.50 per litre by the OMCs in 2006 and Rs.33/- per litre in 2010. This price for the OMCs was fixed by the Ministry of Petroleum and Natural Gas. As the biodiesel manufacturing companies could market biodiesel at Rs. 31/- per litre in 2006 and around Rs.56 per litre in 2010, none of the biodiesel manufacturers sold a single litre of biodiesel to the OMCs. As a result, the entire policy of blending diesel with biodiesel was defeated. Incidentally, there are three other private companies which are involved in the marketing and distribution of diesel. But as the diesel price is fixed by the government and as they do not get subsidy, they have been driven out of the market. It is not clear as to whether they would have been constrained to buy biodiesel at Rs. 26.50 per litre as fixed by the Ministry of Petroleum and Natural Gas. In any case, the issues relating to the



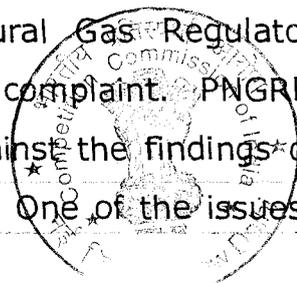
marketing of diesel and subsidy of three public sector OMCs is pending in the Supreme Court.

18. Incidentally, the rise of Competition Law in the modern world came from such restrictive practices. In Canada, the wheat traders formed a cartel and they called it a trust. The wheat traders fixed the price of wheat which was very low and the wheat farmers suffered huge losses. There were disturbances and this led to the enactment of the first competition law in Canada in 1889, In 1890 the same issue came up in the USA and it led to the enactment of the Sherman Act. The other countries including India has borrowed the concept of such a law from Canada and the USA.

19. At the time of forming a prima facie view, the Commission asked for the views of the Ministry of New and Renewable Energy as it was the Nodal Ministry for the policies related to Biofuels. The Ministry stated that marketing and pricing of biodiesel falls within the jurisdiction of Ministry of P&NG. For this reason, the Nodal Ministry did not offer any comments.

20. The D.G. and the majority in this order have held that the Order of 2005 and price fixing is a matter of policy and therefore the Commission should not consider the policy matters. It was also their views that in policy matters there cannot be a competition concern.

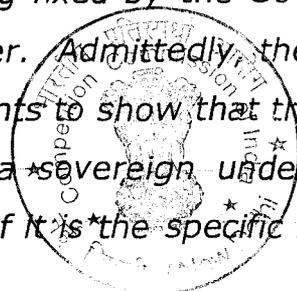
21. A similar issue came up before Appellate Tribunal for Electricity Appeal No. 50 of 2009 in the case of Indian Oil Corporation Ltd. vs. Reliance Industries and Ors. In this case, RIL & Ors. had filed a complaint against IOCL & Ors. regarding pricing of petroleum products. IOCL & Ors. took a plea that the Petroleum and Natural Gas Regulatory Board (PNGRB) had no jurisdiction to entertain the complaint. PNGRB rejected this preliminary objection and aggrieved against the findings of PNGRB, IOCL & Ors. went in appeal to the Tribunal. One of the issues raised in



that appeal was that the pricing of petroleum products was a policy matter of the government and therefore the Tribunal on the Board cannot interfere with the said policy. Under Section 2(x) of the PNGRB Act was to be fixed by the entities. It was not for the government to fix the prices. The Tribunal took into account the prices of motor spirit and high speed diesel was to be market determined from 01.04.2002. In pursuance of this policy RIL and Ors. obtained rights of transportation and marketing of H.S. Diesel and Petrol. But even after 01.04.2002 the government kept on fixing the price of petroleum. The Tribunal in its order dated 05.10.2009 further held as under:-

43. It is a settled law and administrative instructions issued by one limb of the Government to the Appellant companies would not be construed to be the policy decision taken by the Government. As stated earlier, nothing has been produced to show that the earlier notification has been revoked. In the absence of any fresh notification revoking the earlier gazette policy notification of the Central Government dated 28.03.2002, the mere information or opinion expressed by the Ministry to the Appellant companies, in respect of price fixation can only be considered to be mere administrative instruction of the concerned Ministry and the same cannot be construed to be the policy Notification. If the prices of the petroleum products are fixed by the Central Government as a sovereign, it has to be declared as a public policy after observing formalities as provided under Article 72 of the Constitution.

44. Even according to the Appellants, the Ministry of Petroleum is a dominant shareholder in these companies. It is not the case of the Appellant that the prices are being fixed by the Government in the capacity of a dominant shareholder. Admittedly, the Appellants have not produced necessary documents to show that the prices are being fixed by the Government as a sovereign under the policy decision taken by the Government. If it is the specific stand of the



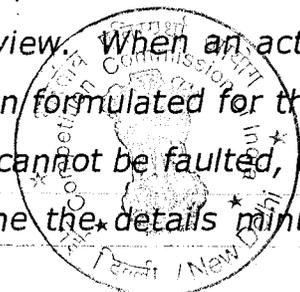
Appellants that prices are being fixed by the Government as a Sovereign under policy decision, even now it is open to them to produce before the Board the materials to establish the same before the Board and in that event the same can be considered by the Board at the time of final disposal.

45. At this stage, in the absence of any evidence available on record, we are not inclined to hold that prices are fixed by the Central Government under the policy decision. So the second contention also has to fail. Under these circumstances, it would be proper to allow the Board to continue the enquiry over the complaint by providing opportunity to both the parties to adduce the evidence to substantiate their respective plea. Accordingly ordered.

22. In view of the observation of the Tribunal fixing of price cannot be a policy decision of the government. This especially the case when the National Policy on Biofuels has not been notified. Further as biodiesel is not a petroleum product, the Ministry of Petroleum & Natural Gas cannot invoke Section 3 of the Essential Commodities Act and put restrictions on the marketing and distribution of biodiesel.

23. The issue of policy of the government came up for discussion in the case of West Bengal Housing Board etc. vs. Brijendra Prasad Gupta and Ors. and the Supreme Court held as under –

The Courts normally do not interfere in the policy matters of the State. If, however, the policy so formulated is against the mandate of the Constitution or any statutory provision it can certainly be tested on the principles of judicial review. When an act falls within the policy of the State which has been formulated for the benefit of the poor and needy and which policy cannot be faulted, court should stay its hands and need not examine the details minutely with a

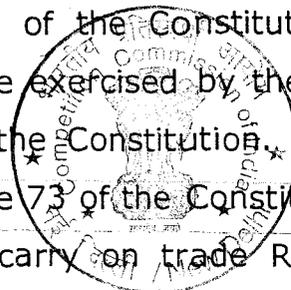


magnifying glass to find some fault here and there unless there are allegations of mala-fides. An overall view is to be taken of the matter and this potent weapon of judicial review cannot be used indiscriminately.

24. A similar issue came up in Centre for Public Interest Litigation vs. Union of India & Ors. W.P.(Civil) No. 423 of 2010 and Dr. Subramanian Swamy vs. Union of India & Ors. W.P. (Civil) No. 10 of 2011. The Supreme Court vide its order dated 02.02.2010 in the issue of policy held as under

In majority of judgments relied upon by learned Attorney General and learned Counsel for the respondents, it has been held that the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the government in financial matters. Therefore cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. However, when it is clearly demonstrated before the Court that the policy framed by the State or its agency / instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters.

25. Under the provisions of Article 53 of the Constitution of India, administrative power of the union shall be exercised by the President or subordinate officers in accordance with the Constitution. But a policy decision has to be formulated under Article 73 of the Constitution. Article 19(1)(g) gives a citizen the right to carry on trade Restrictions on



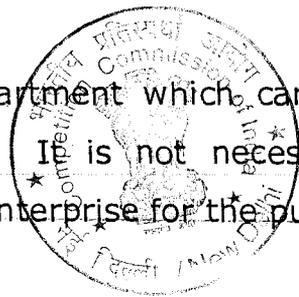
account sovereignty, public order and public interest can be made on freedom to carry on trade. The restriction on the movement and marketing of biodiesel was not on account of sovereignty, public order or public interest. Therefore the order of 2005 was not in accordance with the Constitution of India. In fact, the order resulted in ensuring that a market for biodiesel is not created. It also resulted in lessening employment in the rural sector and lowering the economic development of the country. In fact the order restricting the movement and marketing of biodiesel was not in public interest. It was mainly enforced to ensure that the OMCs did not suffer a loss of business due to biodiesel.

26. It is necessary to examine the provisions of the Competition Act to examine as to how they would apply to the facts of the case. **Section 2(h)** of the Competition Act reads as under

"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control or articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Enterprise means a person or govt. department which carries activity which effects the carrying on business. It is not necessary for an enterprise to carry any business to be an enterprise for the purpose of the

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Competition Act. This view has found favour of the Delhi High Court in the case of Hemant Sharma vs. Chess Federation, Writ Petition (Civil) No. 5770 of 2011 which was confirmed by the Division Bench by its order LPA No. 972 of 2011 dated 22.11.2011. If the activity carried out by a government department effects the business activities then it is an enterprise under the Competition Act. If this view is not taken then the provision govt. department in Section 2(h) would be an otiose provision.

27. In this case the government department is the Ministry of Petroleum and Natural Gas. The three PSU OMCs are Indian Oil Corporation, Hindustan Petroleum and Bharat Petroleum. The government owns more than 50% equity in each of the OMCs which it hold as a trustee for the people of India. Under the Business Allocation Rules, the Ministry of Petroleum and Natural Gas has the charge of the entire petroleum sector and the three OMCs are under the administrative control of the Ministry of Petroleum and Natural Gas. Thus the ownership right in the OMCs are exercised by of the government through the Ministry of Petroleum and Natural Gas which is a part of the government. Thus, the OMCs and the Ministry of P&NG form a group of enterprises in accordance with the definition of group in explanation (b) of Section 5 read with explanation (c) of Section 4 of the Act. This group together has a market share of 95% in petroleum and related products. The size of the resources of the group are huge. As far as competitors in the market of petroleum and related goods are concerned there is hardly any other player. Thus the group is a monopolist group which fixes prices in unison. The enterprises of this group are fully integrated and the consumers in India are totally dependent on the group. This monopoly exists because they are a government company. There are entry barriers in the market due to regulation, high cost of entry, marketing entry barriers etc. Thus the enterprises or the group of enterprises are dominant in view of the majority of the factors mentioned in Section 19(4) of the Act. These enterprises can act independently of the market and the competitors or

consumers or the relevant market are affected to act in the favour of the group. Thus the explanation in Section 4 is attracted in this case.

28. The relevant market in this case consists of a relevant product market and a relevant geographic market. The relevant product market is the marketing of petroleum product and the relevant geographic market in India. In this relevant market Ministry of Petroleum and Natural Gas gives the administrative directions whereas the three OMCs market the products. The Ministry of P&NG fixes the prices of petroleum products in contravention of the provisions of Petroleum and Natural Gas Act.

29. We have to examine whether this dominant group of enterprises contravened any of the provisions of Section 4 of the Act. In other words it has to be examined whether there is any abuse enumerated in Section 4 of the Act. In this particular case the group of OMCs and Ministry of P&NG which fixes the price of commodities which it is going to buy in the form of biodiesel. The group has also passed an order by which the marketing and transportation of biodiesel has been prohibited in India. No policy has been promulgated by the government by the virtue of which such a restriction on trade is authorised. Further this order of 2005 has not been withdrawn and is still in force. Thus by this order of 2005 fetters have been placed on freedom to carry out a trade. Such a restriction is not in accordance with the constitutional provisions. It is also not in public interest as the public is deprived of an environment friendly fuel. It is a duty of the Commission to ensure freedom of trade and protect consumer interests. The Ministry of P&NG has not allowed the market for Biofuels grow though Biofuels not being a petroleum product does not fall within its purview. This has led to decreased employment in the rural sector as in the absence of market no one would cultivate and produce plants required for biodiesel. Thus the group has

limited and restricted production of goods and the market. Therefore the provisions of Section 4(2)(b)(i) of the Act are attracted.

30. Price fixing is an anticompetitive practice referred to in Section 3(3) of the Act. In fact in the case of Hindustan Lever Ltd. AIR 1971 SC 1285 the Supreme Court had held that even a clause in an agreement is an anticompetitive practice. Therefore fixing a price is a practice and this practice along with the practice of banning marketing and transportation of Biofuel has resulted in the denial of market access to many persons. Therefore contravention of Section 4(2)(c) of the Act is also made out in this case.

31. Therefore as the Ministry of P&NG and the OMCs who as a group have contravened the provisions of Sections 4(2)(b)(i) and Section 4(2)(c) of the Competition, it is necessary to issue a cease and desist order. The circular issued by the Ministry of P&NG directing the State Governments that there was a need to stop the sale and marketing of biodiesel should be withdrawn with immediate effect. The Ministry of P&NG and the OMCs should not resort to price fixing and elimination of competition in the market. The Central Government should not create a monopoly by asking the PSU OMCs to only do the marketing, storage and distribution of biodiesel.

32. A copy of this order should be sent to the Ministries of Petroleum and Natural Gas as well as New and Renewable Energy as well as the OMCs.

33. The Secretary should intimate the parties accordingly.



Sd/-
(R. Prasad)
Member, CCI