NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,

NEW DELHI

Competition Appeal (AT) No. 60 of 2022

IN THE MATTER OF:

Sri Balaji Traders **...Appellant**

Versus

Competition Commission of India & Ors. **...Respondents**

Present:

For Appellant : Mr. Vaibhav Gaggar, Sr. Advocate, Ms. Malavika Chandramouli, Ms. Kanishka Pandey, Mr. Sumit Garg, Mr. Yatharth Namdev, Mr. Harshit Singhal, Advocates.

For Respondents : Mr. Kunal Sharma, Mr. Adhirath Choudhary, Mr. C. Vaishnav Kumar, Ms. Shanika Singh, Advocates for CCI. Ms. Sunaina Dutta, Jt. Director, CCI.

Ms. Srashti Parashar & Ms. Mini S, for CCI.

Mr. Arun Kathpalia and Mr. Rajshekhar Rao, Sr. Advocates, Mr. Harman Singh Sandhu, Ms. Nitika Dwivedi, Ms. Raveena Lalit, Mr. Sai Divkanwar Singh, Ms. Pranika Goel, Advocates for APL.

Ms. Ami Parikh, Company Representative.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the Informant under Section 53(B) of the Competition Act, 2002 (in short 'Act') against the order dated 08.09.2022 by which his information case no. 17 of 2021 filed against Respondent No. 2 has been dismissed by the Competition Commission of India (in short 'Commission').

2. The Appellant, a partnership firm through one of its partner Balaji, s/o Anand Kumar, filed the information under Section 19(1)(a) of the Act against Respondent No. 2 alleging violation of Section 3(4) and 4 of the Act, alleging inter alia, that the informant is a dealer and supplier of Respondent No. 2. The Informant purchased Tinting machine from Respondent No 2, operated with the help of a software installation on the informant's computer system which is used for mixing the base shade with a colour to produce shade of a desired colour. It is alleged that there are several tiers of dealers and some of them are known as Ezycolor Retailer, Critical Retailer, CPC Club, PC Club and SPC Club. It is further alleged that the informant was classified as a critical retailer (CR) in 2010. It is alleged that on 24.02.2021, the informant took the dealership of Respondent No. 3 and started selling decorative paints manufactured by them. Tinting machine was also installed at the informant's shop on 25.04.2021. Having started the business of Respondent No. 3, territory sales officer of Respondent No. 2 visited the informant shop on 27.04.2021 and informed that the CR status of the Appellant has been revoked. The allegation of the Appellant is that the CR status was revoked because the Appellant had started selling decorative paints of Respondent No. 3. It is also alleged that the informant had stock of Rs. 3. 50 lakh, used for creating CR shades, which became a dead stock because CR status was cancelled. It is also the case of the Appellant that it had been told that its CR status shall be restored after a three-month review if it sign that it had no problem with Respondent no. 2 but before that the CR status was restored in the month of June, 2021.

3. The informant has also alleged that in another case no. 36 of 2019, the Respondent No. 1 has found a prima facie case against Respondent No. 2 about the abuse of its dominant position in the relevant market and ordered investigation under the alleged anti-competitive conduct of Respondent No. 2 in terms of Section 26(1) of the Act.

4. With these broad averments, the prayers made in the information are (a) club the present information with the information case no. 36 of 2019 in terms of proviso to Section 26(1) and order investigation (b) issue a cease and desist order against APL directing it to forthwith bring an end to its anti-competitive practices against the informant (c) impose a heavy penalty for any competitive conduct under Section 27 of the Act and also prayered for interim relief (a) immediately reinstate the CR status of the informant and restart the supply of CR products till the final orders are passed by the Commission in the present case. The information was filed on 01.07.2021.

5. The Respondent No. 1, in its impugned order, passed both in the information case no. 36 of 2019 and case of the Appellant no. 17 of 2021, discussed the report of the DG.

6. Finding recorded by the Commission in this regard are reproduced as under:-

> "68. With regard to Case No. 17 of 2021, the Commission notes that the DG found that the downgrade of the dealer Sri Balaji Traders from Critical Retailer to Colour World by Asian Paints is fully justified and this downgrade had no relationship with starting a business with the competing brand. The inference has been drawn on the basis that the change in retailing tier was affected on 28.04.2021 as against the alleged claim of February

2021 by the dealer. Further, the dealer was consistently reducing offtake from Asian Paints, which reduced to less than half over a 10-month period, from October 2020 to July 2021. The retailing tier of the said dealer was restored in June 2021 along with seven other dealers after a review exercise undertaken by Asian Paints on the basis of sales, expected sales, customer outreach and other relevant factors.

69. The Commission observes that, as per the DG, the retailing tier of the said dealer was restored in June 2021 along with seven other dealers after a review exercise undertaken by Asian Paints on the basis of factors such as sales, expected sales, customer outreach and other relevant factors. It has also been brought out by the DG that the restoration of dealers' status was done prior to the filing of information in Case No.17 of 2021. The Commission notes that, as per the DG, the retailing status of the said dealer was changed from Ezy Critical Retailer (Ezy CR) to Critical Retailer in 2018-19, when the said dealer had not even started business with any other competing brand. In view of the findings of the DG, the Commission notes that the allegation raised by Balaji Traders that the sudden revocation of the CR status without prior intimation was to punish him for dealing with JSW paints is misplaced. Accordingly, in the facts of this case, the commission tends to agree with the finding of the DG that no case of contravention of provisions of Section 4 or Section 3(4) r/w Section 3(1) of the Act.

70. The Commission observes that any conduct of a firm with significant/substantial market power which has the effect of vertical foreclosure may be liable to be examined within the realm of Section 3(4), Section 4 or of both the provisions, as may be applicable. Such prohibited conduct may result in appreciable adverse effect on competition or a likelihood thereof. There has to be evidence which, on balance of probabilities, would point towards a strong entrenched player using tactics to oust a smaller

player or even a new entrant to the market (regardless of its size or inherent advantages) by either incentivising or coercing downstream players to boycott or not deal with the new players. In the present case, upon weighing the evidence on record, the Commission is of the view that the balance is not tilted towards JSW Paints. Asian Paints has been able to demonstrate that some of its conduct or practices adopted qua the dealers was in furtherance of its terms of doing business with such dealer and not to keep JSW Paints away from the market. The DG in any case found that the alleged deterrence of dealers with JSW Paints has not fructified in the presence of large number of dealers onboarding to the network of JSW Paints and even dealing simultaneously in products of both Asian Paints and JSW Paints.

71. Before parting with the order, the Commission notes that JSW Paints had filed an application dated 28.03.2022, inter alia, seeking a direction to the DG to grant an opportunity of depositions to the aggrieved dealers, who requested to submit additional evidence to the DG and consider such evidence without a preconceived notion; to determine the investigation period during which the key abuse was alleged by JSW Paints; to ensure fair procedure in the supplementary investigation and complete the DG Record with all the evidence submitted by JSW Paints and the aggrieved dealers; to grant JSW Paints/dealers an opportunity to cross-examine the officials of Asiru1 Paints who were deposed by the DG; to direct the DG to revise the report based on the material from the cross-examination; and to pass any other order as the Commission may deem fit in the facts and circumstances of this case. In this regard, the Commission notes that the evidence adduced by the dealers has been duly considered by the DG in its Investigation Report. The Commission has not adverted to oral statements, if any, given by any parties or at their behest before the DG for the purposes of passing the present order. In any event, the Commission is of the view that the 1J1formants and even third parties had been ' given ample opportunity during the course of investigation by the DG. JSW Paints has not been able to demonstrate to the satisfaction of the Commission that it is necessa1y and expedient to grant a right of cross-examination to it. Accordingly, the Commission finds no merit in the said application and the same stands disposed of."

7. Aggrieved against the aforesaid order, the present appeal has been filed.

8. It is pertinent to mention that the case set up by the Appellant in the information is that the appellant was having CR status but when it took the dealership of Respondent No. 3 on 24.02.2021, its CR status was revoked on 27.04.2021 but it has not been disclosed in the information, filed on 01.07.2021 that the CR status was restored by R2 in June 2021, much before the information under Section 19(1) was filed before R1.

9. Counsel for the Appellant has submitted that Respondent No. 2 used its system of discretionary retailing tiers to abuse its dominant position by abruptly downgrading the Appellant's retailing tier because the Appellant started dealing with Respondent No. 3 because of which the Appellant suffered financial losses i.e. left with dead stock (material used to tint CR shades) worth around INR 3.50 Lakh and the downgrade adversely affected appellant's reputation in the market as it was unable to supply CR products to the customers.

10. It is further submitted that on 17.06.2021, the Appellant was informed that its CR status might be restored only after a three month review period but in order to weaken his case, CR status was restored on 23.06.2021. It is also submitted that the Appellant suffered financial loss and also of reputation during the months of April, May and June, 2021 and considered it necessary to file a detailed information before the CCI to prevent any future exploitation by the Respondent No. 2, therefore, even if it is assumed that the grievance has already been addressed by Respondent No. 2 by sudden restoration before the filing of the information on 01.07.2021, the liability of Respondent No. 2 shall still continue in regard to its abusing practices. It is

also submitted that in so far as the proceedings under the Act are concerned, these are held to be proceedings in rem in case of Samir Agarwal Vs. Competition Commission of India, (2021) 3 SCC 136.

11. It is submitted that the Appellant has not concealed any material fact while filing the information because the first attempt was made to file formal information on 25.06.2021 but since it was filed with payment of Rs. 5000 as requisite fee, the Respondent No. 1 rejected the information alleging that the information has been filed by the partnership firm which require to submit fee of Rs. 1 lakh. It is submitted that five days were taken to cure the defect and information was ultimately filed on 01.07.2021.

12. Counsel for the Appellant has next argued that lack of independent application of mind by Respondent No. 1 has prejudiced the Appellant because the immediate abusive action of Respondent No. 2 was the association of the Appellant with R3 because of which R2 downgraded the retailer tier of the Appellant in April, 2021 after it took up dealership of R3 in Feb, 2021.

13. It is submitted that it was also a matter of concern for Respondent No. 1 for ordering investigation that though on 17.06.2021 the Appellant was informed by R2 that its CR status will be reinstated only after three months review but It was hurriedly restored on 23.06.2021 to avoid the potential complaint to Respondent No. 1.

14. It is also submitted that no opportunity of evidence was given to the Appellant all that has been done by the Respondent No. 1 was a period of three days was given for evidence which was not sufficient.

15. Counsel appearing on behalf of the Respondent No. 1/CCI has submitted that DG found in his report that the downgrade of Appellant from critical retailer to colour world by Respondent No. 2 was fully justified and had no relationship with starting the business with the competing brand. The inference was drawn by the DG on the following reasons:-

The change in the retailing tier was affected on 28.04.2021 as against the alleged claim of February 2021 by the dealer.
The dealer was consistently reducing off-take from Asian Paints, which reduced to less than half over a period of 10 months, from October 2021 to July.
Updating of tinting software was undertaken by Asian Paints on regular basis.
Retailing tier of the said dealer was restored in June, 2021along with seven other dealers after a review exercise undertaken by Asian paints on the basis of the sales, expected sales, custom outreach and other relevant factors.
Retailing tier of the said dealer was changed from Ezy Critical Retailer status to Critical Retailer in 2018-19, when the dealer has not even started business with any other competing brand, which corroborated with the fact that Asian Paints conduct with respect to its business partners is independent of their association with competitors.

16. It is further submitted that DG in its meeting held on 11.01.2022 forwarded the electronic copies in order to invite objections/suggestions latest by 07.02.2022 which was extended time and again for both the parties. Thereafter, oral hearing was done on 31.05.2022 at length against the investigation report. The R1 gave liberty to file their written submission of their oral argument within two weeks. It is further submitted that Respondent No. 1 has thus, after careful perusal of the investigation report and evidence in support thereof, submitted by the DG, objections/ suggestions filed by the parties, the oral submissions made by the parties on 31.05.2022, the synopsis of arguments submitted subsequently and other material on record reached

to a conclusion that the information submitted by the Appellant was without any merit.

17. Respondent No. 2, which is basically the effected party, has submitted that the Appellant has not approached R1 with clean hands because its primary grievance was the downgrade in its retailing tier from CR to colour world in April, 2021 but it failed to disclose in the information that the said status of CR was restored by R2 on 23.06.2021, a week prior to filing of the information on 01.07.2021.

18. It is also submitted that informant / Appellant mendaciously sought interim relief of being reinstated as CR though it had already been reinstated as such. It is further submitted that the Appellant disclosed to the Commission ,after investigation of DG, that it has been restored to its original tier i.e. CR prior filing of the information and had also failed to disclose its retailer tier was downgraded from Ezy Critical Retailer to CR in 2018-19 when it was not dealing with R3. It is submitted that because the Appellant has not approached the court with clean hands, therefore, not only the information but also the present appeal deserves to be dismissed. In this regard, reliance has been placed on the following decisions in the case of S.P. Chengalvaraya Naidu Vs. Jagannath, (1994) 1 SCC 1, Satish Khosla Vs. Eli Lilly Ranbaxy Ltd., 1997 SCC Online Del 935 and SJS Business Enterprises (P) Ltd. Vs. State of Bihar, (2004) 7 SCC 166. It is further submitted that the Appellant deliberately did not mention in the information that its grievance has already been addressed by R2 because that itself would have led Respondent no. 1 to close the case on that account. It is further submitted that although in the case of Samir Agrawal (Supra), the Hon'ble Supreme Court has held that

proceedings under the Act are in rem but the said judgment is distinguishable because information in that case has been filed in public interest whereas in the present case the Appellant has been espousing the personal grievance which had already been addressed before the information was filed, therefore, the information should have been rejected / dismissed on this ground alone.

19. It is further submitted that Respondent No. 1 (as well as the DG) have not based their findings solely on the timing of the downgrade. In this regard, it is argued that change in retailing tier is based on certain objective and non-discriminatory criteria such as the past performance and future prospects of such dealers i.e. ability to generate high volumes and turnover, offtake etc. on the basis of the objective criteria, the dealers are evaluated at the beginning of the next financial years. In this regard, the retailer tier changes of the Appellant from 2014-23 has also been given which is as under:-

ANNEXURE – 1

Sri Balaji Traders' Retailing Tier Changes – 2014 to 2023

Date	Old Value Tier	New Value Tier
20-06-2014	CR	Ezy CR
17-07-2015	Ezy CR	CR
20-07-2015	CR	Ezy CR
30-07-2018	Ezy CR	CR
28-04-2021	CR	CW
23-06-2021	CW	CR
16-06-2023	CR	CW

20. It is further submitted that the criteria for retailing tiers are well known to all dealers in advance at the beginning of the year and if the dealers wish to assess their performance they can access their business performance through My Awaaz Portal or contact the call centre or territory sales officer.

21. It is further submitted that the order supply history of the Appellant demonstrates that the supply of orders has been consistent even after it started dealing with R3 when its tier was downgraded. The Respondent No. 2 has given further list of details whose status have not been changed or upgraded. The list in this regard is as under:-

ANNEXURE – 2

Retailing Tier of other dealers who complained against APL and also dealt with JSW[33]

S.No.	Dealer name	Change in status / category	Month / Year when dealer started dealing with JSW
1.	Amutha Hardwares	No change	August 2019
2.	Damini Enterprises	No change	December 2019
3.	Ess Vee Enterprise	No change	September 2019
4.	Karavali Enterprises	No change	October 2020
5.	Kumaraan Hardwares	No change	August 2019
6.	Nayak Traders	Downgraded in 2019-20	September 2019
7.	P S Enterprises	There is no dealer with this name in APL's internal records.	September 2019
8.	Sagar Paints & Hardware	No change	July 2019
9.	Siva Sankar Agencies	No change	November 2019
10.	Sri Lakshmi Agencies	No change	November 2019
11.	Sri Naga Sai Maruti	Downgraded in 2020-21 but restored in 2021-22	November 2019
12.	Sri Sai Balaji Traders	Upgraded in 2021-22	July 2019
13.	Sri Surya Paints	No change	November 2019
14.	Uma Hardwares	Upgraded in 2021-22	August 2019
15.	Venkateshwara Paints & Steels	No change	November 2019

22. Counsel for Respondent No. 2 has also submitted that the criteria of the Appellant was downgraded because of the change in value off take. In this regard, a chart has been produced by Respondent No. 2 since Oct, 2020 to March, 2021 in which the offtake of the Appellant has been shown on the reducing side. The chart is reproduced as under:-

S. No.	Month and Year	Offtake of the Appellant in INR Lakh
1.	October 2020	10.36
2.	November 2020	6.43
3.	December 2020	7.14
4.	January 2021	6.56
5.	February 2021	4.55
6.	March 2021	4.87

23. It is also submitted that the allegation of the Appellant that it was left with deadstock worth Rs. 3.5 lakh is not correct because it can offload that stock in numerous ways including tinting the several base shades and pigments available to a CW dealer, reselling the stock to another held by R3. It is also argued that the criteria of the Appellant was restored after review of its future prospects on sales, expected sales, customers outreach and other relevant factors.

24. In respect of the audio conversation, it is submitted that the Appellant has cherry picked extracts of the conversation without referring to in entirety because it is alleged that Mr. Ajay has also said that even if you go to competition we are ready to support. In the end, it is submitted that the Appellant cannot allege the failure of hearing on the part of the DG because after filing the information the Appellant had five months to submit

further evidence before the investigation was closed by the DG on 15.12.2021 and even when the DG provided the Appellant with a final opportunity to provide any additional evidence on 29.11.2021, the Appellant only sought time from the DG on 02.12.2021 but did not submit any further evidence and even till date more than years months have passed, the Appellant has not provided any further evidence. The Respondent No. 2 has thus argued that there is no error in the impugned order and hence, prayed that the appeal may be dismissed.

25. We have heard Counsel for the parties and perused the record.

26. Undisputed facts of this case are that the information under Section 19(1)(a) was filed by a partnership firm through one of its partner. The sum and substance of the information is that the Respondent No. 2 has downgraded the retailer tier of the Appellant from CR to CW only after it started dealership of Respondent no. 3 in February, 2021. The case set up by the Appellant is that the change in the retailer tier is effected from 20.04.2021. The Information under Section 19(1)(a) was filed on 01.07.2021 but before the said date the retailer tier revoked on 20.04.2021 was restored on 23.06.2021 but this fact was not made part of the information. In the information, the Appellant mainly pray for clubbing the information filed by it with case no. 36 of 2019 and made the interim prayer to direct the R2 to immediately reinstate the CR states of the Appellant and restart the CR products . In support of the information, an affidavit has also filed by the Appellant in which it had specifically averred that "and 47 of information are based on my personal knowledge which means that the prayer made in para 47 (a) for immediately reinstatement of CR status of the Appellant was

also based upon the information of the Appellant to be correct whereas the CR status of the Appellant had already been restored on 23.06.2021 much before the information was filed on 01.07.2021 and false affidavit was filed in support of it. Besides this fact that the Appellant did not disclose the fact in the information that the issue of downgrade of CR status, which is the bedrock of the information, has already been restored and as far as the Appellant is concerned, the personal injury caused to it has been redressed, it not only filed the information but also continued with it before the R1 and disclosed the same very late.

27. The fact that the personal injury having been redressed has also been taken note of by the R1 in its impugned order where it has been observed that "It has also been brought by the DG that the restoration of the dealer status was down prior to the filing information in case no. 17 of 2021."

28. In this regard, the Hon'ble Supreme Court in the case of S.P. Chengalvaraya Naidu (Supra) has held that "the courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

29. Besides the aforesaid, concealment of the fact on the part of the Appellant, it has also come on record that the retailing status of the Appellant

has been changed many times from the year 2014 to 2023. A chart in this regard has already been reproduced in the early part of this order.

30. The Commission has therefore observed that the allegation made by the Appellant that the sudden revocation of the CR status without prior intimation was to punish him for dealing with R3 is misplaced. It has also been brought on record that from Oct, 2020 to March, 2021 there has been consistent reduction in the offtake by the Appellant, in this regard a chart has been given in the earlier part of this order from which it can be assumed that change of the retailing tier of the Appellant was not because of its new dealership taken by the Appellant but because of the reducing offtake.

31. Moreover, Respondent No. 2 has also produced retailing tier chart of the dealers also dealing with Respondent no. 3 in which there is no change in the retailing tier.

32. The last argument of the Appellant that enough time was not given by the DG is also not correct because the Appellant had at least five months' time before the investigation closed by the DG on 15.12.2021.

33. Thus, looking from any angle, we do not find any merit in the present appeal for the purpose of interference and the same is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi

19th February, 2025

Sheetal