NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 113 of 2019

[Arising out of order dated 16th October, 2019 passed by the Competition Commission of India in Case No. 25 of 2019]

IN THE MATTER OF:

Mr. Ashok Suchde
15 Makani Manor 16 Peddar Road,
Mumbai
Maharashtra – 400 026 .. **Appellant**

Vs.

1. **Competition Commission of India,**
   9th Floor, Office Block-1,
   Kidwai Nagar (East),
   New Delhi- 110 023 .. **Respondent No. 1**

2. **Pernod Ricard India Private Limited**
   (PRIPL), 5th Floor, D-3 District Center Saket
   New Delhi – 110 017 .. **Respondent No. 2**

Present:

For Appellant:	**Mr. Summit Jain, Mr. Vikrant Singh, Mr. Harpreet Singh Gupta and Mr. Bhaskar Simha, Advocates**
For Respondents:	**Ms. Shama Nargis, Dy. Director Law, CCI,** **Dr. Navdeep Singh Suhag, Dy. Director, CCI** **Mr. Ankit Virmani, Ms. Manasi Kumar, Ms. Jyoti P. Sahu, Mr. Pundreek Dwivedi, Mr. Tapan Chauhan Advocates for Respondent No. 16**

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

The present Competition Appeal No. 113 of 2019 has been filed by Mr. Ashok Suchde, Mumbai as proprietor of VYN Marketing under Section 53B of the Competition Act, 2002 (in short '**Act**') challenging the order passed by Competition Commission of India (in short '**CCI**') on 16.10.2019 in case No. 25 of 2019 under Section 26(2) of the Act.

2. The Appellant is aggrieved by the aforesaid order of the CCI that the Commission, by virtue of an Expert Body, should have gone into the aspect of the Competition matter when exactly the allegation regarding violation of Sections 3(4) and Section 4 of the Act were made. The Appellant is stated to be the proprietor of 'VYN Marketing', entered into the agreement dated 19.12.2016 with the Respondent No. 2 -M/s Pernod Ricard India Pvt. Ltd.(in short '**PRIPL**'); as per this agreement, the Appellant was required to assist the Respondent No. 2 in ascertaining timely supply position of various alcoholic beverage of PRIPL and prepare orders from Distributors/Wholesalers, provide market intelligence including market acceptance of products and other allied works as per the Agreement. The Appellant has also stated that the Respondent No. 2 has terminated the Agreement with the Appellant on 03.11.2017 without assigning any reason for termination and has also not complied with Clause 21 of the Agreement. The Appellant had over 37 years of dominant experience in the

relevant market of alcoholic beverage in Mumbai and other parts of India. The Appellant has also stated that two days after the termination of the Agreement, on 05.11.2017, the Respondent No. 2 entered into verbal agreement with ZK Marketing, a firm who had no relevant product expertise in the said market and has Office Bearers from the then Ruling Political Party in the State etc. Respondent No. 2 has appointed Mr. Zeheb Khutliwala, an Office Bearer of the then Political Party, who had grown from the Political Party. The Appellant has itself stated that he has signed a Settlement Agreement with Respondent No. 2 in January, 2018 and has received Rs. 1,30,30,680/- from the latter. The Agreement had no clause to sign a Settlement Agreement as was done in January, 2018. The Appellant has filed Case No. 25/2019 before the CCI on 21.06.2019. The Appellant is raising question of violation of Section 3(4) and Section 4 of the Competition Act, 2002. The Appellant is aggrieved that the Commission has closed the case under Section 26(2) of the Act without making the study of the market structure of alcoholic beverage in the city of Mumbai or India. The Commission even did not look into the relevant market, which they are supposed to do, to determine the dominant position. They also failed to look into the appreciable adverse effect on competition as per Section 19(3) of the Act based on the Agreement between PRIPL and ZK Marketing.

3. Various other grounds are raised by the Appellant. The act of PRIPL, where it has unilaterally terminated the Agreement signed with the

Appellant on 19.12.2016 without assigning any reason and using the abuse of dominant position as per Section 4(2) of the Act. The Commission has not gone into the relevant market as required under Sections 2(s), 2(t), 19(6) and 19(7) of the Act. The alcoholic beverage constitutes a relevant product market as per Section 19(7) of the Act and the CCI should have investigated this. The dominant position of the Respondent No. 2 may indeed to be determined, analysed under Section 19(4) of the Act. PRIPL/Respondent No. 2 is a part of the larger Pernod record S.A. group incorporated in France and as per the report of the Economist, the group is the world's second largest wine and spirits seller. It has also been stated by the learned Counsel for the Appellant that the imposition of the unfair and discriminatory condition may be subject to the reaction of the market once Agreement is executed by the party. As a result, the market share of the Respondent No. 2 has dropped from 55% to 20%. The grievance of the Appellant is also that they have not been given 90 days' Notice period in line of Clause 29 of their Agreement with the Appellant which proves that there is an abuse of such dominant position keeping in line with Section 4(2) of the Act. They have also challenged the decision of Department of Excise, Administration of Dadra & Nagar Haveli to issue license to ZK Marketing for sale of alcohol. They have also challenged that the Excise Department, by virtue of a Government Body, is dominant in the relevant market of issuing license for retail sale of alcohol in the Union Territory of Dadra and Nagar Haveli. This clarifies for abuse of dominant position of the Excise Department in violation of Section 4(2) of the Competition Act. They have also alleged that the Office Bearers of ZK Marketing were relevant party appointed as there were simultaneous allegation of Respondent no. 2 trying to receive kickback from the Government through ZK Marketing getting leadership. The Agreement signed between Respondent No.2 and ZK Marketing influences Section 19(3)(b) of the Act where existing competitors are driven out of the market. They are also ascertaining that the Appellant should have reasonable choice for Respondent No. 2 to conduct market analysis being a financially dominant ex parte. There is indirect loss to the end consumer as the end consumer will not know the product as envisaged by Respondent No. 2. This is in violation of Section 18 and Preamble of the Act. It is also alleged by the Appellant that the Respondent No. 2 by entering Agreement with ZK Marketing is heartening the Indian economy and finally they have submitted that the findings recorded and order passed by the Commission is contrary to the settled principle of law.

SUBMISSION OF RESPONDENT NO. 2

4. While the Respondent No. 2/PRIPL has submitted that it is running, manufacturing and marketing alcohol, beverage of good quality. While the Appellant, Mr. Ashok Suchde is proprietor of VYN Marketing, Marketing Agency. The Appellant and Respondent No. 2 entered into an Agreement on 19.12.2016, *inter alia*, for promotion and marketing of product of Respondent No. 2 in the Union Territory of Dadra and Nagar Haveli. The

Appellant was not a Distributor/Wholesaler or Retailer of the product of Respondent No. 2. The Appellant was responsible for ascertaining demand/supply position of various brands of Respondent No. 2 including for procuring order from the Distributor/Wholesaler. It has also been stated by Respondent No. 2 that it has terminated the Agreement vide e-mail dated 03.11.2017. In the e-mail, they have stated that the reason is moving out of understanding between the Appellant and Respondent No. 2. 2nd Respondent thereafter entered into a similar Agreement dated 01.12.2017 with ZK Marketing for providing similar services as was provided by the Appellant in the Union Territory of Dadra and Nagar Haveli. Aggrieved by the termination of the Agreement dated 19.12.2016, the Appellant addressed an e-mail dated 10.12.2017 to Pernod Ricard India Pvt. Ltd. to investigate the matter. In order to settle all disputes, the Appellant and PRIPL entered into a Settlement Agreement in January, 2018 and paid an amount of Rs. 1,30,30,860/-. The settlement covered full and final settlement of all claims but not limited to service charges, compensation charges, notice charges, incentives, bonus, settlement amount on severance of the relation with VYN Marketing etc. The Settlement Agreement is at pages 34-36 of the Reply of the Respondent No. 2. After appropriating the above settlement amount, the Appellant addressed a Notice dated 24.12.2018 through its Advocate to Mr. Pernod Record France making false and frivolous allegations against Respondent No. 2 pertaining to the appointment of the new Service Provider in place of

Appellant and thereafter filed Complaint Case No. 25/2019 before the CCI on 25.06.2019.

ANALYSIS & OBSERVATIONS:

5. We have gone through the pleadings of the parties including submissions made by them, replies and rejoinder and relevant provision of law relied by them, citations as applicable in the present case and are having following observations:

a) On the date of hearing i.e., on 28.04.2022, it was brought to the notice of this Bench that Mr. Ashok Suchde, Appellant died on 29.04.2021 at Mumbai and has requested the Bench then for promoting wife of Mr. Ashok Suchde to act as a legal heir of Mr. Ashok Suchde in the above mentioned Appeal and pursue the matter on merit. However, since the Interlocutory Application which was filed vide diary no. 50396 dated 22.12.2021 was under defect and it was not cured by the Appellant, I.A. was not allowed because of the defects including non-production of order of Competent Court approving legal heir.

b) The Informant's Agreement with the Respondent No. 2 is appearing at page No. 75 of the Appeal Paper Book where the Agreement is reflected to be between VYN Marketing, a company incorporated under the Companies Act, 1957 having its registered office at 15, Makani Manor, 16 Pedder Road, Mumbai and that of Respondent

No. 2- 5th Floor, D-3, District Center Saket, New Delhi- 110 017.This itself reflects that it is company under the Companies Act and Company having perpetual succession under the Companies Act, so there was no question of filing this I.A. to substitute legal heir without getting share transferred in her name or appropriate Board Resolution for prosecution of this case. The Appellant/Informant has not provided any document or authorisation where the Board has authorised Company to pursue this case. This is mentioned from page 75 to page 82 of the copy of the Agreement as produced in the Appeal Paper Book. This is itself is a grey area.

c) The Information is reported at page no. 39, Sl. No. 8 as given below:

> **"Introduction/brief of the facts giving rise to filing of the information:**
>
> *Ashok Suchde, the proprietor of Vyn Marketing had entered into an Agreement dated 19 December 2016("Agreement") with Pernod Ricard India Private Limited ("**PRIPL**"), who was inter alia engaged in manufacture, sale and distribution of various alcoholic products. Hereto annexed and marked as Exhibit A is the Agreement.*
>
> *Vyn Marketing has been a service provider in the Union Territory of Silvassa (Dadara and Nagar Haveli and Gujarat) in India since 10 years for PRIPL and has knowledge in this field for more than 37 years.*
>
> *Vyn Marketing was only complying with all its obligations under the Agreement, however, PRIPL*

arbitrarily terminated the Agreement on 3 November 2017 without providing the 90 days' notice as required under Clause 21 of the Agreement.

*Post the abrupt termination, Mr. Suchde inquired with Mr. Sunish Cherian, Zonal Manager at goa, Mr. Rupesh Jagavkar, the area manager and Mr. Ashish Mishra, the local representative as to the reason for the termination. No clear response was forthcoming save and except that it was '**due to change in the company's policies**".*

Thereafter, PRIPL appointed ZK Marketing. The sole proprietor being Mr. Zoheb Khutliwala, the son of Mr. Altaf Khutliwala, both being local politicians in the area wherein Mr. Suchde was providing services. ZK Marketing immediately started providing services on 5 November 2017. Although the 'Khutliwalas' had no knowledge of the area of the services provided by Mr. Suchde, he was appointed. Thus, it is clear and apparent that M. Khutliwala was appointed due to the political contribution or on account of receiving kickbacks in lieu of the dealership.

*Hereto annexed and marked as **Exhibit A1** is a notification dated 29 November 2017 wherein Zoheb Khutliwala was appointed as Vice President – Yuba Morcha and **Exhibit A2** is the press note 17th May 2016 issued by Mr. Altaf Khutliwala.*

Such appointment of the political party who has no experience is simply done with an intention to gain unfair advantage which is likely to have an adverse effect on the competition, which is explained below in detail.

In the light of the above facts, the present application is filed."

d) This reflects that Mr. Ashok Suchde is proprietor of VYN Marketing. This means that either the Agreement appearing at page no. 73 to 81 is defective as VYN Marketing, in the Agreement dated 19.12.2016, entered into Agreement with Respondent No. 2, is incorrect or here the information reported at page no. 39 is wrong.

e) In the entire information as provided to CCI from page 37 to page 70, the grudge seems to be hoving around annulment of the Agreement by the Respondent No. 2. It is also astonishing to see that the Appellant had entered into a settlement, full and final settlement of claim, which Respondent No. 2 has already paid, as per the Agreement appearing at page nos. 34 -36 of the Reply of Respondent No. 2 amounting to Rs. 1,30,30,860/-.

f) The complaint filed before CCI is vindictive litigation and an abuse of the process of law. The sole point of filing of the case is that the termination of Agreement dated 19.12.2016.

g) The Appellant using the malafide intention in levelling a charge that Respondent No. 2 has appointed ZK Marketing, who had no domain ex parte, resulting into a financial loss to the Appellant, seems to be prima facie wrong when it has entered into full and final settlement.

h) The contention of the Appellant that it has violated the provisions of Section 3(4) & Section 4 of the Competition Act 2002.

For brevity and clarity, all these Sections are reproduced below:

Section 3(4) in the Competition Act, 2002

….

"(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,
shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation —For the purposes of this sub-section —

(a) "tie-in arrangements" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged."

(5) Nothing contained-in this section shall restrict –

(i) the right of any person to retrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under –

(a) the Copy right Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Mrks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Simi-Conductor Integrated Circuits Layout-Designs Act, 2000

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Section 4 in the Competition Act, 2002

4. Abuse of dominant position —

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or
(ii) price in purchase or sale (including predatory price) of goods or service;
Explanation —For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory

conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.
Explanation. —For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

[(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]

i) The Appellant has not made any case against Respondent No. 2 for violation of Section 3(4) & Section 4 of the Competition Act, 2002. Raising the issue of political influence of Mr. Zoheb Khutliwala proprietor of ZK Marketing is a politician and this politician can influence Excise Inspector to issue more import permit while continuing the same to common Service Provider. This ground has been taken by the Appellant to prove adverse effect on competition. This seems to be wild, baseless remark speculative and without even a shred of evidence.

j) This itself is amply clear wherein the Appellant himself has stated at page-15 of the Appeal Paper Book that the market share of the Respondent No. 2 has reduced from 55% to 20% due to termination of his Agreement. If this be the case, there is no question of appreciable adverse effect on competition being caused due to appointment of ZK Marketing.

k) The contention of the Appellant that the Agreement made between the Respondent No. 2 and ZK Marketing is an exclusive for supply and distribution Agreement dated 01.12.2017does not seem to be correct. The stores in the Union Territory of Dadra and Nagar Haveli stock and sale of all brands and the choice customer is not reflected among the competing brands. No Stores has exclusive Agreement to supply only the product of Respondent No. 2.

l) It is also very much clear that the termination of the Agreement dated 19.12.2016 between the Appellant and the Respondent No. 2 does not constitute imposition of any condition on the Appellant which tantamount to unfair and discriminatory condition in purchase or sale of any goods or services. The consumer has an option to purchase the product of their choice from the outlet of Stores. All these reflect that the Appellant has not made any case for violation of Section 4(2) of the Competition Act, 2002.

m) For forming a prima facie opinion under Section 26(1) of the Competition Act, 2002, it does not require to call the Informant. For brevity and clarity, paragraphs 37 and 38 of the Judgment titled "***Competition Commission of India Vs. Steel Authority of India,"*** ***(2010) 10 SCC 744*** are reproduced below:

> *…*
>
> *"37. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the*

existence of a prima facie case for 27 contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53A of the Act.

38. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is *akin to a departmental proceeding which does not entail civil 28 consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations."*

n) It is amply made clear that the Appellant has failed to make out a prima facie case under Sections 3 & 4 of the Competition Act, 2002. Hence the Appellant's plea that the CCI should have determined the relief sought is completely misconceived and misplaced.

o) This Tribunal has already held in ***Parsoli Motors Works Pvt. Ltd. Vs. BMW India Pvt. Ltd. & Ors***, (2019 SCC online NCLAT 1410), vide paragraph 5 has already held that the allegation of financial losses on account of non-renewal of Agreement do not raise any Competition concern and the complaint is liable to be dismissed in limine.

…

"5. Heard learned counsel for the parties. It is not in dispute that the Informant was a dealer for BMW vehicles for the Gujarat State under a Dealership Agreement and it enjoyed such position since 2001 in terms of an agreement executed inter-se the relevant parties. The dealership was to last till 31st December, 2017. However, OP-1 shot letter dated 7th December, 2017 intimating the Informant that the existing dealership would not be renewed and would expire on

31st December, 2017. The contention put forward on behalf of the Informant that while it was not given sufficient time to exit from the business and the effect of termination of its dealership had the effect of allowing dealers outside Gujarat to sell BMW cars to customers in Gujarat resulting in loss to the Gujarat Exchequer besides causing financial loss to the Informant, would amount to abuse of dominant position is without substance and the competition concern raised is unfounded. Even if it is assumed for the sake of argument that the termination of the dealership of the Informant or refusal on the part of OP-1 to further renew dealership in favour of the Informant is in derogation of the policy framed in this regard and the Informant had altered its position by raising infrastructure and making investment for running such dealership, breach thereof may give rise to civil liability but not have the consequence of abuse of dominant position. Nothing has been placed on record to establish that in the relevant market i.e. the segment of passenger cars, BMW India enjoyed a dominant position. The material available in public domain which has been considered by the CCI unmistakably demonstrates that BMW India -5- Competition Appeal (AT) No. 52 of 2018 had insignificant presence in the relevant market and BMW passenger cars did not occupy a significant market share. Merely because, the act of refusal on the part of OP-1 to renew dealership of Informant beyond 31st December, 2017 may have caused pecuniary loss to the Informant does not raise any competition concern, even if, the consequence of such termination of dealership has *proved advantageous to the dealers of OP-1 in neighbouring states of Gujarat to sell BMW cars to customers hailing from Gujarat. As regards, fiscal loss to the State of Gujarat in the form of Taxes leviable on sale of cars suffice it to say that apart from the Informant having no locus to raise such issue the revenue resources available to the State would depend on the profitability of business and it lies within the domain of the manufacturer, whether setting up of dealership in a particular State would promote its business and generate profit. It is inconceivable that an Automobile Company would setup a dealership solely for the benefit of the dealer or for generating the revenue for the State where such dealership is located. Argument raised on this score being highly illogical and repugnant to reason is rejected."*

..

p) CCI in its order dated 16.10.2019 has clearly reflected in paragraph-13 that the allegations raised by the Appellant do not reveal any competition issue/concern which needs to be examined within the statutory framework as provided under Sections 3 & 4 of the Act.

For brevity and clarity, paragraphs 13 & 14 of the CCI order dated 16.10.2019 appearing at page 33 & 34 are reproduced below:

..

"13. A bare perusal of the allegations made by the Informant indicates that the gravamen of the Informant pertains to appointment of ZK Marketing as its new service provider mainly due to its political and bureaucratic connections, alleged quid pro quo *corruption in government department, violation of French law and Code of Conduct by the OP etc. in this regard, the Commission is of the considered opinion that such allegations do not reveal any competition issues/concerns which can be examined within the statutory framework as provided in Sections 3 & 4 of the Act.*

14. In view of the above, the Commission is of the view that no case of contravention of either Section 3 or Section 4 of the Act is made out against the OP in the present matter. Therefore, the matter is directed to be closed under the provisions of Section 26(2) of the Act."

…

Hence, we find no reason to interfere with the impugned well-reasoned order in this Appeal and accordingly, we find no merit in this Appeal. The Appeal is accordingly dismissed. No order as to costs.

(Justice M. Venugopal)
Member(Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

9th May, 2022

Akc