

CASE NO.:
Writ Petition (civil) 490 of 2003

PETITIONER:
BRAHM DUTT

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT: 20/01/2005

BENCH:
C.J.I.G.P. MATHUR & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
P.K. BALASUBRAMANYAN, J.

1. The Competition Act, 2002 received assent of the President of India on 13.1.2003 and was published in the Gazette of India dated 14.1.2003. It is an Act to provide for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith. The statement of objects and reasons indicates that the Monopolies and Restrictive Trade Practices Act, 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the country's focus from curbing the monopolies to promoting competition. Section 1(3) of the Act provides that the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and provided that different dates may be appointed for different provisions of the Act. Pursuant to this, some of the sections of the Act were brought into force on 31.3.2003 vide S.O. 340 (E) and published in the Gazette of India dated 31.3.2003 and majority of the other sections by notification S.O. 715 (E) dated 19.6.2003. In view of bringing into force Sections 7 and 8 of the Act, the Central Government had to make prescription for the appointment of a Chairman and the members as composing the Commission in terms of Section 9 of the Act.

2. In exercise of the Rule making power under Section 63(2)(a) read with Section 9 of the Act, the Central Government made "The Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003" and published the same in the Gazette of India on 4.4.2003. Section 9 of the Act provides for the selection of the Chairperson and the other members as may be prescribed. The Rules above referred to was that prescription. Under Rule 3, the Central Government was to constitute a Committee consisting of a person who has been retired Judge of the Supreme Court or a High Court or a retired Chairperson of a Tribunal established under an Act of Parliament or a distinguished jurist or a Senior Advocate for five years or more, a person who had special knowledge of and professional experience of

25 years or more in international trade, economics, business, commerce or industry, a person who had special knowledge of and professional experience of 25 years or more in accountancy, management, finance, public affairs or administration to be nominated by the Central Government. The Central Government was also to nominate one of the members of the Committee to act as the Chairperson of the Committee. The function of the Committee was to fill up the vacancies as and when vacancies of Chairperson or a member of the Commission exits or arises or is likely to arise and the reference in that behalf had been made to the Committee by the Central Government. It is said that the Committee so constituted made a recommendation in terms of Rule 4(3) of 'the Rules' and a Chairman and a member were appointed. Though, the member claims to have taken charge immediately after being appointed, the person appointed as Chairman, has taken the stand that he had not taken charge since he was content to await the orders of this Court in view of the filing of this Writ Petition.

3. The present Writ Petition was filed in this Court by a practicing Advocate essentially praying for the relief of striking down Rule 3 of the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 (hereinafter referred to as 'the Rules') and for other consequential reliefs including the issue of a writ of mandamus directing the Union of India to appoint a person who is or has been a Chief Justice of a High Court or a senior Judge of a High Court in India in terms of the directions contained in the decision in *S.P. Sampath Kumar v. Union of India & Others*, (1987) 1 SCC 124. The essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the contention is that the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary. The arguments in that behalf are met by the Union of India essentially on the ground that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and such expertise cannot be supplied by members of the judiciary who can, of course, adjudicate upon matters in dispute. It is further contended that so long as the power of judicial review of the High Courts and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the Constitution. It was also contended that the Competition commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers. Since the main functions of the expert body were regulatory in nature, there was no merit in the challenge raised in the Writ Petition.

4. During the pendency of the Writ Petition, two additional counter affidavits were filed on behalf of the Union of India, in which it was submitted that the Government was proposing to make certain amendments to the Act and also Rule 3 of 'the Rules' so as to enable the Chairman and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee. This position was reiterated at the time of arguments. Of course, it was also pointed out that the question of amendment had ultimately to rest with the Parliament and the Government was only in a position to propose the amendments as indicated in the additional affidavits. But it was reiterated that the Chairman of the Commission should be an expert in the field and need not necessarily be a Judge or a retired Judge of the High Court or the Supreme Court.

5. We find that the amendments which the Union of India proposes to introduce in Parliament would have a clear bearing on the question raised for decision in the Writ Petition essentially based on the separation of powers recognized by the Constitution. The challenge that there is usurpation of judicial power and conferment of the same on a non-judicial body is sought to be met by taking the stand that an Appellate Authority would be constituted and that body would essentially be a judicial body conforming to the concept of separation of judicial powers as recognized by this Court. In the Writ Petition the challenge is essentially general in nature and how far that general challenge would be met by the proposed amendments is a question that has to be considered later, if and when, the amendments are made to the enactment. In fact, what is contended by learned counsel for the petitioner is that the prospect of an amendment or the proposal for an amendment cannot be taken note of at this stage. Since, we feel that it will be appropriate to consider the validity of the relevant provisions of the Act with particular reference to Rule 3 of the Rules and Section 8(2) of the Act, after the enactment is amended as sought to be held out by the Union of India in its counter affidavits, we are satisfied that it will not be proper to pronounce on the question at this stage. On the whole, we feel that it will be appropriate to postpone a decision on the question after the amendments, if any, to the Act are carried out and without prejudice to the rights of the petitioner to approach this Court again with specific averments in support of the challenge with reference to the various sections of the Act on the basis of the arguments that were raised before us at the time of hearing. Therefore, we decline to answer at this stage, the challenge raised by the petitioner and leave open all questions to be decided in an appropriate Writ Petition, in the context of the submission in the counter affidavits filed on behalf of the Union of India that certain amendments to the enactment are proposed and a bill in that behalf would be introduced in Parliament.

6. We may observe that if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognized by the Constitution. Any way, it is for those who are concerned with the process of amendment to consider that

aspect. It cannot be gainsaid that the Commission as now contemplated, has a number of adjudicatory functions as well.

7. Thus, leaving open all questions regarding the validity of the enactment including the validity of Rule 3 of the Rules to be decided after the amendment of the Act as held out is made or attempted, we close this Writ Petition declining to pronounce on the matters argued before us in a theoretical context and based only on general pleadings on the effect of the various provisions to support the challenge based on the doctrine of separation of powers.

8. The Writ Petition is thus disposed of leaving open all the relevant questions.