

BISHOP COTTON WOMEN'S CHRISTIAN LAW COLLEGE, BENGALURU

PRUDENTIA CONSCIENTIA INGENIUM OCCURSUS 2013

MOOT PROBLEM

1. The appellants are manufacturers of essential oils. Essential oil is a vital ingredient for perfumes, soaps, room fresheners and many other cosmetic products. It plays a vital role to the cosmetic industry which is growing at exponential rates in India ushering in high revenues and better job prospects to the entire nation.
2. The manufacturers of essential oils in India were having turbulent times and were losing a large chunk of market share to imported essential oil, soon after India reduced the steep import tariffs on such imported essential oil, in keeping with its GATT commitments. The competition got very fierce and many manufacturers in India had to close down their business establishments.
3. After considerable deliberation and meetings amongst the top representatives of some of the biggest manufacturers in India, they arrived at a conclusion that in order to protect their share in Indian market and fend off foreign competition, it was important for them to have best technology and production process, quality control, be abreast of prevalent market conditions and for such purpose, form a collective arrangement to share such information among themselves. This would vastly help in improving the outlook of buyers towards essential oils produced in India and help regain lost market share and on a macro-picture, also help the country's internal economic policies by ensuring that it is not depending excessively on foreign suppliers for such essential items.
4. Accordingly, the manufacturers of essential oils formed themselves into an association known as Manufacturers of Essential Oils Association ("MEOA"). Three members being the chief representatives of the organisation forming part of the association were elected unanimously to constitute the board and governing committee of MEOA. As part of its practices, the MEOA organised monthly meetings for its members to exchange information on advances in technology, technical know-how, market related information for streamlining production process, output, product pricing to avoid losses. Also, any manufacturer who identified and

patented new technology was obliged to license the technology to other association members by entering into an irrevocable license agreement with each of the members, for a royalty which was decided by MEOA. This ensured that the patent holder earns adequate royalty and at same time keeping with the basic premise, the members have access to new technology.

5. Over a period of 3 years, the MEOA gained considerable importance, strength and control over all manufacturers of essential oils in India and almost none of the manufacturers could manage to conduct business without the support and endorsement of MEOA. The large scale distributors and buyers of such essential oil were required to purchase essential oil only from manufacturers who were certified by MEOA and in-turn such buyers/distributors were provided certain discounts in prices. This way MEOA ensured quality control through the certification process. Any buyer/distributor buying essential oil from any non-MEOA member was boycotted from future supply by any of the MEOA members, as penalty. Over the course of years, the manufacturers began to recoup their lost market share largely aided by MEOA and within 5 years of forming MEOA, supply of essential oil by Indian manufacturers accounted for nearly 85% of all essential oils sold and sourced in India.
6. In 2008, global recession resulted in losses to the essential oil manufacturers, attributed largely to excess production on account of reduced demand from buyers. Immediately the board of MEOA decided that, in order to streamline and evenly match the supply and demand in line with prevailing market conditions and ensure reduction in losses, the MEOA divided the market for the members and offered exclusivity for manufacture and supply of essential oils in a particular territory for each member. The members were allowed to sell in other territories only if the member allocated a certain territory was unable to supply or sought for extra supply from another manufacturer. The MEOA warned that any member defaulting on this condition would lose membership and privileges available to members of the MEOA. However, as required by MEOA, each member also signed a non-compete agreement with the other members agreeing not to compete in other territories by supplying essential oils in such other territories. This arrangement considerably helped the essential oil manufacturers avoid any losses by planning production output, production costs etc. in line with the amount required to be supplied in their relevant geographical territory.

7. The MEOA meetings continued normally and members continued to benefit from sharing of information pertaining to market conditions, pricing, technological improvements, opportunity to supply to foreign markets etc.
8. In 2011, one of the members, Lotus India, which is one of the biggest manufacturers and suppliers of essential oil, also holding various technology patents, found it of great inconvenience and loss to continue to adhere to the norms and territorial restrictions imposed by MEOA. Lotus India consciously decided to flout the terms agreed to it under the non-competition agreement with the other members and proceed to selling and supplying its product to buyers across the country. In order to ensure buyers for its product, Lotus India offered steeper discounts thereby encouraging the buyers to move from their current seller (being a member of the MEOA) to buying from Lotus India. Further, to ensure lesser competition, Lotus India prematurely terminated the license agreements executed with other manufacturers in order to deny access to patented technology of Lotus India.
9. While Lotus India suffered loss of membership from MEOA, Lotus India was comparatively unaffected by it, because it had sufficient technology and production capacity to ensure unabated supply and also ensured to have buyers on account of offering steeper discounts. Lotus was successful in offering lesser price to its customers.
10. However, despite termination of the license, the other manufacturers continued to use the patented technology and process of Lotus India, claiming that they had already expended considerable efforts, time and amounts in setting up production units to produce essential oil using the technology earlier licensed by Lotus India and ceasing to use the same will result in considerable losses and potential closure of business because of time involved in setting up other production plant, during which period, the manufacturer could completely lose its customers.
11. On account of this, the other members filed a petition before the court seeking for temporary and permanent injunction against violation of the non-compete arrangement as well as termination of the technology license. Further, the other manufacturers claimed damages for loss of profit suffered on account of violation of the

non-compete agreement. Also, the other manufacturers claimed that Lotus India's technology could be technology subject to compulsory licensing since it is technology pertaining to an essential commodity.

12. On the other hand, Lotus India filed a petition seeking injunction against use of its technology by the other manufacturers and sought for damages for loss incurred by it resulting from continued unauthorized use of its technology by other manufacturers. Further, Lotus India has in its objections before the court alleged that the non-competition arrangement is eitherways void since it falls within the restraint of trade arrangement which is strictly prohibited under section 27 of Indian Contract Act.
13. In addition, Lotus India filed a complaint with the Director General (DG) of Competition Commission of India stating that the MEOA arrangement is a pure cartel arrangement in clear violation of Section 3 of Competition Act, 2002 and also agreeing to cooperate with the DG's investigation and provide all necessary information on the condition that Lotus India will be offered immunity against penalty and punishment. The case was taken up by the Competition Commission of India ("CCI").
14. The DG conducted investigation and submitted the case with sufficient information and evidence to CCI. The DG has submitted to CCI that the arrangement by MEOA members was one of horizontal price fixing, horizontal arrangement for output fixing, facilitating practices, group boycott arrangement, abuse of dominant position and has submitted various cases on these points such as *FICCI Multiplex Association of India Vs. United Distributors/ Producers Forum*, *Uniglobe Mod Travels Pvt. Ltd. Vs. Travel Agents Association of India & Ors.*, *Monsanto Vs. Sprayrite Service Corp*, *Klor's Inc. Vs. Broadway-Hale Stores Inc.*, *United States Vs. Topco Associates*, *American Column & Lumber Co. Vs. United States*, *Standard Oil Co Vs. United States*, *United States Vs. Jellico Mountain Coal & Coke Co.*
15. The appellants on the other hand contended before the CCI that, none of their activities or collaboration resulted in cartelization. To that effect, the appellants raised the following contentions:
 - Only information pertaining to price points, market factors and technology were exchanged for general welfare and

improvement of technique and quality of production, while each manufacturer had the liberty of independently choosing the product price. There was no form of horizontal pricing arrangement or re-sale price maintenance imposed by MEOA members on any of their distributors, which directly or indirectly determined prices. To that effect, the appellants cited certain cases such as *Union of India & Ors. Vs. Hindustan Development Corpn. & ors*, *Maple Flooring Manufacturers Association vs. United States*, *Polk Bros. Vs. Forest City Enterprises* etc.

- The MEOA members did not have monopolization over or full control of the market because of existence of fierce competition and availability of various options of imported essential oils for buyers to consider. Therefore, by this arrangement, the MEOA members cannot either ways threaten to limit production or control price, to their long term benefit.
 - Also, the act of geographical division was not to suppress competition or effect output, but instead to achieve more streamlined production and as a result increased output, quick and easy delivery to buyers of a particular region at competitive prices. This did not suppress competition but improved output. The appellants cited cases such as *Continental GT Vs. Sylvania*, *White Motor Corp Vs. United States*, *Sweeney Vs. Texaco* etc.
 - Further, even if the MEOA members did have control on the market, it was exercised in a manner beneficial to the market and not in a manner which could suppress competition or threaten availability of the product. However, Lotus India, now being the only one with access to the latest technology of production by terminating the licenses, could be a single player having full and unbridled control over the essential oil market, which may threaten exercise of greater market control, output fixing and abuse of its dominant position, which is prohibited under Section 4 of Competition Act, 2002.
16. The CCI, upon hearing the case arrived at the conclusion that this is a case of pure cartelisation and a *per se* violation of Section 3 of Competition Act, without having to carry any further in-depth analysis under Section 19. Based on assessment of potential market impact from the arrangement, the CCI ordered the appellants to pay penalty to the tune of One Thousand Five

Hundred Crore rupees collectively, except Lotus India. Upon appeal by the other manufacturers the Appellate Commission upheld the decision of CCI.

17. The appellants have now filed an appeal before the Supreme Court against the decision of the CCI and Appellate Commission. The Supreme Court has decided to also club with this appeal the issue pertaining to the violation of the non-competition agreement and license agreement and hear the case in its entirety and has asked the parties to present final arguments based on national and international precedents, logical analysis and cogent reasoning.
18. The Supreme Court will hear on the following issues:
 1. Whether the arrangement is a cartel arrangement and hence violative of Section 3 of Competition Act, 2002?
 2. Whether the case requires to be tested under Section 19 of Competition Act, 2002 and if so, whether the CCI and Appellate Commission exercised jurisdiction properly?
 3. Whether Lotus India can be offered full immunity against punishment or penalty since it is one of the biggest manufacturers of essential oils and was an important member of the MEOA?
 4. Whether Lotus India has acted in violation of the non-compete agreement or whether such agreement itself is in violation of Sections 23 and 27 of Indian Contract Act?
 5. Whether Lotus India is entitled to unilaterally terminate the license agreement? Should it be entitled to damages from other manufacturers for unauthorised use of its technology; or should Lotus India be required to compulsorily license the technology to other manufacturers. Incidentally would it have made any difference if Lotus India was a pharmaceutical company?