

COMPETITION ENFORCEMENT IN INDIA: BACK TO SQUARE ONE?

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I. INTRODUCTION:

The Competition Act, 2002 (“the Act”) establishes a specialised investigative and quasi judicial body, the Competition Commission of India (CCI) with the objective of preventing 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.¹ Apart from CCI, the Act also provides for an investigative arm (the office of the Director General) to investigate upon contraventions of the Act. The Act also provides for the establishment of a judicial appellate body in the form of the Competition Appellate Tribunal (COMPAT) which seeks to exercise oversight over the decisions of the CCI.²

CCI has been one of the most active regulatory bodies in India ever since it became operational. With each passing year, it receives more and more applications of alleged violations of the provisions of the Act. Though CCI has time and again proved that it is not a toothless tiger, its endeavor often gets obstructed due to procedural lapses. Critics have observed that the CCI in its eagerness to mete out justice on the merits of a case often disregards certain basic principles of natural justice that ought to be followed. As a result, numerous decisions of CCI have been challenged before COMPAT. In any jurisdiction, the position taken by the anti-trust regulator and the eventual response of the Appellate forum shapes the future course of competition law.³ During the seven years of competition law enforcement in India, an analysis of the cases filed before COMPAT sends a loud and clear message: even though application of competition law principles is a must, such application or enforcement cannot be at the cost of due process.

It is seen that most of the orders of CCI which are appealed before COMPAT are overturned on procedural grounds such as non-observance of principles of natural justice. While some have argued that the COMPAT is impeding competition concern by giving unwarranted weightage to hyper technicalities, others have taken the stance that the principles of due process and natural justice form the bedrock of any adjudication mechanism and are an integral part of the Indian legal

¹ The Competition Act 2002, preamble.

² Nisha Kaur Uberoi, 'Indian Competition Law: Awaiting Judgment' CPI Antitrust Chronicle April 2016 (1) <<https://www.competitionpolicyinternational.com/wp-content/uploads/2016/04/Nisha.pdf>> accessed 11 September 2016.

³ Sudipto Banerjee, 'CCI, COMPAT & Principles of Natural Justice' (20 July 2016) <<http://tiolcorplaws.com/news/details/MjY5NzY=>> accessed 11 September 2016.

system. This argument is primarily based on Section 36 of the Act which talks about adherence to principles of natural justice and the decision of the Supreme Court (SC) in which the apex court held that the CCI being a quasi judicial authority was bound by the principles of natural justice.⁴

In this backdrop, the author seeks to examine a few important orders passed by COMPAT in recent years. The author will then undertake a critical analysis of these orders to understand the approach taken by COMPAT and whether it is justified.

II. INDIAN JUTE MILLS ASSOCIATION AND OTHERS V. THE SECRETARY, CCI:⁵

Three organisations had brought up a matter before CCI claiming that the Indian Jute Mills Association (IJMA) and Gunny Trades Association (GTA) had violated Section 3 of the Competition Act, 2002 by forming a cartel and engaging in anti-competitive practices.

CCI found merit in these claims and held that the activities of IJMA and GTA were anti-competitive and violated Section 3 of the Act. However, the said order was set aside by COMPAT as it held that there was no express or tacit agreement or understanding between IJMA and GTA for fixing the price and the DG and the Commission committed grave error by holding that IJMA has acted in contravention of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act.⁶ The following are the important issues under the order:

A. Practice of preliminary conference

Section 26(1) of the Act talks about investigation by the DG if the CCI is of the opinion that there exists a prima facie case. In relation to this, Regulation 17 of the CCI (General) Regulations, 2009 states that the CCI may, if it deems necessary, invite the information provider and other necessary parties for a preliminary conference to form an opinion whether a prima facie case exists.⁷

COMPAT noted that the CCI had passed the order under Section 26(1) without holding a preliminary conference. COMPAT seems to be of the opinion that the preliminary conference could have had an effect on the order passed by the CCI. In the author's opinion, such practice is not mandatory and the present decision should not be treated as a precedent to be followed in the future cases. This claim is further supported by clause 3 of Regulation 17 which states that the

⁴ *Competition Commission of India v Steel Authority of India Limited*, (2010) 10 SCC 744 [86].

⁵ *Indian Jute Mills Association v Secretary, CCI, New Delhi*, [2016] 71 taxmann.com 118 (CAT - New Delhi).

⁶ *ibid.*

⁷ Competition Commission of India (General) Regulations 2009, s 17.

preliminary conference need not follow formal rules of procedure.⁸ Thus, the conduct of these conferences should not be made mandatory and the final say in this regard should be with the CCI.

B. Only the person who hears can decide

In the present case, one of the grounds for setting aside the order was the fact that one of the members of the CCI who had participated in the final order joined the Commission after the proceedings of the case had begun. COMPAT held that the member had mechanically endorsed the conclusion recorded by the Chairman and other Members due to which the impugned order was per se contrary to the basics of natural justice and had the effect of vitiating the impugned order.⁹

In the author's opinion, though the participation of the member might have been unjustified, such participation was merely a procedural irregularity which did not have any impact upon the merits of the case. Such a defect may not be the sole reason for setting aside the entire order and the COMPAT could have simply excluded the participation of the member from the proceedings. Courts¹⁰ have previously held that the absence of a member in cases where the quorum requirements are met does not make the order of the tribunal *per incuriam*.¹¹ In the present case, six members had participated in the final order. Thus, even if the participation of that particular member was excluded, the quorum requirements under Section 22 (minimum of three members) were clearly met thereby making the final order valid.

C. Procedure for prosecuting the members/ office bearers and employees

COMPAT relied on Alkem Laboratories Limited v. CCI and held that Section 48 can be invoked only after it was found that the company had contravened the provisions of the Act and in the absence of such determination, CCI could not have imposed a penalty upon the appellants and held them guilty of anti-competitive conduct with the aid of section 48.

However, the author believes that the said practice would be time consuming and might reduce the efficaciousness of the action of CCI. Therefore, in light of the objectives of the Act, the section

⁸*ibid.*

⁹ *supra* n 5.

¹⁰ See *The Punjab University, Chandigarh v Vijay Singh Lamba*, AIR 1976 SC 1441; *Ram Autar Santosh Kumar v State of Bihar and others*, AIR 1987 Pat 13.

¹¹ Tarun Mathur, 'CCI loses gain before COMPAT: Analysis of the COMPAT order in the matter of Indian Jute Mills Association' (12 August 2016) <<https://www.linkedin.com/pulse/cci-loses-gain-before-compat-analysis-order-matter-indian-mathur>> accessed 11 September 2016.

should be broadly interpreted to allow concurrent proceedings against the company and the individual.

D. Concept of turnover for assessing penalty

CCI had imposed a penalty of 5% of its average income of three preceding financial years on IJMA. This was set aside by COMPAT in light of its earlier ruling in ECP Industries Ltd. v. CCI. In the said case, it was held that the Commission did not have the jurisdiction to impose penalty Section 27(b) by taking into consideration the total turnover of the enterprise. Only the turnover of the product which was the subject matter of investigation and qua which a finding had been returned about violation of Section 3 and/or Section 4 could be taken into account for the purpose of Section 27(b) of the Act.¹²

Though the ruling stands for now, the interpretation of the word 'turnover' is *sub judice* before the Supreme Court.¹³ The position can be settled only once the apex court gives an authoritative ruling on the same.

III. SURENDRA PRASAD V. CCI:¹⁴

Relying upon the order of the Supreme Court in B.S.N.Joshi & Sons v. Ajoy Mehta, the informant approached the CCI under Section 19(1) alleging that MAHAGENCO was enabling formation of a cartel between the opposing parties. This was done in the form of bid-rigging by geographically dividing the area of contracts. It was contended that these activities amounted to anti competitive practices under Section 3 and 4 of the Act. The CCI held that it had no jurisdiction to inquire into allegations of favoritism and corruption. An appeal was preferred before COMPAT against this order.

Following are some of the important issues which arose for consideration before COMPAT –

A. Whether direction to DG can be made

COMPAT in its order made a direction to the DG to conduct investigation into the allegations and submit a report to the CCI within three months. In the author's humble opinion, the order passed by COMPAT may have been beyond the scope of its powers under Section 53B. Section 53B(3) provides that the COMPAT may pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.¹⁵ The provision does

¹² *ECP Industries Ltd. v CCI*, [2016] 68 taxmann.com 17 (CAT - New Delhi).

¹³ *M/s. ECP Industries v CCI*, Appeal No. 4342 of 2014.

¹⁴ *Surendra Prasad v CCI*, [2015] 63 taxmann.com 368 (CAT)

¹⁵ The Competition Act 2002, s 53B.

not speak about issuing directions to the DG. It would have been more appropriate if the matter had been remanded to CCI for fresh consideration.

B. Locus of informant

The locus standi of the informant was challenged on the ground that he was working with the advocate who had been representing M/s. B.S.N. Joshi & Sons Ltd. in several litigations. COMPAT rejected the contention and held that these facts were not sufficient to draw a dubious inference that the informant was prosecuting the interest/cause of M/s. B.S.N. Joshi & Sons Ltd. The author believes that the reasoning adopted by COMPAT was correct. As long as the requirement under Section 19(1)(a) is fulfilled, there should be no bar or limitation upon anyone to provide information to the CCI.

C. Cartel facilitator liability

COMPAT in its order ruled that the DG shall not proceed on the premise that MAHAGENCO was a part of the cartel. It is observed that both CCI and COMPAT rejected the allegations of MAHAGENCO being a facilitator in the formation of a cartel between opposite parties without giving any due justifications. The question that emerges is whether cartel facilitators are covered within the mischief of Section 3(3) of the act. A comparative analysis with the European antitrust law throws some light in this regard.

In *AC-Treuhand AG v. European Commission*, the Court of Justice held that cartel prohibition under Article 81(1) of the EC Treaty covers all levels of cartel participation, whether active, passive or supportive.¹⁶ The court noted that the main objective of Article 81(1) EC was to ensure that competition remains undistorted within the common market. It held that this objective would stand negated if it would not be possible to put a stop to the active contribution of an undertaking to a restriction of competition simply because that contribution did not relate to an economic activity forming part of the relevant market on which that restriction came about.¹⁷

Though there has been no such ruling in India, the Indian authorities should take cue from other advanced jurisdictions and explore the idea of imposing sanctions on parties facilitating the formation of cartels. Such an approach would be consistent with the overall aims and objectives of the Act.

¹⁶Martijn Snoep et al, 'European Union: Cartel Facilitators No Better Than Participants' (18 November 2015) <<http://www.mondaq.com/x/444594/Cartels+Monopolies/Cartel+Facilitators+No+Better+Than+Participants>> accessed 11 September 2016.

¹⁷ Case C-194/14 P, *AC-Treuhand AG v European Commission*, para 36.

D. Reliance on SC ruling

COMPAT held that the Supreme Court had recorded an unequivocal finding regarding formation of a cartel and that the CCI committed grave error by refusing to direct an investigation by the DG. It noted that CCI was bound by the verdict of the apex court in this regard.

It is argued that the observations made by the SC in the contempt petition and the civil appeal pertaining to cartelisation is not binding upon CCI since the decision is not precedent under Article 141 of the Constitution. The issue of cartelisation was not directly in issue before the SC due to which the observations should not have a binding effect.¹⁸ Further, Section 42 of the Indian Evidence Act, 1872 states that – “judgments are relevant if they relate to matters of a public nature relevant to the enquiry but such judgments are not conclusive proof of that which they state.”¹⁹ Thus, COMPAT could have erred in holding that CCI was bound by the observations made by the apex court.

IV. DLF LIMITED V. CCI:²⁰

A complaint was filed by Belaire Owners Association against DLF for grossly abusing its dominant position and imposing unfair conditions in the sale of flats/apartments to home buyers/consumers in contravention of the provisions of the Act. The CCI found them guilty of the accusations and asked DLF to modify the unfair conditions of the agreement. DLF appealed against this order before COMPAT. The appellate tribunal asked CCI to pass another order “specifying the extent and manner in which terms and conditions of the agreement needed to be modified”.²¹ Accordingly, CCI passed a supplementary order modifying the buyer agreement. DLF again approached COMPAT alleging that CCI was not the appropriate forum for hearing the matter.

A. Applicability of the Act

COMPAT dealt with the issue of whether the agreements would be subject to the provisions of the act even though they were executed before the act came into force. It distinguished the present case from the Kingfisher and Jet airways²² case decided by the Bombay High Court on various grounds among which the primary ground was that the case before Bombay HC was concerned

¹⁸ *Union of India v Dhanvanti Devi*, (1996) 6 SCC 44.

¹⁹ Indian Evidence Act 1872, s 42.

²⁰ *DLF Limited v CCI*, [2014] 45 taxmann.com 300 (CAT).

²¹ Aakanksha Kumar, 'The question of CCI's jurisdiction to “modify” apartment buyers agreements – A Review of COMPAT's DLF order' (28 June 2014) <<http://www.livelaw.in/question-ccis-jurisdiction-modify-apartment-buyers-agreements-review-compats-dlf-order/>> accessed 11 September 2016.

²² *Kingfisher Airlines Limited v CCI*, [2011] 12 taxmann.com 285 (Bombay)..

with cartelisation and anti-competitive agreements under Section 3 whereas the present case related to an abusive agreement under Section 4. It then went on to hold that “if the imposition of unfair or discriminatory conditions was post 20th May, 2009, it would certainly attract the provisions of the Act, but if it was prior, then it would not amount to imposition at all. The parties would then have to be governed under the agreement itself.”²³

In the author's humble opinion, the legislators could not have intended such distinction between a cartel case and an abuse of dominance case in that while the Commission has jurisdiction over cartels existing from before the Act, it has no such jurisdiction over abuse of dominance cases.²⁴ Further, the continuation of the agreement after 20 May 2009 by itself should be sufficient to attract the mischief of the Act and passing an order against such an agreement would not amount to retrospective operation of law.

B. Powers of CCI under Section 27

COMPAT interpreted Section 27(a), (b) and (d) of the Act to hold that in cases of contravention of Section 4, the CCI could only direct the concerned guilty party to discontinue its abuse of dominant position under clause (a) or/and impose penalty under Section 27(b). Moreover, it also held that only those agreements which were covered by section 3 of the Act and which were found to be in contravention of section 3 of the Act could be ordered to be modified under section 27(d) of the Act.²⁵

The author believes that COMPAT might have adopted a strictly literal interpretation of the provisions which is not desirable. It did not consider clauses (e) and (g) of Section 27 which are 'catch all'²⁶ in nature and vests the CCI with discretion to pass any such orders or directions as required. The said provisions have been included to give sufficient leeway to the CCI in passing such directions which are in consonance with the objectives of the Act but could not be captured in the other narrower clauses or provisions.

Further, the position stated by COMPAT can lead to practical difficulties. For instance, if the CCI finds that an agreement is leading to abuse of dominance, it can set aside the agreement by exercising its powers under Section 27(a) in order to 'discontinue such abuse of dominant position'.

²³ *supra* n 20.

²⁴ Vinod Dhall, 'Shackling competition' (*The Financial Express*, 5 June 2014) <<http://www.financialexpress.com/archive/column-shackling-competition/1257318/>> accessed 11 September 2016.

²⁵ *supra* n 20.

²⁶ Nisha Kaur Uberoi, 'COMPAT Holds DLF Guilty; Dilutes CCI's Powers!' (30 May 2014) <http://thefirm.moneycontrol.com/story_page.php?autono=1096181> accessed 11 September 2016.

However, if the entire agreement is not abusive and only certain clauses leads to a Section 4 violation, it would not be in a position to modify or remove these clauses. Instead, it would be forced to strike down the entire agreement.

C. Relevant turnover and Penalty

The issue of relevant turnover has arisen in this case also. COMPAT did not follow its own precedent in earlier cases and upheld the 630 crore rupee penalty which amounts to 7% of DLF's turnover. Since the interpretation of the term 'turnover' is *sub-judice* before the Supreme Court, this controversial issue will be put to rest only once the court clarifies the position of law in this regard.

Further, it is pertinent to note that out of the 21 instances of abuse of dominance found by CCI against DLF, only three were agreed upon by COMPAT. However, COMPAT did not make any changes to the penalty imposed on DLF.

In the author's opinion, the basis of imposition of such a huge penalty on DLF was the fact that it was found liable for abusing its dominant position in multiple instances. However, if the CCI had only considered the instances of contravention of Section 4 as determined by COMPAT, the quantum of penalty might have been lesser. In such a situation, COMPAT could have alternatively remanded the matter back to CCI for fresh consideration.

V. CONCLUSION

An analysis shows that the majority of cases are appealed before COMPAT on procedural grounds and not on merits. Section 36 of the Act provides that the CCI will be guided by the principles of natural justice. However, the provision should be read in light of the overall scheme of the act which envisages an expert body and an appellate Tribunal to save competition law disputes from the rigours of court litigation and hyper technicalities. While it is true that the expert body must comply with the requirements of due process while passing orders, the author is of the opinion that a balance needs to be struck somewhere. A case ought not to be dismissed merely on the ground of procedural impropriety if the merits disclose a grave violation of the provisions of the Act.

It is thus seen that the fundamental dispute remains over the exact nature of the CCI and its functions. While the CCI projects itself as a regulatory and expert inquisitorial body²⁷, COMPAT and the Supreme Court is of the opinion that the CCI is a quasi judicial body in light of the orders

²⁷ Amit Gupta, 'Competition Law Jurisprudence: Recent decisions by COMPAT and its criticism by the CCI', (29 January 2016) <<http://www.legallyindia.com/blogs/competition-law-jurisprudence-recent-decisions-by-compat-and-its-criticism-by-the-cci-1>> accessed 11 September 2016.

that it can pass. The author believes that this difference of opinion needs to be resolved at the earliest. This could be done either by evolving a comprehensive set of guidelines for conducting investigation by the DG and subsequent determination by CCI or by appointing more judicial members in the CCI who can take care of the due process requirements. Meanwhile, the COMPAT should also take steps in order to ensure that parties charged with serious violations of the Act do not escape its liabilities by taking advantage of the irregularities in procedure.