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DECODING THE CONTOURS OF CCI'S JURISDICTIONAL QUANDARY: A COMMENT ON *STAR INDIA PRIVATE LTD & ORS V. COMPETITION COMMISSION OF INDIA*

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The October, 2019 order of the Bombay High Court in *Star India Private Ltd & Ors v. Competition Commission of India*[1] which delved into the depths of turf war between the Competition Commission of India ("CCI") and Telecom Disputes Settlement and Appellate Tribunal ("TDSAT") has highlighted certain glaring issues in identifying and interpreting the jurisdiction of the CCI. The High Court has dealt with this contentious issue by holding that the CCI has transcended its authority in ordering a full probe into Sony Pictures Network India and Star India for alleged price discrimination while certain *in personam* disputes were pending before the TDSAT. It also emphasized on CCI's lacunae in adhering to the procedure laid down under the Competition Act, 2002 before passing an order for investigation under Section 26(1) of the Act. In this comment, the author argues that the reasoning for defying CCI's jurisdiction is problematic while the finding concerning CCI's non-adherence to the procedure laid down under the Act before passing an order under Section 26(1) is misplaced.

I. INTRODUCTION

The order of Bombay High Court quashing the Competition Commission of India's ("CCI") future probe into Sony and Star's alleged anti-competitive conduct, further elevates the already existing conundrum regarding CCI's jurisdictional matrix. In addition, the reasoning in the judgement raises questions on the extant of a competition

[1] Star India Private Ltd & Ors v. Competition Commission of India, 2019 SCC OnLine Bom 3038 (India).

watchdog in India. In this piece, the author's claims are substantiated by first describing the dichotomy between the judicial pronouncements of various courts. Further, the author analyzes the broad contours of the debate surrounding the troubles in identifying CCI's jurisdiction and argues that not only was the legal reasoning in the judgement flawed but also it paves the path for larger concerns in the Indian Competition framework.

In India, liberalization followed the footsteps of a massive balance of payments crisis that was unearthed in 1992 to replace the previously dominated public sector industries of petroleum, telecom, electricity, etcetera with private players.[2] The potential fear of further market failures gave birth to the Securities Exchange Board of India with a view to regulate and control market violations.[3] This trend saw the establishment of a number of sector-specific regulators, like TRAI (1997), CERC (1998), PNGRB (2006), etcetera by the government to avoid prospective market failures. Though prior to the liberalization period, the Monopolies and Restrictive Trade Practices Act, 1969 regulated the market to promote welfare monopolies, as an additional protective move, the Competition Commission of India was established under the Competition Act, 2002 ("the Act") "to promote and sustain competition in the market and to protect the interest of consumers and competitors".[4] The intention of building such market regulators might have been with a view to eradicate market imperfections and prevent market failures but the outcome has served as a window for larger concerns of jurisdictional overlapping. The existence of an appreciable jurisdictional overlap can be traced down to the goals and objectives of these regulators. Competition authorities possess an inherent mandate to maintain competition in the market and sustain consumer interests. The sectoral regulators on the other hand

[2] Montek S. Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism worked?,* 16 J. OF ECO. PERSPECTIVES 67 (2002).
[3] Murali Patibandla & Ramkanta Prusty, *East Asian Crisis as Result of Institutional Failures: Lessons for India*, 33 ECO. & POL. WKLY. 469, 471 (1998).
[4] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), Preamble.

feature a wider scope of goals and objectives concerning economic, technical and competition assessment.[5] Despite the similarities in their goals and objectives, a stark difference is noticeable in their methods. Sectoral regulators adhere to an ex-ante regulation like framing policies while competition authorities follow an ex-post competition regulation by holding various market players liable for affecting fair competition.[6] The root of such overlap also lies in the ambiguity inherent in the respective legislative framework. Despite the presence of CCI for delineating relevant markets and assessing likelihood of harm to competition, the legislations of sector specific regulators like TRAI[7], CERC[8] and PNGRB[9] possess inherent mandates to promote and sustain fair competition. The result is an ostensible bubble of jurisdictional overlap which is aggravated by the legislative ambiguity inherent in the Competition Act, 2002.

II. THE BALANCING WITHOUT A SCALE: THE PROBLEMS OF JUDICIAL INCOHERENCE

A recent addition to this jurisdictional war is the October 2019 order of the Bombay High Court rejecting CCI's jurisdiction in a turf war with TDSAT. The factual matrix of this case flows from the series of litigations before TDSAT between Sony Pictures Network India Pvt. Ltd ("Sony"), Star India Pvt. Ltd ("Star") and Noida Software Technology Park Limited ("NSTPL") involving Rate Interconnect Offer ("RIO") agreements and recovery of dues. While the proceedings were under process under the TDSAT, the NSTPL filed

[5] *See*, *Relationship between Regulators and Competition Authorities*, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMMITTEE ON COMPETITION LAW AND POLICY, DAFFE/CLP (99)8 (June 24, 1999), at 1, 8, *available at* http://www.oecd.org/regreform/sectors/1920556.pdf.
[6] *See*, *Antitrust Enforcement in Regulated Sectors Working Group*, INTERNATIONAL COMPETITION NETWORK (April, 2004), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc377.pdf.
[7] Telecom Regulatory Authority of India Act, 1997, No. 24, Acts of Parliament, 1997 [hereinafter TRAI 1997], §11(1)(a)(iv).
[8] The Electricity Act, 2003, No. 36, Acts of Parliament, 2003 (India), §23, 60.
[9] Petroleum and Natural Gas Regulatory Board Act, 2006, No. 19, Acts of Parliament, 2006 (India) [hereinafter PNGRB 2006], §11(a).

an information on 7th June, 2017 with the CCI against Sony, Star and Indian Broadcasting Federation ("IBF") alleging the contravention of Section 3 and 4 of the Act owing to their strategic positions in the broadcasting market. The information contained imposition of unfair terms, price discrimination and limitation of services to NSTPL. After taking cognizance of the matters, the CCI passed two orders under Section 26(1) of the Act directing the DG to conduct an investigation to ascertain the violations of Section 3(4) of the Act. Affected by the order, Sony and Star filed writ petitions in furtherance of the same. The present case flows from the aforementioned factual conspectus. The order has broadly dealt with two major issues concerning the question of CCI's jurisdiction and the validity of its Section 26(1) order. This piece scrutinizes the reasoning of the Court and aims to highlight the incoherence imbibed in it.

(i) THE "FIRST INSTANCE" ARGUMENT

The Court while dealing with the contours of CCI's jurisdiction failed to appreciate certain crucial submissions made by the CCI. In this aspect, it is pertinent to correctly interpret the *CCI v. Bharti Airtel Ltd & Ors*[10] judgement. The judgement discusses at length that CCI's jurisdiction will come into play only after jurisdictional aspects are disposed by the sector specific regulator.[11] It does not state that the CCI can take cognizance of the matter only after adjudication of *in personam* disputes. Even if, the contrary interpretation is taken into consideration, in the instant case, the dispute is *in rem* since it encompasses anti-competitive conduct and market abuse. Therefore, the reasoning of the Court that CCI's jurisdiction will materialise only after *in personam* disputes are settled is entirely misplaced. In this regard, reference should be made to Delhi High

[10] CCI v. Bharti Airtel Ltd & Ors, (2019) 2 SCC 521 (India).
[11] *Id* at ¶ 91.

Court's judgement in *Telefonaktiebolaget Lm Ericsson v Competition Commission of India & Anr.*[12], where the Court held:

> *"The provisions of Sections 21 and 21A of the Competition Act, read in the aforesaid context, indicate that the intention of the Parliament was not to abrogate any other law but to ensure that even in cases where CCI or other statutory authorities contemplate passing orders, which may be inconsistent with other statutes, the opinion of the concerned authority is taken into account while passing the such orders. The plain intention being that none of the statutory provisions are abrogated but only bi-passed in certain cases. These provisions - Sections 21 and 21A of the Competition Act - clearly indicates that the intention of the Parliament was that the Competition Act co-exist with other regulatory statues and be harmoniously worked in tandem with those statues and as far as possible, statutory orders be passed which are consistent with the concerned statutory enactments including the Competition Act..."*[13]

Further,

> *"..... in absence of any irreconcilable conflict between the two legislations, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of Patent rights cannot be ousted..."*[14]

A similar stance was observed by the Supreme Court in *CCI v, Fast Way Transmissions*[15], where it overruled a previous COMPAT decision holding the CERC to be more competent to deal with competition aspects. The Apex Court upheld CCI's jurisdiction through a combined

[12] Telefonaktiebolaget Lm Ericsson v. Competition Commission of India & Anr., (2016) SCC OnLine Del 1951 (India).
[13] *Id* at ¶ 168.
[14] *Id* at ¶ 174.
[15] CCI v. M/S. Fast Way Transmission Pvt. Ltd. and Others, (2018) 4 SCC 316 (India).

reading of Section 18 and 19 of the Act to eliminate all forms of market abuse and sustain competition. [16]

However, the Supreme Court undertook a steep departure from the jurisprudence of cementing CCI's jurisdiction in *CCI v. Bharti Airtel Ltd. & Ors.* Though the judgement reiterated the concept of 'comity' between the two regulators, looking at the judgement through the scope of pragmatism, it is clear that CCI's jurisdiction was undermined. The judgement suffers a huge setback in its reasoning for primary and secondary jurisdiction. The dicta have been carried forward in the present decision which places the CCI as a secondary authority to adjudicate competition issues after the final adjudication by the sectoral regulators.

The second limb of the argument nullifying CCI's jurisdiction involves the final adjudication of issues by the TDSAT. The Court has discussed at length the disputed 7th December 2015 order of the TDSAT for the purpose of establishing that the same could not be considered as the final order settling the anti-competitive and *in personam* disputes. But an important facet was ignored by the Court while adjudicating this issue. The Court ought to have considered the aforementioned judgements rather than placing its reliance on *CCI v. Bharti Airtel Ltd. & Ors* which is flawed in its approach of interpreting the Act. If the present case considered the dicta of *Telefonaktiebolaget Lm Ericsson v. CCI & Anr*, both the regulators could have construed the matter harmoniously. The Court failed in its approach to appreciate the provisions of the Act as well as the intention of the drafters to create a body for specific ex-post competition regulation. Through its flawed reasoning, the Court has capriciously undermined the CCI's jurisdiction.

(ii) THE ACT OF "PRIMA FACIE" NON-ADHERENCE

[16] *Id.*

As rightly stated by the Court in its judgement, *prima facie* finding is *ad idem* for passing an order under Section 26(1) of the Act. In its reasoning for setting aside the order, the Court observed that the CCI did not carry out an analysis of appreciable adverse effect on competition (AAEC) arising out of any agreements entered between NSTPL, Star and Sony. The CCI in its order has extensively dealt with this aspect by laying down the consequences arising out of refusal to deal and price discrimination.

It noted that:

> "*It is observed that in the market for broadcasting of television channels in India, both OP-1 and OP-2 are leading broadcasters owning premium content and offering some of the most popular television channels with high ratings in terms of viewership across various genres. As such, no distributor can operate in the market of distribution of television channels without offering channels of OP-1 and OP-2....*"[17]

Further, the Court also ignored the existence of any agreement causing AAEC. In this regard, it is important to note that the Rate Interconnect Offer ("RIO") agreements between the parties fall under the ambit of Section 2(b) of the Act. Therefore, any discrepancy observed in the same would result in market abuse. In the instant case, as observed by TDSAT in its 07.12.2015 order, the RIO agreements have the potential to establish a refusal to deal mechanism.

> *"But in this country, unfortunately RIOs are framed seemingly in negation of all the attributes of a true RIO. The RIO is used by the broadcaster as a coercive tool and a*

[17] *In Re:* Noida Software Technolgy Park ltd. and Star India Pvt. Ltd and Ors, (2018) SCC OnLine CCI 65 (India).

threat to the seeker of TV channels and it undermines the essence of the Regulations, which is to provide healthy competition by providing level playing field."[18]

The RIO agreements in the instant case if used as a coercive tool, possess the ability to hamper competition by forcing competitors out of the market, thereby satisfying Section 19(3)(b) and 19(3)(c).

III. CONCLUSION

In order to settle the turf war between these two regulators, a legislative overhaul is the need of the hour. The Indian Act has subtle influences of the UK's model of competition framework following the policy of concurrency.[19] The policy of concurrency entrusts the Office of Fair Trading (OFT) and sector specific regulators' concurrent powers to regulate the competition and prevent market failures. UK's Competition Act of 1998 acts as a means to enforce Chapter I and Chapter II of the Act. The Act also contains concurrent powers of the sectoral regulators under Section 54 and Schedule 10 of the Act. This allows the regulators to decide which would be the most suitable means to regulate anti-competitive practices. In India, a plain reading of Section 21 and Section 21A of the Competition Act, 2002 would find certain similarity with the UK's concurrency model. However, the resultant Act is a failure owing to its ambiguous language. Section 21 provides a mechanism of reference to the CCI from other statutory authority in case a decision is contrary to the Act.[20] Section 21A provides a similar mechanism of reference from the CCI under similar circumstances.[21] A major loophole in this context would be the absence of intricacies dealing with the enforcement of this mechanism. The regulators are bestowed with the discretion to

[18] M/s Noida Software Technology Private Limited vs. M/s Media Pro Pvt. Ltd. & Ors., (2015) SCC OnLine TDSAT 1614 (India).
[19] Suzanne Rab, *Indian Competition Law : 10 years On An International Perspective*, 2 COMPETITION L. REP. 99 (2012).
[20] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §21.
[21] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §21A.

evaluate the consequences of potential overlap and accept the opinion of the other regulator. The provisions being of a non-mandatory[22] nature deviate from their objective of ensuring a harmonious perusal of the matter.[23] Discrepancy is also observed in Section 60 and Section 62 of the Act. Section 60 furnishes the CCI with a non-obstante clause allowing it to have a primacy over competition angle matters [24] but Section 62 prescribes that the provisions of the Act are in addition to and not in derogation of any law in force.[25] This is further aggravated by Section 18 of the Act which is a restatement of the preamble of the Act providing the CCI with powers to regulate fair competition and to protect the interests of the consumers. The presence of such glaring ambiguities in the Act paves a way for complication in the allocation of jurisdiction which has been the cynosure of judicial scrutiny in the recent years.

The Acts and Statutes of various sectoral statutory authorities are couched in ambiguity. The Competition Act, 2002 was introduced with a view to regulate the free market after the liberalization. Its preamble enforces the competition watchdog's responsibilities to promote competition and prevent market failures resulting out of market failures. The jurisdictional overlap in this aspect can be avoided if competition mandates are removed from sector specific acts and statutes. A policy of exclusivity would untangle the knots of jurisdictional overlap and establish a simple flow of affairs without any direct regulatory interference.[26] For establishing 'comity' between the regulators, bifurcation of the issues is pivotal. The presence of a stark demarcation would set the boundaries for each of the regulators while adjudication of issues. The technical and economic regulation should be overseen by the sectoral

[22] Vikash Trading Company v. Designated Authority, Directorate General of Anti-Dumping and Allied Duties, Ministry of Commerce and Industry, (2012) SCC OnLine Mad 4801(India), ¶ 33.
[23] Rahul Singh, *The Teeter-Totter of Regulation and Competition: Why Indian Competition Authority must trump Sectoral Regulators*, COMPETITION COMMISSION OF INDIA (December 15, 2007), at 1,5, *available at* https://www.cci.gov.in/sites/default/files/interface_sr_ca_20080508112129.pdf.
[24] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §60.
[25] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §62.
[26] Maher M. Dabbah, *The Relationship between Competition Authorities and Sector Regulators*, 70 CAMBRIDGE L. J. 113, 116 (2011).

regulators while the issues having a competition angle to them should be referred to the CCI for adjudication.[27] Once the demarcation is created, overlapping jurisdictional issues would soon cease to exist. The Competition Act, 2002 was built with an objective to thwart market abuses and anti-competitive practices. But if the sectoral regulators are given a primacy to deal with such issues, then the competition authority would soon be a toothless tiger. Hence, in the interest of upholding and appreciating its competency, a legislative overhaul is indispensable.

[27] United Nations Conference on Trade and Development, *Best Practices for Defining Respective Competences and Settling of Cases Which Involve Joint Action by Competition Authorities and Regulatory Bodies*, TD/RBP/CONF.6/13/Rev.1 (Aug. 17, 2006), *available at* https://unctad.org/en/Docs/tdrbpconf6d13rev1_en.pdf.