

India's Competition Tussle: Supreme Court plays Referee

Introduction

The recent decision of the Supreme Court of India (“SC”) in *Competition Commission of India v. Steel Authority of India Ltd. and Anr.*, is of immense significance. The judgment pushes India’s nascent Competition regime in a forward direction as it settles issues regarding the ambit and scope of the powers of the Competition Commission of India (“CCI”) and the Competition Appellate Tribunal (“Tribunal”). The SC has interpreted various provisions of Competition Act, 2002 (“Act”) keeping in mind the object and the legislative intent behind the Act and in turn laid down an effective and efficient mechanism of maintaining a pro-competition environment. This newsletter examines the judgment and its impact on India’s evolving competition regime.

1. Brief Facts

Jindal Steel & Powers Ltd. (“Informant”) filed a complaint before the CCI alleging that Steel Authority of India Ltd. (“Respondent”) had entered into an exclusive supply agreement with the Indian Railways for supply of rails. Under Section 3(4) of the Act, an exclusive supply agreement is anti-competitive if it causes or is likely to cause an appreciable adverse effect on competition in India. In the present instance, the other suppliers of rails in the industry did not get a chance to put forth their bids as no tender was floated by the Respondent. This led to the Informant filing a complaint with the CCI for the Respondent’s abuse of dominant position¹ and the anti-competitive agreement with the Indian Railways. The complaint was registered and the Respondent was directed to submit its comments in respect of the information sought within two weeks. The Respondent did not file its comments and requested for an extension of six weeks. The CCI, however, declined the prayer for extension and held that a *prima facie* case existed against the Respondent, and issued directions to the Director General to carry out investigations under Section 26(1)² of the Act.

Aggrieved by the directions issued by the CCI, the Respondent filed an appeal with the Tribunal contending that the said directions were opposed to natural justice since they were passed without giving the Respondent an opportunity to be heard. CCI sought to implead itself as party to the appeal and questioned its maintainability before the Tribunal on the ground that the direction under appeal was a “direction simpliciter” to conduct investigation and not an “order” appealable under the Act. In its order dated March 15, 2010, the Tribunal admitted the appeal and held that CCI cannot be impleaded as a party as it is neither a necessary nor a proper party to the appeal. The Tribunal also held that the CCI should give reasons while passing any order, direction or taking any decision. This order of the Tribunal was challenged by the CCI before the SC.

¹ Section 4(1) provides that no enterprise or group shall abuse its dominant position.

² Under Section 26(1) the Central Government or a State Government or a statutory authority can direct the Director General to carry out investigations when a *prima facie* case has been established.

2. Issues

The main issues before the SC were:

2.1 The viability of an appeal against the directions passed by the CCI in exercise of its powers under Section 26(1) of the Act for forming a *prima facie* opinion.

2.2 The dispute regarding the necessity to follow the principles of natural justice *i.e.* providing notice to the parties and recording of reasons at the preliminary stage of formulating an opinion as to the existence of the *prima facie* case.

2.3 The viability of CCI being impleaded as a necessary or at least a proper party before the Tribunal.

2.4 The power of the CCI to pass an interim order.

3. Observations made by the SC

3.1 The right to appeal

The SC held that the “right to appeal” is a statutory right and if the statute omits to provide it, the court would not venture into providing it by implication. The SC interpreted Section 53A(1) that lays down the directions/orders against which an appeal lies to the Tribunal. The SC held that “right to appeal” is a statutory right and is controlled strictly by the provision and the procedure prescribing such a right. The language of Section 53A, which states that every direction, order or decision of the CCI would be appealable, is clear and unambiguous and specifically excludes any appeal against the directions issued under Section 26(1). Thereafter, the SC noted that the direction passed by the CCI under Section 26(1) concluding that a *prima facie* opinion exists, is nothing but a “direction simpliciter” in the nature of an administrative order without any adjudicatory component and is therefore, non-appealable. In support of its above observations, the SC referred to various European community judgments. Delineating on the scheme of the aforementioned sections, the SC noted that legislature did not intend to make all orders and directions appealable before the Tribunal.

3.2 Exclusion of the principles of natural justice

The SC discussed in detail the exceptions to the application of the principles of natural justice and tested them with respect to sections 19³ and 26.⁴ It noted that the legislature had not included notice as a requirement for the formation of a *prima facie* opinion. Notice, however, is a requirement when a decision is taken under Section 26(2)⁵ and such a decision may be challenged by way of an appeal. Construing formation of *prima facie* opinion as a

³ Inquiry in to certain agreements and dominant position of enterprises is called for under Section 19.

⁴ Section 26 lays down the procedure for inquiry under Section 19.

⁵ Sections 26(2) cast an obligation on the CCI to give a copy of its order to the parties in a situation where no *prima facie* case exists and the matter is closed.

departmental procedure and not an adjudicatory function, the SC held that minimum reasons substantiating the formation of such opinion should be stated, while all other orders and decisions of the CCI should be well reasoned.

3.3 The Issue of Necessary and Proper Party

The SC analysed the scheme of appeal under Section 53B⁶ of the Act and deliberated upon who can file the appeal. By interpreting the phrase “any person” mentioned in Section 53B, the SC concluded that a “body corporate” like CCI was well within the meaning of the phrase. The SC, after a detailed discussion on the concepts of necessary and proper party, concluded that whenever the CCI takes *suo motu* cognizance of matter under Section 19 of the Act, it would be a proper party, while in all other cases, it would be a necessary party to the appeal. The SC was of the view that impleading CCI as a necessary or proper party would be in furtherance of the objective of the Act. It would avoid multiplicity of litigation and would lead to complete, effective and expeditious adjudication.

3.4 Passing of Interim Orders

Finally, the SC adjudicated upon whether the CCI has powers to issue orders without giving notice to restrain the acts of one party, which are likely to cause irreparable or irreversible damages to the other party. The SC laid down the following guidelines which have to be followed to prevent the misuse of the power to issue interim order:

- a) The CCI should satisfy itself, that a prohibited act is committed and continues to be committed or is about to be committed;
- b) There should also be a necessity to issue an interim order;
- c) The CCI should be of the opinion that the party to the dispute would suffer irreparable and irretrievable damage and the competition in the market would be hampered if such order is not passed.

Therefore, the power to serve an interim order is to be exercised by the CCI only when it forms *prima facie* opinion and a direction for investigation is issued under Section 26(1) of the Act. The SC was of the opinion that such powers should be sparingly used with a focus on the guidelines issued above and the reasons for non-issuance of the notice must be recorded by the CCI.

Conclusion

With this judgment, the SC has very effectively settled the tussle between the CCI and the Tribunal. In essence, if the CCI is of the opinion that a *prima facie* case exists, the Respondent will have a right of appeal only after the investigation process is over and an order is passed. It is pertinent to note that not allowing annulment proceedings against non-

⁶ Section 53B lays down the procedure for filing an appeal with the Tribunal by “any person” aggrieved from the direction issued by the CCI, subject to the grounds enumerated in Section 53A(1).

adjudicatory or more precisely put, departmental directions, is in consonance with the law in most jurisdictions across the globe and therefore the SC's stand is a welcome move.

The judgment is momentous on other counts namely, (a) it demarcates the powers of the CCI and defines boundaries between the CCI and the Tribunal and (b) it interprets various provisions of the Act settling issues which could have been subject matters of potential disputes, especially since competition jurisprudence is still in its infancy. The judgment not only addresses issues at hand but also gives directions for fulfilling the object and purpose of the Act. Hopefully the findings of the SC will cut down litigation at a pre-investigation stage and allow the due process of investigation to conclude smoothly. Of course, for the aggrieved party, such investigation may be a long drawn process before they can start exercising their right to appeal.

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