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I. INTRODUCTION

In a recent telling judgment,[2] the Supreme Court of India effectively and judiciously delineated the scope and manner of exercise of powers by the Competition Appellate Tribunal (hereinafter "the Tribunal") and the Competition Commission of India under the new Competition Act of 2002. The Supreme Court was hearing an appeal filed by the Competition Commission against the Tribunal order dated February 15, 2010.[3] The dispute, being the first before the Supreme Court in relation to the Competition Act, has generated lot of curiosity and euphemism among lawyers, academia, and students. Even though the dispute did not involve interpreting any substantive concepts of competition law, the judgment will have significant bearing on the functioning of the Competition Commission of India and the Tribunal in times to come.

In this paper, I describe the judgment's importance for those readers having a special interest in competition law developments in India. Part II of the paper briefly sets out the background against which the Competition Act was enacted and enforced. Part III summarizes the main provisions of the Competition Act. Part IV briefly captures the facts of the dispute and order of the Tribunal. Part V paper deals with the issues framed by the Supreme Court and its findings. Finally, in Part VI, I draw conclusions.

II. ECONOMIC BACKGROUND TO THE ENACTMENT OF THE NEW COMPETITION ACT

With the shift from a socialist economy to a free market economy in the 1990s, India has become one of the fastest growing economies in the world. The opening of India's economy not only brings opportunities in terms of employment and consumer choices but also challenges in terms of regulating various market sectors, including banking and financial, capital markets, telecom, energy, transport, etc. During the last two decades, the government has successfully put in place expert regulators for each of these sectors. However, the government was quick to realize that sector-specific regulators in themselves were not sufficient to keep markets free from potential vices of a capitalistic economy. Anticompetitive and abusive conducts are some of the

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[2] *See*, Competition Commission of India v. Steel Authority of India Ltd., 2010(8) UJ 4093(SC); also *available at* http://cci.gov.in/menu/civilAppealNo.7779.pdf (last visited on October 12, 2010).

[3] *See*, Steel Authority of India Ltd. v. Jindal Steel &Power Ltd. *available at* http://compat.nic.in/Upload/PDFs/Court%20Order%2015.2.2010.doc (last visited on October 12, 2010).

major vices that are a concern for almost all market economies, and the Indian economy is no exception.

In India, decades of government controls had resulted in a weak competition culture. The new market-driven economy required revived and suitable systems and processes to curb anticompetitive and abusive practices by firms. The age-old Monopolies and Restrictive Trade Practices Act of 1969 had aimed at curbing monopolies but needed changes in both its content and scope to deal with the challenges of the new economy, especially in the face of international competition. In 1997, almost six years after India engaged in economic reforms, the then Finance Minister in his Budget Speech stated:

> The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a commission to examine this range of issues and propose a modern competition law suitable for our conditions.[4]

It was against this background that the government appointed a High Level Committee on Competition Law and Policy in October 1999 (also known as the "Raghavan Committee"[5]) to suggest suitable legislative frameworks relating to competition law, changes relating to legal provisions in respect of restrictive trade practices, and suitable administrative measures required to implement the proposed recommendations. The Raghavan Committee recommended, *inter alia*, to introduce a new law and law enforcement authority in the form of a Competition Act and Competition Commission of India. The Parliament, based on the Raghavan Committee recommendations, enacted the Competition Act, 2002 (hereinafter "the Act"). The Act was brought in force gradually and, finally, the operative provisions of the Act dealing with anticompetitive agreements and abuse of dominance were enforced effective May 20, 2009.[6] Sections 5 and 6 of the Act, which are aimed at regulating mergers, are yet to be enforced by the government.

III. MAJOR PROVISIONS OF THE ACT

The Act is primarily aimed at prohibiting anticompetitive agreements and abuse of dominance, along with regulating mergers and acquisitions, which are likely to have appreciable adverse effects on competition in relevant Indian markets. Section 3 of the Act prohibits all such agreements, whether horizontal or vertical, which are likely to cause or have caused appreciable adverse effect on competition. These agreements, *inter alia*, include cartels, tie-in arrangements, exclusive distribution agreements, and exclusive supply agreements, among others. Section 4 defines firm practices that may be considered as abuse of dominance and prohibits all such abusive practices. Interestingly, Section 4 does not make any reference to appreciable adverse effects on competition in relevant markets in India. Section 5 sets out threshold requirements for combinations (mergers, acquisitions, takeovers, etc.) which must be notified to the Competition

[4] *See*, Budget Speech of Shri Yashwant Sinha, Finance Minister, GOI, 27th Feb, 1999 (Union Budget 1999-2000).

[5] *See*, Report of the High Level Committee on Competition Policy and Law, Government of India, 2000.

[6] *See*, the Notification No. S.O. 1241(E) dated May 15, 2010 issued by Ministry of Corporate Affairs *available at* http://cci.gov.in/images/media/notifications/cf3.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00 (last visited on October 12, 2010). Sections 3 and 4 of the Act deal with anticompetitive agreements and abuse of dominance, respectively.

Commission of India (hereinafter "the Commission") before such combination is effected. Section 6 lays down the procedure for regulating combinations by the Commission. Sections 7 through 17 provides for the establishment of the Commission, appointment of the members of the Commission and the Director General, etc. Sections 18 through 40 lay down the powers, functions, and duties of the Commission. Section 19 sets out the substantive factors to be considered by the Commission while examining the effects of an alleged anticompetitive practice or agreement and/or abuse of dominance. Section 26 provides for inquiry procedures under Section 19.[7] Sections 53A through 53U provide for, *inter alia*, establishment of the Tribunal, its powers and functions, and its jurisdiction. Section 53A(1) expressly defines what may be appealed before the Tribunal. The dispute before the Tribunal and Supreme Court described in this paper was largely centered on the interpretation of the Sections 26 and 53A provisions.

IV. BACKGROUND FACTS AND THE ORDER OF THE TRIBUNAL

Jindal Steel & Powers Ltd. (hereinafter "JSPL" or "the informant") provided information to the Commission alleging, *inter alia*, that Steel Authority of India (hereinafter "SAIL") had entered into an exclusive supply agreement with Indian Railways to supply rail in contravention with Sections 3(1) read with 3(4) of the Act. It further alleged that SAIL had abused its dominant position in the market and deprived others of fair competition, acting contrary to the mandate of Section 4(1) of the Act.

This information was registered by the Commission and was considered in its meeting held on October 27, 2008 on which date the matter was deferred with a request for the informant to furnish additional information. The Commission also directed SAIL to submit its responding comments within two weeks and the matter was adjourned till December 8, 2009. On November 19, 2009 a notice was issued to SAIL enclosing all the information submitted by the informant. When the matter was taken up for consideration by the Commission on December 8, the Commission took on record the affidavit filed by the informant per the terms of the earlier order, but SAIL requested a 6 weeks extension to file its comments. Finding nothing to justify SAIL's request, the Commission declined the extension. In this order, it also formed the opinion that a *prima facie* case existed against SAIL and directed the Director General (hereinafter "the DG"), appointed under Section 16(1) of the Act, to investigate the matter in terms of Section 26(1) of the Act.

The Commission also granted liberty to SAIL to file its views and comments before the DG during the course of investigation. Despite these orders, SAIL filed an interim reply before the Commission, along with an application requesting that it may be heard before any interim order would be passed. On December 22, 2009 the Commission only reiterated its earlier directions made to the DG, granting liberty to SAIL to file its reply before the DG. SAIL challenged these directions before the Tribunal. The Commission filed an application on January 28, 2010 before the Tribunal seeking impleadment in the appeal filed by SAIL. It also filed an application to vacate the interim orders that had been issued by the Tribunal on January 11, which had stayed further proceedings before the DG that had been directed in the Commission's December 8 directions.

[7] This provision will be dealt with in further detail in the later part of this paper as it is the central point of the dispute before the Supreme Court.

The Tribunal, in its detailed order, held that even the direction to inquire was appealable under Section 53A(1) of the Act, and noted that CCI could not have directed the DG to inquire into the complaint without having heard SAIL. It further noted that CCI was neither a necessary nor a proper party in appeals filed by an aggrieved party before the Tribunal. The Tribunal also noted that CCI did not record any reasons why it declined to grant a time extension; therefore, it had acted in violation of principles of natural justice.

V. APPEAL BEFORE THE SUPREME COURT

The Commission approached the Supreme Court, which framed six broad questions arising from the Tribunal's decision and in the larger interest of justice administration:

1. Whether the direction passed by the Commission u/s. 26(1) of the Act while forming prima facie opinion would be appealable u/s/ 53A(1) of the Act?
2. What was the scope of the power vested with Commission u/s. 26(1) of the Act and whether parties including the informant and other affected parties were entitled to notice at the stage of formation of *prima facie* opinion?
3. Whether the Commission would be a necessary or at least a proper party in proceedings before the Tribunal?
4. At what stage and in what manner the Commission could exercise its powers u/s. 33 of the Act while passing interim orders?
5. Whether it was obligatory for the Commission to record reasons while forming *prima facie* opinion?
6. What directions, if any, needed to be issued by the Court for ensuring proper compliance of the procedural requirements while keeping in mind the scheme and object of the Act?

A. Issue 1: Right to Appeal Against the Direction Passed Under Section 26(1) of the Act

Before proceeding to the findings of the Supreme Court, it is pertinent to cite relevant parts of Sections 26(1) and 53A of the Act. Section 26 of the Act provides for the procedure for inquiry under Section 19. It reads in part as follows:

> On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall *direct* the Director General to cause an investigation to be made into the matter…[Emphasis supplied]

Section 53A(1) of the Act sets out the broad function of the Tribunal. It states as follows:

> The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal—
>
> (a) to hear and dispose of appeals against *any direction issued or* decision made or order passed by the Commission *under sub-sections (2) and (6) of section 26*, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;… [Emphasis supplied]

From a cursory reading of the aforesaid provisions, it is clear that directions passed under Section 26(1) of the Act are not mentioned under Section 53A(1) of the Act; hence, the Tribunal cannot entertain appeals against such directions. The respondents argued that the word "or"

occurring in Section 53A(1) is disjunctive and thus the expression "any direction issued" should be read as a disjunctive giving a complete right to the respondent to prefer an appeal under Section 53A. The Court, having made an exhaustive study of the scheme and the provisions of the Act and rules of statutory interpretation, noted the distinction between "and" and "or," referred to Indian, U.K. and European decisions[8] to unearth settled principles of law and finally concluded that Section 53A(1) of the Act expressly provided for which decisions or orders or directions may be appealed before the Tribunal. The Court noted that the right to appeal is a substantive right that derives its legitimacy from the operation of law or statute. If the Statute does not provide for an appeal, the Court cannot presume such right. The direction to cause an investigation into a matter under Section 26(1) of the Act does not determine any right or obligation of the parties to the *lis*. It is not mentioned in Section 53A(1) of the Act and, hence, the Court found that such orders would not be appealable under the Act.[9]

B. Issues 2 and 5: Right to Notice Before a Prima Facie Opinion is Formed by the Commission

The Court noted that the exclusion of principles of natural justice is a well-known concept and the legislature has the competence to enact such laws. Whether the exclusion of application of principles of natural justice would vitiate the entire proceedings would depend upon the nature and facts of each case in the light of the Act or Rules and Regulation applicable to that case. The Court, then, read various provisions of the Act and the Competition Commission of India (General) Regulations, 2009 to determine the nature of functions of the Commission under various provisions. The Court found that the exercise of power under Section 26(1) of the Act while forming *prima facie* opinion is inquisitorial and regulatory. It held that while forming *prima facie* opinion, the Commission does not condemn anyone. This function is not adjudicatory in nature but merely administrative. This function is in the nature of preparatory measures—in contrast to the decision-making process—and, hence, right of notice of hearing is not contemplated under Section 26(1) of the Act.

On the issue of reasons to be recorded at the stage of forming *prima facie* opinion, the Court held that the Commission must express in no uncertain terms that it is of the view that a *prima facie* case exists. Such opinion should be formed on the basis of the records, including the information furnished and references made to the Commission. The reasons need not be in detail, but there must be a minimum number of reasons substantiating the view of the Commission.[10]

C. Issue 3: Status of the Commission as a Necessary Party or Proper Party

The Court reiterated the settled position of law relating necessary party and proper party. A necessary party is one without whom no order can be made effectively whereas a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.[11] In the opinion of the

[8]*See, supra* note 1 at ¶ 29 [The Court referred to the decision of the Court of First Instance in *Automec Srl v. Commission of the European Communities*, (1990) ECR II 00367 in order to bring support for its view that the direction of the Commission at a preliminary stage are of a preparatory nature].

[9]*See*, *supra* note 1 at ¶¶ 27 – 50.

[10]*Id.* at ¶¶ 51 – 74.

[11]*Id.* at ¶ 81.

Court, the informant/applicant in a case is the *dominus litis*[12] and has the right to control the proceedings. Applying the principle of *dominus litis*, the Court held that in cases where the Commission initiates a proceedings *suo moto* it shall be the necessary party and in all other proceedings, it shall be a proper party.[13]

D. Issue 4: Power to Pass Interim Orders

On powers of the Commission under Section 33, the Court noted:

> During an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order *inter alia* should: (a) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, it is apparent that there is every likelihood of the party to the *lis*, suffering irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect on competition in the market.[14]

E. Issue 6: General Issues of Importance

One of the major outcomes of the case related to the Court's recognition and affirmation of the expeditious disposal of complaints filed before the Commission. The Court found this to be a fit case to issue certain guidelines in the larger interest of the justice administration. These directions merit special value in light of the fact that the Commission, even after more than one year of enforcing the operative provisions of the Act, has not issued a final order in a single contentious case.[15] The Court passed the following guidelines which would be in effect until Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission are framed:

a. Even though the time period for forming *prima facie* opinion by the Commission is provided in the Regulations (i.e. 60 days from the date of filing information) it is expected that the Commission will hold its meetings and record its opinion about the existence or otherwise of a *prima facie* case within a period much shorter than the stated period.

b. All proceedings including investigation and inquiry by the Commission/DG must be completed expeditiously while securing the objectives of the Act.

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[12] *Dominus litis* is the person to whom a suit belongs. This also means master of a suit. The person has a real interest in the decision of a case. It is this person who will be affected by the decision in a case. This person derives benefits if the judgment is in his favor, or suffers the consequences of an adverse decision.

[13] *See*, *supra* note 1 at ¶ 84.

[14] *Id.* at ¶ 87.

[15] The Commission has rejected some of the complaints on the grounds of lack of merit in such complaints. These orders of the Commission may be found at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150. However, it has not issued its final order in any contentious case.

c. Wherever, during the course of inquiry, the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days.

d. The reports by the DG under Section 26(2) should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of Section 26(1) of the Act.

e. The Commission/DG shall maintain complete confidentiality as envisaged under Section 57 of the Act and Regulation 35 of the Regulations. Wherever the "confidentiality" is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in terms of the provisions of the Act and the Regulations in force.[16]

VI. Conclusions—Reading Between the Lines

The verdict of the Supreme Court bears immense significance given the timing of and issues involved in its judgment. It may be noted that both "competition law and policy" and the Commission are at a very nascent stage within the broad regulatory matrix of Indian economy. The judgment of the Supreme Court rightly echoed the sentiments of proponents of free and fair market economy and it will go a long way in sketching the competition law landscape in the country. The following are some conclusions that may not be readily apparent:

1. The aims and objectives of competition law and policy have been of great concern to jurists and judges, especially in the United States. In the United States, the antitrust courts and academia have debated for decades to ascertain the true aim of antitrust laws. In academia, the Harvard-Chicago debate centered on the issue of "protection of competitors" vis-à-vis "protection of competition."[17] Unlike the debate in the United States, it seems that the Supreme Court is clear about the true aim of the Act. The Court, in its opening paragraphs, notes the importance of competition law and policy for any free market economy referring to three types of efficiencies: i.e. allocative, productive, and dynamic. The Court observes that the main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of markets responsive to consumer preferences. It may be too early to conclude, but this, even though an *obiter*, certainly indicates that Indian courts are going to lean towards the efficiency test as propagated by Chicago School of Economists rather than Harvard School.

2. While highlighting the aims of competition law, the Court makes mention of the relevant laws of other jurisdictions including those of the United States, the United Kingdom, and Australia. It would not be far-fetched to argue that the Court has indirectly hinted that, in the future, it will take into account the competition law jurisprudence developed in these jurisdictions while deciding contentious issues. This premise that the Supreme Court is going to rely on EU and U.S. court decisions to explain the substantive concepts of

[16] *See*, *supra* note 1 at ¶ 96.

[17] Until late 1950, the Structure, Conduct and Performance (S-C-P) paradigm, developed by Harvard School of Economists, dominated antitrust jurisprudence arguing that aim of antitrust laws is to protect competitors. In contrast to Harvard School, the Chicago School of Economists argued that the antitrust laws are aimed at promotion of efficiency and they have no concern with the structure of the market.

competition law is further strengthened by the fact that the Court referred to two European decisions in its very first judgment related to the Act, even when there was no need to refer to these decisions.

3. The Court has effectively defined the ambit and scope of the powers of the Commission and the Tribunal at the stage of forming of *prima facie* opinion. No jurisdiction generally allows challenging competition authorities' ability to initiate investigations. However, there may be cases where the amount of information to be filed is voluminous and the Commission, in such cases, must provide adequate time. In the light of the judgment of the Court, it is doubtful whether a person would be able to challenge the denial of extension of time by the Commission in such cases. However, an aggrieved party can invoke the writ jurisdiction of High Courts against the directions of the Commission which may not be appealable before the Tribunal.

4. In the larger interest of justice administration, the Court passed certain directions until the Commission formulates its own regulations. Though such a step by the Court is quite welcome, the timelines provided by the Court are quite unreasonable and strict. For example, the Court has directed that the DG must submit its report within 45 days under Section 26(2) of the Act. The collection of evidence and ascertainment of facts, in some cases (especially in cartel investigations), may require months. Therefore, the Court has put an onerous burden on the DG that may be difficult to implement in practice.[18]

[18] However, Regulation 20(3) of the Competition Commission of India (General) Regulations of 2009 provides that the Commission may, on an application made by the DG, extend the time for submission of the report.