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In September 2010, the Supreme Court of India handed down an eagerly awaited judgment that cleared the way for the recently empowered Competition Commission ("CCI") to flex its muscles.[2] In a comprehensive and unanimous judgment, the Court endorsed the intent of the legislature to afford a speedy and effective resolution to matters before the Commission and limited the right of parties to challenge its orders before the Appellate Tribunal.

The root of the controversy is traced to a complaint filed by Jindal Steel & Power Ltd. before the Competition Commission against the agreement between a public sector company, Steel Authority of India ("SAIL"), and the Indian Railways.[3] The Commission, convinced that a *prima facie* case had been established, issued an order for further investigation. SAIL appealed, in what was the first appeal before the Competition Appellate Tribunal.

Section 53A of the Act, which establishes the Appellate Tribunal, also states its purpose, i.e. to hear appeals from orders of the Commission.[4] That provision, however, specifically lists a number of sections in the Act from which orders are appealable. The question was whether directions of the Commission other than those specifically listed could also be appealed.

After hearing the parties, the Tribunal, in summary, ruled:[5]

1. that an appeal can be filed against the determination by the CCI (passed under Section 26(1) of the Competition Act[6]) that it was satisfied that there is a case which requires further investigation by the Director General ("DG"), the investigative arm under the Act);

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[1] The opinions expressed here are the author's own.

[2] Judgment dated 9th September 2010 in Civil Appeal No. 7779 of 2010 reported at 2010 CompLR 61 (Supreme Court).

[3] For more information regarding the initial complaint leading up to the appeal before the Tribunal, *see* A. Hussain, *Competition Update: Commission & Appellate Tribunal Up & Running*, 5(1) CPI ANTITRUST J. (May 2010).

[4] Section 53A(1): 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 this Act.

[5] Order of the Competition Appellate Tribunal dated 15th February 2010 in Appeal No. 1 of 2010, http://compat.nic.in.

[6] Section 26(1):

> 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:

2. that the Commission is not entitled to be impleaded as a party and to be heard in appeals before the Tribunal; and
3. that the order of the Commission under Section 26(1) must be a reasoned one.

This was much more than SAIL could realistically have hoped for and equally disastrous for the Commission. All orders of the Commission directing further investigation could now be appealed. Worse, the Commission could not even defend its orders. Left with little option, the Commission approached the Supreme Court in appeal.

The Supreme Court was faced with the three main questions arising out of the Tribunal's order:

a. Whether the direction passed by the Commission in exercise of its powers under Section 26(1) of the Act would be appealable in terms of Section 53A(1) of the Act?
b. Whether the Commission ought to be a party to the proceedings before the Tribunal in an appeal?
c. Whether it is obligatory for the Commission to record reasons while forming its *prima facie* opinion in terms of Section 26(1) of the Act?

Reversing the Tribunal's decision, the Court put an authoritative stamp on the Act's intent and purpose, and laid particular emphasis on matters being dealt with in a "time bound manner." If final orders were delayed, the Court noted, "the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market, and resultantly, country's economy cannot be ruled out."[7] Penning the judgment for the Court, Justice Swatanter Kumar held the first issue in favor of the Commission. Only those orders of the Commission passed under the specific provisions listed in Section 53A(1)(a) would be appealable before the Tribunal. An order recording a *prima facie* view and issuing a direction to the Director General for investigation would therefore not be appealable.

An allied question also arose, namely whether the party against whom allegations were leveled had a right to be heard prior to the Commission issuing an order under Section 26(1). Answering the question in the negative, the Court held that the Commission was free to call either party (informant or respondent), or such other third person to appear before it or provide information, prior to issuing an order for investigation. However, it was under no statutory obligation to do so. The Commission could therefore not be hauled up in appeal for not having heard a party prior to directing investigation.

The Court then went even further. It examined the nature and exercise of the Commission's power to issue interim orders pending the investigation.[8] Section 33 of the Act

[7] *Supra* n. 1, ¶ 6, p. 70. Somewhat of an overstatement one may argue, but nevertheless emphasizing the fact that proper implementation of competition laws was crucial to an open and efficient economy.

[8] Section 33: Power to issue interim orders:

> Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any 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.

empowers the Commission to injunct a party to carry on an act that it deems prejudicial to competition until the conclusion of the inquiry.

This is a common power vested in courts and tribunals in order to enable them to provide instant, albeit transitory, relief. Indeed, it is rare to find a suit or petition filed without an accompanying application for an injunction of one kind or another. In law, this power can be used only when the court is satisfied that a *prima facie* case exists and irreparable loss would be caused to the claimant if the injunction were not granted.[9]

These principles were reiterated by the Court and the Commission was instructed that the power under Section 33 could only be exercised on recording its satisfaction on the existence of a *prima facie* case and irreparable loss. However, the Court made a distinction in the nature of the Commission's satisfaction when reaching a *prima facie* opinion under Section 26(1) and under Section 33 of the Act. The satisfaction under Section 33 it said "has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act."[10] On what would constitute or satisfy this "higher degree" of satisfaction, the judgment is silent, except to say that the act in question must be a continuing one so as to necessitate the injunction.

At first blush, this distinction appears to be superficial and unwarranted. A closer reading would show that it has been precipitated by the fact that a *prima facie* opinion under Section 33 is specifically appealable under Section 53A whereas the direction under 26(1) is not. This leaves us with a peculiar situation—whereas a positive *prima facie* opinion (coupled with a direction to the DG for investigation) under Section 26(1) is not appealable, a positive *prima facie* opinion under Section 33, with or without the grant of an injunction, would be appealable. This then explains the distinction. The Commission may feel that the material before it sustains the need for further investigation under 26(1) and at the same time does not satisfy the requirement for an injunction under 33. Thus the need to record the Commission's "higher degree" of satisfaction in an order passed under Section 33, which the parties have the right of calling into question before the Tribunal.

The second issue, namely whether the Commission ought to be a party to the proceedings before the Tribunal, was also decided in favor of the Commission. The Court held that "in cases where the inquiry has been initiated by the Commission suo moto, [it] shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the Competition Tribunal."[11] The Tribunal could then draw upon the Commission's expert views to enable it to dispose of matters expeditiously. Here again, Justice Kumar shows a concern for the speedy dispensation of cases.

Since the middle of 2009 there has been a growing concern over the number of cases pending in the courtrooms. In October 2009, a national conference was held to discuss reducing pendency and delays in the disposal of cases in the judiciary. Following up this June, the Law Minister released the National Litigation Policy. Given that estimates place the government (or a constituent body) as a party to approximately 50 percent of the 31 odd million pending cases, the

[9] Technically, there is one other factor—the court must also determine the party in whose favor the balance of convenience lies, which normally depends on the practicalities of the matter at hand.

[10] *Supra* n. 1, ¶ 19, p. 76.

[11] *Id.*, ¶ 19, p. 75

Policy was primarily directed toward at reducing pendency by making the government a "responsible litigant."

Justice Kumar is one of those to have expressed concern over the number of pending cases and chided counsels for taking "unnecessary adjournments." He spoke at the National Seminar on Judicial Reforms in August 2010, which again focused on "fixing the justice delivery system" so as to provide quicker results. In July this year, he is reported to have delivered 75 judgments in a single day of hearing, unprecedented by far in the Supreme Court (the next highest tally of 25, ironically, belonging to former Supreme Court Justice, Arijit Pasayat, the author of the Tribunal's order).

This sense of speedy disposal pervades the Court's opinion in the battle between the steel giants. "Time-bound," "expeditious," and "efficient" disposal of matters influences the finding in regard to each of the issues framed; indeed, so much so that the Court found the need to frame an additional issue, not in contention between the parties: "What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent?"[12]

The Court then issued directions effectively modifying the time frame specified under the Act and the procedural regulations framed thereunder.[13] According to the directions issued (i) the Commission must now come to a decision regarding the existence of a *prima facie* case under Section 26 within a period "much shorter than" the stated 60 day period, and (ii) the Director General must submit its report within a maximum period of 45 days from the referral by the Commission.[14]

In practice, this time frame has put the DG in a tight spot. To review the material sent by the Commission, frame and issue appropriate questionnaires, receive and review information sent in reply, and form a report, all in the space of 45 days, is already proving to be an uphill task. Although the direction has no doubt been issued with good intent, it may be hard to implement.

The Court does uphold the Tribunal's order on one issue. It states that the Commission is required to record "at least some reason" while forming a *prima facie* view under Section 26(1).[15] This is somewhat antithetical given that the Court already concluded that the order itself cannot be called into question, but is perhaps inescapable given the well-settled principles regarding the

[12] *Id.*, ¶ 18, p. 75

[13] The justification for having to do so in this case is given in ¶¶ 86 and 87 of the judgment:

> Courts have been issuing directions in appropriate cases and wherever the situation has demanded so. Administration of justice does not depend on individuals, but it has to be a collective effort at all levels of the judicial hierarchy, i.e. the hierarchy of the Courts or the for a before whom the matters are sub-judice, so that the persons awaiting justice can receive the same in a most expeditious and effective manner. The approach of the Commission even in its procedural matters, therefore, should be macro level rather than micro level. It must deal with all such references or applications expeditiously in accordance with law and by giving appropriate reasons. Thus, we find it necessary to issue some directions which shall remain in force till appropriate regulations in that regard are framed by the competent authority.

[14] *See* Regulations 16, 18 and 20 of the CCI General Regulations 2009.

[15] *Supra* n.1, ¶ 19, p.76.

need to record reasons regardless of whether one is acting in a judicial, quasi-judicial, or administrative capacity.[16]

[16] The nature of the functions performed by the Commission is described somewhat vaguely by the Court. One of the reasons for the Court's decision denying the right to appeal was that the order under section 26(1) is purely an administrative order not affecting the substantive rights of the parties to the *lis* (*supra* n. 1, ¶ 22, p.80). However, later it goes on to describe this power as "inquisitorial" and "regulatory" as it is an "investigative" power given to an "administrative" body (¶ 61, p. 92). Further on the Commission is described as "discharging inquisitorial, regulatory as well as adjudicatory functions" (¶ 78, p. 98). Despite these sweeping statements, the judgment is consistent in describing the function under 26(1) as an administrative one. This, however, puts the Court on a bit of a sticky wicket when it comes to the orders of the Commission passed under Section 33. As noted earlier in this paper, an order under Section 33 (which the court held must include *prima facie* opinion regarding the violation of Sections 3, 4, or 6 of the Act) is specifically appealable under Section 53A. Would this mean the Commission is performing administrative functions under Section 26(1) and adjudicatory functions under Section 33 when coming to a *prima facie* opinion?