

IMPORTANT JUDICIAL PRONOUNCEMENTS BY COURTS IN DEVELOPING THE JURISPRUDENCE OF CCI

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Competition Commission of India

BEFORE THE SUPREME COURT

1. Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744;

- Order of Competition Commission taking a *prima facie* view and issuing direction to Director General for investigation not appealable.
- No statutory duty on Competition Commission nor any party can claim right to notice and/or hearing at stage of formation of *prima facie* opinion under Section 26(1).
- The power to issue interim orders has to be exercised by the Commission sparingly and under *compelling and exceptional circumstances*.
- The Commission is expected to record at least some reason(s) even while forming a *prima facie* view.
- Commission to pass speaking orders while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity.

2.CCI v. Co-ordination Committee Of Artists and Technicians of W.B. Film and Television and Ors.; (2017) 5 SCC 17

- Information was filed by Sajjan Khaitan against Eastern Motion Picture Association (EIMPA) and Committee of Artists and Technicians of West Bengal Film alleging contravention of the provisions of the Act by limiting and controlling the distribution and exhibition of dubbed TV serials in their areas of operations.
- CCI found their conduct to be in violation of Section 3(3)(b) read with Section 3(1) of the Act.
- COMPAT: Order of CCI was set aside and it was held that CCI has committed an error in holding the Co-ordination Committee guilty of contravention of Section 3(3)(b) of the Act.

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- In appeal, Hon'ble Supreme Court held that:
 - In order to find contravention, it is first necessary to find agreement. Such an 'agreement', referred to in Section 3 of the Act has to relate to an economic activity since it is central to the concept of Competition Law;
 - Any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act, when it engages in economic activity.
 - An economic activity includes any activity, whether or not profit making that involves economic trade.
 - While inquiring into any alleged contravention and determining whether any agreement has an AAEC under Section 3, factors enumerated under Section 19(3) were to be examined;

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- Since it is the notion of 'power over the market' which is the key to analysing many competitive issues, the first and foremost aspect that needs determination is: 'What is the relevant market in which competition is effected'
- With regard to the said finding of the Supreme Court, CCI filed a clarification application to which Hon'ble Supreme Court clarified that determination of 'relevant market' is not a mandatory pre-condition for making assessment of the alleged violation under Section 3 of the Act.

**3. Excel Crop Care Limited v CCI;
(2017) 8 SCC 47**

- Information was filed by Food Corporation of India (FCI) against M/s. Excel Crop Care Limited, M/s. United Phosphorous Limited, M/s. Sandhya Organics Chemicals (P) Ltd. and Agrosynth Chemicals Limited, in relation to tenders issued by FCI for supply of Aluminium Phosphide Tablets ('APT') of 3 gms.
- CCI found the acts and conduct of the parties in contravention of Section 3(3)(b) and Section 3(3)(d) of the Act. Penalty @ 9% on the total turnover of the parties was imposed on the contravening parties.
- COMPAT: Order of CCI was upheld on merit. However, penalty was reduced from 9% of total turnover to 9% of "relevant turnover" i.e. turnover only of the product of which the contravention is established.

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- In appeal, Hon'ble Supreme Court held that:
 - The inquiry into the tender of March, 2009 by the CCI is covered by Section 3 of the Act inasmuch as the tender process, though initiated prior to the date when Section 3 became operational, continued much beyond May 20, 2009, the date on which the provisions of Section 3 of the Act were enforced.
 - It was contended that the expression 'turnover' is not limited or restricted in any manner and introduction of concept of 'relevant turnover' amounts to adding words to the statute. COMPAT gave restricted interpretation to 'turnover' by making it product specific and not person/enterprise specific. However, said arguments were not entertained by the court.
 - When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. Penalty under Section 27(b) of the Act has to be imposed on 'relevant turnover' viz., relating to the product in question in respect whereof provisions of the Act are contravened rather than 'total/entire turnover' of the company covering all the products.

4. CCI v Bharti Airtel Ltd. and Ors.; (2019) 2 SCC 521

- Information was filed by Reliance Jio Infocomm Limited alleging anticompetitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited.
- CCI finding prima facie case of contravention ordered investigation by DG under Section 26 (1).
- Bombay High Court, upon challenge set aside the direction passed under Section 26(1) on the ground that CCI had no jurisdiction.

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- In appeal, Hon'ble Supreme Court held that:
 - Only CCI is empowered to deal with the anti-competitive act from the lens of the Competition Act, 2002 (Act). The Court noted that the unique feature of CCI is that it is not sector based body but has jurisdiction across which transcends sectoral boundaries, thereby covering all the industries, with focus on the object and purpose behind the Act.
 - The specific and important role assigned to CCI cannot be completely wished away and the 'comity' between the sectoral regulator (i.e. TRAI) and the market regulator (i.e. the CCI) is to be maintained.
 - High Court of Bombay was competent to deal with and decide the issues raised regarding jurisdiction in exercise of its power under Article 226 of the Constitution. However, the High Court would not be competent to adjudge the validity of a direction passed under Section 26(1) on merits.

5. CCI v JCB; SLP CrI. Nos. 5899- 5900/2016

- CCI ordered an investigation under Section 26 (1) into an alleged abuse of dominant position by JCB.
- Pursuant to the same, dawn raid was carried out by the DG in the JCB premises and all incriminating documents, hard drives and laptops found by the inspecting team during the course of the “dawn raid” were seized.
- A writ petition before the Delhi High Court was filed for setting aside of the search and seizure conducted by the DG. The Single Judge Bench of Delhi High Court stayed the investigation restraining DG from acting on the seized material for any purpose whatsoever till the next date of hearing.
- CCI filed an SLP in the Supreme Court against the order of the Delhi High Court.

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- Hon'ble Supreme Court held that:
 - The provisions of Section 240A of the Companies Act, 1956 do not merely relate to an authorization for a search but extend to the authorization of a seizure as well.
 - Unless the seizure were to be authorized, a mere search by itself will not be sufficient for the purposes of investigation.
 - By virtue of Section 240A read with Section 41(3) of the Act, DG was authorised to conduct search and seizures.
 - The blanket restraint which had been imposed by the Delhi High Court by way of stay on the DG from acting on the seized material for any purpose whatsoever was not warranted.
 - Matters remitted back to Delhi High Court for decision.

HIGH COURTS

6. CCI v Grasim; LPA 137/2014 pending before Delhi High Court

- DG has reported contravention of the provisions of Section 4 when there was no such direction of CCI in 26 (1) order in this regard.
- Application filed by Grasim to set aside the DG investigation report on the aforesaid ground was dismissed by CCI stating that directions given u/s 26 (1) are only meant to initiate the process of investigation by DG and CCI does not interfere during the period of investigation.
- In appeal, Learned Single Judge of Delhi High Court in Writ Petition No. 4159/2013 held that:

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- The formation of prima facie opinion of contravention is a sine qua non for investigation by the DG. If the DG investigates information not considered by CCI in the first instance, such act of DG is ultra vires his powers under the Competition Act.
- If CCI prima facie finds violation of Section 3 but DG while conducting investigation reports contravention both/ either S. 3 and/ or 4 upon the same set of information, then such report will not be contrary to the provisions of the Act.
- However, if the DG relies on altogether different information, then such conduct would be contrary to the provisions of the Act. In such a case, CCI would be entitled to treat such part of the DG report as fresh information under Section 19 and proceed accordingly.
- The captioned LPA was filed by CCI is pending before the Delhi High Court upon a limited issue i.e. whether DG can expand its scope during investigation?

7. CCI vs. Telefonaktiebolaget LM Ericsson & Anr.; LPA 550/2016 pending before Delhi High Court

8. The Tamil Nadu Film Exhibitors Association Vs. CCI; Review Petition No. 329/2015 in W.A. No. 1806-1807/2013 pending before Madras High Court

- Ericsson was not granting the license on FRAND terms. Also it was alleged that in order to grant license, the Non-Disclosure Agreement (NDA) containing onerous clauses has been imposed on them. (CCI Case No. 4/2015)
- The prima facie order of CCI was set aside by the Single Judge, not on merits but only for the reason that the matter was already settled between the parties. Delhi HC observed that there is no need to investigate the matter since the parties have amicably reached a Settlement/Compromise. Further, CCI was directed to record the compromise.
- Aggrieved by the Single Judge order, LPA has been preferred by the CCI, on ground that once information is filed before the CCI, the informant can neither withdraw the information nor his entering into any compromise/ agreement with the Opp. Party would affect the proceedings before CCI.

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- In another case (CCI Case No. 1/2013), CCI passed a direction under S. 26(1). 26(1) order was challenged by filing writ petitions before the Madras High Court. The Writ Petitions were dismissed and the writ appeals were filed against the order of dismissal.
- During the pendency of the writ appeals (1806-1807/2013), the parties arrived at a compromise and filed a memo praying for recording of the compromise and disposal of the writ appeals.
- Madras High Court disposed of the Writ Appeals filed by the parties, directing the parties to file the memorandum of compromise/ settlement entered into between the Association and the informant before the CCI.
- CCI has filed captioned review petition contending that CCI has no power under the Act to record a settlement/compromise reached between the parties.

09. Telefonaktiebolaget LM Ericsson (Publ) vs CCI & Anr. 2016 ComplR 497 (Delhi) – Delhi High Court

- Separate informations were filed by Micromax Informatics Ltd. and Intex Technologies (India) Ltd. alleging that Ericsson, which has a large portfolio of Standard Essential Patents in technologies used in mobile handsets and network stations, has abused its dominance.
- CCI ordered investigation by the DG under Section 26 (1) of the Act.
- Said direction of investigation was challenged by Ericsson before the Delhi High Court alleging that it was beyond the jurisdiction of the Commission. The Court dismissed the writ petitions stating that the CCI has jurisdiction to investigate into the matter.

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- Delhi High Court held that:
 - If there were irreconcilable differences between Patents Act and Competition Act in so far as anti-abuse provisions were concerned, Patents Act being a special act shall prevail notwithstanding provision of Section 60 of Competition Act. Legislative intention that, Competition Act and Patents Act be worked harmoniously.
 - Operative width of Patents Act and Competition Act was different. Question as to whether a condition imposed under agreement was reasonable or not would be a matter which could only be decided by CCI under provisions of Competition Act.

THANK YOU!!