

Director General & Competition Commission Powers: Madras HC Sets Precedent

Date : Mon, 03/09/2015 - 16:26



**Gowree Gokhale, Partner
and Head of TMT Practice at
Nishith Desai Associates**



**Huzefa Tavawalla, Co-Head,
Commercial Law Practice at
Nishith Desai Associates**



**Satish Padhi, Member,
Competition Law Practice at
Nishith Desai Associates**

Introduction

The Madras High Court recently in Hyundai Motor India Limited (“**Hyundai**”) v. Competition Commission of India (“**CCI**”) has clarified that under the Competition Act, 2002 (“**the Act**”):

- The Director General (“**DG**”) cannot initiate an investigationsoumotu;
- The process to be followed should be: DG to submit information to CCI, and then CCI to cause an inquiry under Section 19 of the Act and order for an investigation – thereafter DG can initiate investigation.
- The CCI is not required to form a *prima facie* opinion before initiating an investigation upon receipt of information pertaining to the same subject matter.

This article analyses the aforesaid decision of the Madras High Court.

Background and Factual Matrix

A complaint was lodged before the CCI under Sections 3 and 4 read with Section 19 (1) (a) of the Actalleging anti-competitive practices and abuse of dominant position against three Automobile manufacturers namely Honda Siel Cars India Limited, Volkswagen India Private Limited and Fiat India Automobiles Limited. The complainant had sought for an enquiry into the trade practices of the automobile manufacturers and a restraint order against them for practicing unfair, restrictive and monopolistic trade practices.

An order was passed under Section 26 (1) of the Act by the CCI directing the DG to conduct an investigation into the aforesaid allegation and submit a report within sixty days. Pursuant to which the Additional Director General filed a report before the CCI on April 19, 2011 seeking the approval of the CCI *to expand the scope of the investigation to other car manufacturers as similar practices were adopted by them in the areas of after sales services and procurement of spare parts.*

CCI thereafter passed an order on April 26, 2011 (“**Impugned Order**”) permitting the scope of expansion of the scope for investigation. Subsequent to the order of the CCI, the DG ordered for inspection of the records of Hyundai *vide* notice dated May 4, 2011 (“**Impugned Notice**”).

Hyundai and Nissan challenged the Impugned Order of the CCI (*vide* writ petitions), while Hyundai also challenged the Impugned Notice of the DG. The single judge of the Madras High Court dismissed the writ petitions stating that an effective alternative remedy of approaching the Competition Appellate Tribunal (“**CAT**”) exists.

Nissan filed an intra-court appeal against the order of the single judge on the ground that, no appeal would lie to CAT under Section 53 B of the Act against the Impugned Order. This is so because under Section 53 A of the Act, CAT is empowered to hear and dispose of appeals against an order passed by the CCI under Section

26 (2) to (6) of the Act. However, CAT is not empowered to hear an appeal from an order passed by the CCI under Section 26 (1) of the Act. The division bench thereafter remitted the matter back to the single judge for disposal of the case on merits.

The Madras High Court clubbed together the writ petitions filed as they involved similar questions of law.

Issues

- (1) Whether the DG of the CCI has *suomotu* power to initiate investigation?
- (2) Whether the CCI could have the power under Section 19 of the Act to pass the Impugned Order?
- (3) Whether formation of a *prima facie* opinion was a *sine qua non* for passing the Impugned Order by the CCI?
- (4) Whether the DG has acted in excess of its jurisdiction vested to him under the Act?

JUDGMENT AND JUDICIAL REASONING

The reasoning of the Madras High Court speaking through V. Ramasubramanian J is stated as follows:

(1) The Competition Act, 2002 was enacted pursuant to S.V.S Raghavan Committee Report and the 93rd Report of the Parliamentary Standing Committee which was submitted to the Rajya Sabha in August 2002. Both of them have clearly stated that the DG will have no *suomoto* powers of investigation. Further, the statement of objects and reasons of the Competition Act, 2002 states that the DG would be able to act only if so directed by the CCI but will not have any *suomoto* powers for initiating investigations. Hence, it is abundantly clear that the Act does not empower the DG to initiate an investigation *suomotu*. However, the complainant had sought for an enquiry into the trade practices of all the car manufacturers including the three car manufacturers. In light of the same, it was stated that the DG did not act *suomotu* but acted pursuant to the complaint.

(2) As per Section 19 (1) (a) of the Act, the CCI can inquire into any alleged contravention upon receipt of any information from any person which is accompanied by such fee as found in the regulations. After examining the definition of the term 'person' as defined in Section 2 (l) of the Act, the court concluded that 'person' includes every artificial juridical person and hence DG would be covered by the definition.

(3) CCI is required to form a *prima facie* opinion for ordering an investigation upon receipt of any information under Section 19. However, if the additional information received is substantially the same or is covered by any previous information received, the CCI was not required to form a *prima facie* before ordering an investigation. The proviso to Section 26 (1) of the Act makes it evident that the Commission is not required to form a *prima facie* opinion again if the subject matter of information is substantially the same as has already been received. In the instant case, the CCI had formed a *prima facie* opinion on the complaint received from the complainant. The information supplied by the DG through a memo is to be treated as additional information under the proviso of Section 26.

(4) The DG has been conferred with all the powers that have been provided to the CCI under Section 36 of the Act such as summoning and enforcing the attendance of any person, the discovery and production of documents and issuing commissions for the examinations of the witness. Hence, action of the DG pursuant to the order of the CCI directing investigation was held to be valid in law.

ANALYSIS

The Delhi High Court in *Grasim Industries Limited v. Competition Commission*^[1] ("**Grasim Industries**") has held that the DG would have no power to undertake an investigation in respect of the complaint which the Commission did not consider while forming an opinion.

However, the Madras High Court has distinguished the decision of the Delhi High Court in *Grasim Industries* on facts by stating that the DG did not go beyond the scope of his powers as he was merely providing additional

information in relation to the subject of which the CCI already had knowledge. Hence, the proviso to Section 26 (1) of the Act inserted by the Competition (Amendment) Act, 2007 would apply as the information received from the DG was simply additional information pertaining to the same subject matter of complaint.

In *Grasim Industries*, the DG was directed by the CCI to investigate into the alleged anti-competitive practices carried out by the manufacturers of manmade fibers. However, the DG extended his investigation in relation to manufacturers abusing their dominant position. This was clearly held to be beyond the powers of the DG as investigated into a complaint which the CCI did not consider at all.

Interestingly, the proviso to Section 26 (1) of the Act states that if the subject matter of information is in the opinion of the CCI substantially the same, then the new information may be clubbed together with the previous information and the CCI is not required to form a prima facie opinion. The Madras High Court has held that the information received from the DG will fall under Section 19 (1) (a) of the Act.

Further, the Court has left open the CCI and the DG to rope in other car manufacturers and automobile manufacturers for the investigation pertaining to the same subject matter.

Separately, the Competition (Amendment) Bill, 2012 (“**Bill**”) has proposed some radical changes to the powers of the DG. It has removed the provision of Section 41 (3) of the Act which currently provides that the powers of a DG shall be akin to that of an Inspector under Sections 240 and 240-A of the Companies Act, 1956 and the DG was required to obtain an order from the magistrate of relevant jurisdiction in order to conduct ‘*search*’ and ‘*seizure*’ operations. However, the Bill empowers the DG to conduct search and seizure operations by seeking permission from the chairperson of the CCI if he is satisfied that the entity or the person against whom investigation is carried has failed or would not provide the information sought for or would destroy, alter the requisite information. This Bill has been brought in to make the power of the DG similar to that of the investigative authorities under other enactments such as and Income Tax Act, 1961.^[2] This will enable the DG to carry out dawn raids and will go a long way in effective investigation of cartels and other anti-competitive practices carried out under Section 3 of the Act.

^[1] (2014) 41 Taxmann 333 (Delhi)

^[2] See Section 132 of the Income Tax Act, 1961