

Competition Law Hotline

November 02, 2015

COMPAT ASSUMES AUTHORITY TO DIRECTLY INITIATE INVESTIGATION BY DIRECTOR-GENERAL

- Rules that a consumer of electricity can file an information before Competition Commission of India. Restrictions / limitations could not be read into Section 19 (1) (a) of the Act to limit eligibility of an informant under the Act.
- COMPAT rules that order refusing investigation under Section 26 (2) of the Act can be challenged in an appeal under Section 53B of the Act.
- COMPAT in exercise of powers under the Act DG to investigate investigation for violation under the Act rather than remand to Competition Commission for reconsideration.

BACKGROUND

The Competition Appellate Tribunal ('COMPAT') allowed an appeal against an order of the Competition Commission of India ('CCI') and directed the Director-General ('DG') to investigate allegations of cartelization by the bidders in relation to procurement of coal.¹ CCI concluded that material on record did not make out a *prima facie* case against Maharashtra State Power Generation Co. Ltd. ('MAHA Genco') and the bidders alleged to have been colluding. In an earlier round of litigation BSN Joshi & Sons Ltd ('BSN Joshi') successfully challenged a tender issued by MAHA Genco in relation to coal procurement services. Supreme Court of India ('Supreme Court') observed that private respondents had formed a cartel and that consequently, BSN Joshi's application for coal procurement services was directed to be reconsidered.² COMPAT relied on observations of the Supreme Court in *BSN Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Others* and allowed the appeal and also directed the DG to investigate allegations of cartelization.

COMPAT's order does not set any boundaries on who can file an information before CCI. The informant in the present case was the advocate for BSN Joshi in the earlier round of litigation – COMPAT held that this was not a bar. More importantly, the direction to the DG to investigate rather than remanding the case to CCI is fairly unprecedented.

FACTS

Supreme Court litigation

MAHA Genco floated a tender to appoint 'private liasoning agents' for supply of quality coal, transportation and its supervision. BSN Joshi the lowest bidder and yet was unsuccessful. It successfully challenged MAHA Genco's selection process and the Supreme Court held that the rejection was unfair.³ However, despite Supreme Court upholding eligibility of BSN Joshi and giving directions, MAHA Genco did not consider it for the tender ('SC Order'). Consequently, a contempt petition under Contempt of Courts Act, 1971, was filed by BSN Joshi before the Supreme Court for non-compliance of SC Order. In the contempt petition, BSN Joshi made allegations of cartel-like behavior and substantially, Supreme Court accepted these allegations (even though Supreme Court was not the forum to arrive at a conclusion on whether a party was part of a cartel like arrangement). While disposing off the contempt petition, Supreme Court made following observations in its disposal order ('Contempt Order'):⁴

We are distressed to see that MAHAGENCO had been encouraging formation of a cartel and, thus, allowing the rate of transportation of coal to go high up. Unless a power generating company takes all measures to cut down such malpractices, the generation cost of electricity is bound to go higher and ultimately the same would be passed on to the consumers of electricity. We hope a public sector undertaking would take adequate and appropriate measures to meet the said contingency in future.

Thereafter, the tender was ultimately awarded to BSN Joshi. However, the contract in favor of BSN Joshi was terminated prematurely on the ground of unsatisfactory performance.

Information before CCI

An advocate practicing in Nagpur filed the present information relying substantially on the SC Order and the Contempt Order and alleged that MAHA Genco enabled the opposite parties to the information ('OPs') to act like a cartel. Based on the material before it, CCI, by a majority ('Majority Opinion') came to the conclusion that no case was made out against MAHA Genco and in fact, the informant, did not have *locus standi* to file the information before CCI ('CCI Order'). Majority Opinion noted that prices quoted were in a narrow band, but, that by itself was not sufficient to hold that there was a cartel or collusion. Majority Opinion further held that it was not possible for CCI to rule on alleged corrupt practices by MAHA Genco. The dissenting view ('Dissenting View') placed great reliance on the SC Order and Contempt Order and concluded that a *prima facie* case was made out for further investigation under Competition Act.

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Two issues arose for consideration before COMPAT:

- Whether the informant in the case had *locus standi* to file the information before CCI, and,
- Whether CCI Order deserved to be set aside.

COMPAT ORDER

COMPAT held that section 19 (1) (a) of Competition Act, 2002 (**‘Competition Act’**) did not provide for any limitation on who could file an information. In the present case, informant was admittedly a consumer of electricity and hence, was affected by conduct of MAHA Genco. COMPAT also rejected another argument of OPs that informant had not made a complete disclosure before CCI, namely, that informant before CCI was associated with lawyers who represented BSN Joshi in the Supreme Court in the earlier round. However, COMPAT rejected this ground as well and held that the fact that the informant was practicing as an advocate with the counsel who had represented BSN Joshi in Supreme Court was not sufficient to justify the ‘dubious’ inference that the informant was prosecuting the case for BSN Joshi.

On allegations regarding cartel like behavior, COMPAT concluded that based on a reading of SC Order and Contempt Order, OPs were acting like a cartel. COMPAT also held that the observations of Supreme Court would be relevant and binding on CCI and therefore, CCI was bound to take cognizance of the fact that Supreme Court had expressed view on a related issue. COMPAT also held that the allegations of informant read with distribution of successful bidders, clearly made out a *prima facie* case of cartel like behavior by OPs and therefore, the matter ought to have been referred for investigation.

COMPAT approved the findings in the Dissenting Opinion and accepted the conclusions in the Dissenting View, including those relating to ‘relevant market’. Thus, rather than remand the matter back to CCI, COMPAT itself directed investigation by the DG.

OUR ANALYSIS

COMPAT’s order almost exclusively relies on observations of Supreme Court in the earlier round of litigation. The powers of a court to take cognizance of judgments of another court are provided for in sections 40 to 43 of Evidence Act, 1872 (**‘Evidence Act’**). Issues of cartelization were not directly in issue before the Supreme Court and hence it is arguable that COMPAT ought not to have relied on those observations, particularly, keeping in mind Section 42 of the Evidence Act.⁵ Admittedly, while reviewing material on record at the preliminary stage to determine whether a case is fit for investigation, CCI only takes a *prima facie* view of material on record. Although COMPAT specifically rejected CCI’s observations in CCI’s Order, it may have been more appropriate to remand the matter to CCI for fresh reconsideration rather than COMPAT directing DG to investigate – a fairly drastic exercise of power by COMPAT.

Section 53B (3) of the Competition Act provides:

On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against. (emphasis added)

COMPAT’s power to direct DG to conduct the investigation may be considered beyond the scope of powers under section 53B (3) of the Competition Act. There does not appear to be a precedent of COMPAT restoring a complaint and also directing investigation by the DG. It is settled law that courts cannot direct the investigating agency how to carry out an investigation and powers of court are limited. Section 129B of Customs Act, 1962 and section 35C of Central Excise Act, 1944 use similar language as section 53B – ‘*pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority (emphasis added)*’ and there is no precedent for either tribunals exercising such powers. It is therefore a moot point, whether COMPAT has such powers⁶ and if so, whether any parameters are to be satisfied before COMPAT exercises such powers.

– **M.S. Ananth & Pratibha Jain**

You can direct your queries or comments to the authors

¹ Shri. Surendra Prasad v. Competition Commission of India & Ors. Appeal No. 43 of 2014.

² BSN Joshi & Sons Ltd. V. Nair Coal Services Ltd. And Others (2006) 11 SCC 548.

³ High Court of Bombay, Nagpur Bench, dismissed the writ petition (being Writ Petition No. 2444 of 2005). This dismissal was challenged in Supreme Court.

⁴ Order dated December 19, 2008, in Contempt Petition No. 245 of 2007.

⁵ Section 42 - Judgments, orders or decrees other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

⁶ See for instance *I.T.O. v. Mohammed Kunhi* 1969 SCR (1) 65 for the argument that tribunals have necessary powers to carry out their functions and *Union of India v. Paras Larinates (P) Ltd.* 1990 SCR (3) 789 for a discussion on when courts should refrain from interfering with the executive.

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