Matter of Penalty on Insurance Companies

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The Competition Commission of India(CCI) had imposed a penalty of Rs. 671 Crores, cumulatively, on four public sector general insurance companies. All the four companies preferred an appeal before the Competition Appellate Tribunal (COMPAT). In its appellate order, the COMPAT did not disagree with CCI as far as the applicability of penalty was concerned but reduced the quantum by Rs. 669 Crores.

The write up discusses ONLY the factual aspects of the case, strictly for academic purposes, WITHOUT airing any personal opinions on the issue. This is being done on account of the fact of the author being professionally involved in the matter.

On March 06, 2017, Court Number 2 of the Hon'ble Supreme Court of India, on Bhagwan Das Road in Delhi, was in the midst of chaotic hearings as it nearly always happens on every Monday and Friday before the apex court of the country. Any casual conversation with any of the persons walking in the black robes in the court premises of Hon'ble Supreme Court would reveal that Mondays and Fridays are like the days when, metaphorically speaking, 'tossing of coin' is officially on, on the premises of the court. It has been frequently told by the Senior Advocates, who normally dominate the exalted landscape of Hon'ble Supreme Court of India (SC) that predicting the outcome of any matter on Monday or Friday is like attempting to tell which way the coin would fall - head or tail. The reasons are not very far to seek. Being a litigious society as we are and many instances involving genuine mis-carriage of justice, at lower levels, results in a situation where a large number of cases vie for the attention of the Hon'ble Supreme Court of India. The gates of the temple of justice are opened for such likely new entrants on each Monday and Friday when the court is open for admission of new cases. These are the days which are reserved for considering the cases for admission. It includes all kinds of Special Leave Petitions, Civil Appeals, Writs and what have you under all different laws of the country.

On an average day, almost all the benches are having not less than anywhere from 50 to 80 or so cases listed for the hearing. Despite that being so, it is not uncommon for the different benches to clear the list quite frequently only in the first half that is prior to 1 PM on that day and, in some cases, the table can be cleaned of all the new matters by as early as 11:30 AM/12 PM after the assembly of the court at 10:30 AM. The average time available for any

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matter is not very long. Naturally, the time and attention given to each case and the time in which arguments can be submitted supporting admission for the new matters is extremely small. This time window being so small, it is a challenge both for the Honourable Judges to decide and understand the import of the matter being listed and the litigants and advocates to invite the kind attention of the Hon'ble Supreme Court of India and be able to convince the bench of the merits of the case and why it needs the attention and time of the apex court. Time and resources being at premium and time and resources of the Hon'ble Supreme Court being on a higher premium, it is natural and obvious for the highest court to decide as to in which matter its time is more effectively utilised. It is not uncommon to hear of many cases where the bench declares 'question of law kept open, matter dismissed'. Though for the litigant who has gone before the Hon'ble Supreme Court of India with an injury caused because of certain question of law which has not been rightly interpreted, it is the end of the road, but, in its wisdom, the highest court in the land takes a view that that particular matter is not worth its time and attention even if the issue may be significant and can be dealt with later in some other 'more important' case. It is also not uncommon to hear the bench dismissing the matter and saying 'come back in a better case'. What is a better case? And what is not a better case? It can be left to your own devices. As the regular fixtures in Hon'ble Supreme Court reveal, the success rate on Mondays and Fridays for admission of new matters is pretty low. It does not mean that the cases are not being taken cognisance of, some cases do. Nonetheless one thing is certain that it is very difficult for any advocate to be able to predict, beforehand, whether any particular case shall be admitted or not. To this extent, there is a degree of uncertainty in the entire arrangement of delivery of justice before the highest court in the land.

To understand this particular judgement in the case of public sector insurance companies, further, we should recall that on 9th December 2016, Competition Appellate Tribunal (COMPAT) passed an order in an appeal filed by the four public sector insurance companies viz. United India Insurance Company (UIC), Oriental Insurance Company Limited (OIC), National Insurance Company Limited (NIC) and New India Assurance Company Limited (NIA) against an order imposing penalty on these companies by the Competition Commission of India (CCI). It may be recalled that way back in May, 2015, the CCI had imposed a penalty of Rs. *671* Crores, cumulatively, on the four insurance companies mentioned above (hereinafter referred to as the Insurance Companies) for an alleged act of cartelisation in a scheme of Rashtriya Swasthya Bima Yojna (RSBY) floated by the Kerala Government to help the Below Poverty Line (BPL) families in the entire state of Kerala. It may be recalled that this was a totally new scheme in which the claim ratio was not known as such kind of scheme had not been tried prior to that point of time elsewhere in the world.

As is generally known, the business of insurance operates on the principle of probability. It is for this reason that some professionals called actuaries, who specialise in the incidence of probability with regard to various claims such as claims of life insurance or claim of motor accidents etc., are engaged by the insurance companies to assess the actual burden. The principle followed by the insurance companies is simple and it is that the premium is given by the all the policy holders, however the claims are not made by all the policy holders. If it is a question of health policy what matters is how many people actually fall sick. It is true that from an individual's

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perspective, the probability of having to shell out a huge sum for certain critical illnesses may be a big issue as compared to the burden of paying out an annual premium at a slight cost to his annual savings out of his earnings. Thus it makes sense for either an individual or an institution , if it wants insurance for its employees, to safeguard or hedge against the risk of life or business. If that person actually falls sick, the expenditure borne by an insurance company may be much more than the premium paid by the individual concerned till this point of time. However, there can be instances where the person does not fall sick and, in the process, the amount paid as premium goes down to drain as far as the person is concerned. It does not actually go down the drain, it goes to guard against the potential of falling sick or having a guaranteed healthy life span. Thus as far the individual or institution is concerned, they have to assess the risk of actually paying the premium and its sustainability with respect to their earnings and buying either the guarantee of staying healthy or being treated well without huge burden to them if falling sick.

From the perspective of an insurance company, it is this part of 'probability' which makes it an extremely interesting and specialised job. On the basis of the specialists called actuaries, the company looks into the probabilities of a particular percentage of the population falling sick and the anticipated quantum of the cumulative claims from those people falling sick. To an insurance company, it remains a worthwhile business proposition if the 'out go' after assessing all these probabilities on the amount of claims is a less than or equal to the premium amounts received from various constituents. However, in case the claims in the real life scenario far exceed the amount of premium received, it is becomes a losing business proposition which can be termed as a 'business risk' and may be decided to be tolerated by any company in the short run as the business development proposition but cannot be a basis of doing business on a sustained manner in long term. Sometimes, to make an entry into a particular market, a company may choose to take a gamble and learn along the way and absorb the claims payable. This gives the company an intimate knowledge of the claim ratio and the sustainability of the scheme. This may be leveraged next time when similar schemes are launched and the profitability or sustainability of such schemes is no more in question. Thus the knowledge about claim ratios in various schemes under various circumstances are extremely valuable input variables for understanding or assessing the sustainability of any insurance scheme.

The matter, whose appellate decision has been mentioned in the preceding paragraphs relates to this kind of insurance business. On account of the inherent high risks involved, the insurance business is highly specialised and is accorded a special status in different countries from the point of view of suitability of their bottom line so as to ensure that the solvency ratio of the insurance companies remains healthy. A little wrong judgement here and there and a few wrong insurances given can wipe out complete companies in absence of adequate safeguards. However, the

scheme being pro poor for 'below poverty line' families of Kerala and having substantial risk did not find too many takers or enthusiasm amongst the private players to apply for such a scheme was considerably less. It is for this reason that Government sometimes uses its prerogatives and coxes, cajoles and, sometimes, directs the public sector undertaking general insurance companies to bid for such schemes where the private sector players might be slightly hesitant on account of an unknown claim ratio history or there being no history at all. Being under the direct administrative control of the Central Government, within the Department of Financial Services (DFS) within the Ministry of Finance, it becomes extremely difficult for the companies to resist the directives which may be issued either orally or in writing. This factum runs contrary to the status of these four insurance companies as 'board run independent companies' under the Companies Act 1956 (and now Companies Act 2013). However nerve centre being with the Department of Financial Services, it is nearly impossible for so called board elected Chairman to defy the directions given by the Central Government in case he is keen to survive in the job. This has its own dynamics.

So the issue here culminated to the point whether the so called public sector general insurance companies are free as expected within the four corners of law under Companies Act of 1956 (and later 2013) or they are mere links to execute the sovereign functions and objective of the Central Government. Another question which is extremely intimately connected with the first question is whether a 'decision making process' amongst the four general insurance companies can be treated as a conspiracy in terms of section 3 of the Competition Act, 2002 (the Act) in view of the fact that entire share holding of these companies lies with the President of India (after the disinvestment of GIC). Can a process of consultation amongst the four general insurance companies , which practically behave almost different divisions of the same big parent, be called a conspiracy ? This is wider question. From now onwards, we will proceed to examine how these issues have been dealt in by CCI and COMPAT.

The above background was necessary to understand the import of what happened in Court Number 2 on March 06, 2017. There was a matter in which Appeals have been filed by the Competition Commission of India (CCI) before the highest court in the land against the order of Competition Appellate Tribunal (COMPAT) confirming the action of the CCI of imposing a penalty of Rs. *671* crores on four public sector general insurance companies viz. United India Insurance Company (UIC), Oriental Insurance Company Limited (OIC), National Insurance Company Limited (NIC) and New India Assurance Company Limited (NIA) (here in after collectively referred to as the public sector general insurance companies) but reducing the quantum of penalty. As discussed in the beginning, a couple of months before that, on December 09, 2016, COMPAT had passed an order in an Appeal filed by these four public sector insurance companies against the order of CCI. As the matter was called out, on serial number 15 in the Hon'ble Supreme Court, as the counsel engaged to represent the CCI was busy elsewhere, another lawyer representing CCI sought to seek the indulgence of the Hon'ble Bench for a 'pass over', a technicality in which the matter is kept aside while other following matters are heard. After the whole list is over, the 'passed over' matters are taken up towards the end before the bench rises. When this advocate was requesting for a 'pass over', came a surprised announcement from the Hon'ble Bench stating that the matter was admitted and there was no

need of a 'pass over'. In a situation where a few scores of cases are crying for attention and trying their luck to be noticed even with a lukewarm 'issue notice', conferring the title of 'appeal admitted' in a matter where even the Senior Counsel has not opened his mouth is a rarity indeed. But this rarity indicated that indeed there was a 'question of law' involved and it did not require investing of time of any Senior Counsel or spending time by the bench.

This simple anecdote does go on to explain the important issues involved in the matter in which the COMPAT had decided on an appeal against the order imposing penalty by CCI on the four general insurance companies. To look into the factual background, earlier there were a large number of insurance companies which, over a period of time, were consolidated and, thereafter, a holding company called General Insurance Corporation (GIC) was formed which was a holding company for the shares of the four general insurance companies mentioned herein above. In 1972, by an instrumentality of General Insurance Business (Nationalisation) Act, 1972 (GIBN Act), the arrangement was changed and all the share holding of all the four insurance companies was transferred from GIC to the President of India. As things stands today, the entire share holding of these companies is vesting in the name of President of India. Under the delegated legislation, the President gets them administered through the Department of Financial Services (DFS), within the Ministry of Finance, which looks after the Banking and Insurance division. Thus, although all the four companies are having board run administration wherein the Chairman and the Members of the Board are given some token share holding for meeting the technical requirement of Companies Act but, for all the purposes, the entire share holding is with Government of India, held through the President of India. To that extent, these four companies are sister concerns having the same parent with the share being held by the President of India and administration being run through the Ministry of Finance. As the Ministry of Finance, through one of the civil servants, oversees and manages these four general insurance companies, the performance of the executives including the Chairman and the Board of Directors is subject to review. From time to time, the circulars 'meant for overall conduct of business on the basis of review including review of 'claim ratios' and the 'premiums received' are issued which are administrative in nature. During the course of examination of this matter, as is obvious from the order of CCI & COMPAT, the insurance companies had been able to marshal a large number of instructions issued, from time to time, from concerned ministry and Government of India wherein some instructions regarding conduct of business were given and any deviation from these instructions was communicated to be seriously viewed. One of the instructions also included that there should not be any undue competition among the four public sector insurance companies and the tendency of taking accounts of sister company should be discouraged. Among the material submitted before the CCI as well as honourable COMPAT was the policy of transfer of Senior Executives, above a particular level in seniority from one company to another at the instance of Department of Financial Services, Ministry of Finance. Even the copies of some of the orders of transfers of the officials were produced. Not only this, during the course of investigation, the office of the Director General (DG) considered it necessary to call for the response of the Government (read Ministry of Finance) about the issue of administrative instructions and circular which was dully confirmed by

Government of India.

It is against this background that an alleged meeting between the executives of the four insurance companies in Kochi, a day before the submission of tender bids for Rashtriya Swasthya Bima Yojna (RSBY) for which Government of Kerala had called for bids through a comprehensive health insurance scheme. The minutes of the alleged meeting were signed by the executives of the four public sector general insurance companies and it stipulated that one of them would be the LI.

The arguments advanced by the public sector insurance companies were as under:

1. As the entire share holding is being held by the Government of India, in the name of President of India, therefore, these are merely four divisions of the same parent group, though technically they may be separate companies under the Companies Act 1956 (now Companies Act 2013). That being so, various divisions of a group cannot conspire with each other.

2. For conspiracy to succeed all the people who are submitting the bids must meet. Otherwise there is no possibility of successful bid rigging if only PSU general insurance companies met and not other private players.

3. GIBN Act, 1972, in its section 18 (2) clearly stipulates as under:

> "In issuing any directions under sub-section (1), the [Central Government] shall keep in mind the desirability of encouraging competition amongst the acquiring companies as far as possible in order to render their services more efficient."

From the above language of Section 18(2) of the GIBN Act, it is clear that although competition is expected but the Central Government is to keep in mind the desirability of encouraging competition among the four companies. So the argument of the insurance companies was that Government being sovereign had to take a call about the extent of competition being desirable and, to that extent, a host of circulars were issued and complied with. Therefore, even if this alleged meeting took place, it did not make any material difference and should not be the basis for imposing any penalty for cartelisation or bid rigging.

4. It is the parent that is the Government which has to be responsible for the entire conduct and not necessarily, the four individual insurance companies.

5. The concept of Single Economic Entity(SEE), also known as Copper Weld Doctrine in United States of America on the basis of the famous Copper Weld case wherein it had been held that conspiracy cannot be done with oneself , suggests there is no case of penalty in present case.

Armed with the above factual and legal position, the insurance companies requested the COMPAT to set aside the penalty imposed by an order of CCI.

After hearing arguments, which went on for on many dates over a period of a couple of months and more, the COMAPT took a view that all these four companies are independently board run companies under the Act and as the Act is very clear on one aspect that when any terms are not defined within the Competition Act, 2002, the provisions of the Companies Act case shall be applicable. That being so, the entire share holdings being with the Government of India or President of India and the decision making considerably influenced by the directions from the top, the factum of these being four independent companies cannot be taken away. Despite the division of business in which the Ministry of Finance through Department of Financial Services is giving directions for their overall running or, even sometimes, day to day running the fact of these four individual enterprises being separate cannot be taken away.

However, the COMPAT has earlier taken a view in the past that the entire turnover of an enterprise should not be a basis for imposing penalty but the 'relevant turnover' (so defined by COMPAT) relating to the affected business in which the allegations of anti-competitive conducts have come, should be the basis of imposing of penalty. On the basis of this reasoning, following its own earlier orders, COMPAT reduced the penalty to the 'relevant turnover'. This ensured that, after the order of the COMPAT penalty, cumulatively, did not exceed Rs. 2 crores. Thus, in totality, the penalty was reduced from Rs. *671* Crores to Rs. 2 Crores.

At the time of the order being received from the COMPAT, honourable Supreme Court had just concluded hearing in another matter where relevant turnover was an issue. This order was reserved. As of now, the outcome of the particular order is not yet known. As and when the case is finally decided by Hon'ble Supreme Court, it shall be a path breaking judgement as it would through considerable light on how the Public Sector Undertakings (PSU) are to be treated under competition law.