Directions for Investigation by Competition Appellate Tribunal (COMPAT)

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The order passed by the Competition Appellate Tribunal(COMPAT) in the Appeal No. 43 of 2014 has created quite a news. This is the first time that the COMPAT has sent a matter to Director General(DG) for investigation. In this information, filed by a consumer of electricity and a practicing advocate against Maharashtra State Power Generation Company Ltd.(MAHAGENCO), the majority Members of the Competition Commission of India(the Commission) formed a prima facie opinion that the matter did not need an investigation by the Director General(DG). However, Justice S N Dhingra, one of the Members of the Commission passed a dissenting(minority) order agreeing with the allegations contained in the information and forming a prima facie opinion that there was a need to direct DG to cause an investigation into the matter. The Informant preferred an appeal before COMPAT which differed with the order passed by the majority and agreed with the minority order of Justice Dhingra. Having set aside the majority order, the minority order survived and, accordingly, investigation by DG has been ordered. The Author, who headed the Antitrust Division of the Commission in the critical formative years of the Commission looks at the new emerging trend in evolution of the competition law jurisprudence.

The Competition Act, 2002, No. 12 of 2003(the Act) is the basis of enforcement of competition law in India. Although more than ten years have passed since the law was first enacted and more than five years have lapsed since the partial powers for enforcement of this new law were given to the Competition Commission of India (the Commission) but the evolution of the law has been rather slow. This could have been for a number of reasons. Unlike some jurisdictions, the Commission has, relatively, not been very enthusiastic in taking up *suo-motu* cases for investigation though very clearly provided under section 19 of the Act.

The Act, in terms of the architecture of competition law envisaged under it, provides for an appeal against a decision or orders of the Commission before the Competition Appellate Tribunal (COMPAT) under Section 53B of the Act. For this purpose, the COMPAT has been established under Section 53A of the Act. In terms of clause (a) of sub section (1) of section 53A, the COMPAT can hear appeals against the orders passed by the Commission under sub-section (2) and

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(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 the Act. In addition, in terms of clause (b) of sub section (1) of Section 53A of the Act, the COMPAT can also hear the claim for compensation that may arise out from the findings of the Commission or the orders of COMPAT in an appeal against any finding of the Commission or under Section 42A or under sub-section (2) of Section 53Q of this Act and pass orders for the recovery of compensation under Section 53N of the Act.

Thus the orders or directions or decisions passed by Commission under any of the sections of the Act by which the Commission either imposes liability on any party or issues any direction, in keeping with the principles of natural of justice, can be challenged before the COMPAT. After the matter has been heard by the COMPAT, the parties can further move up the escalation ladder and file the appeal before Hon'ble Supreme Court under section 53T of the Act. Thus, unlike other laws, there are only two appeals provided for in terms of the architecture provided for under competition law in India.

Thus the structure provided under the Act has got a mechanism by which any decisions, orders or directions of the lower authority /body, provided under the law, has got a mechanism for redressal by a higher appellate forum/ body. However, if some decision /order/ direction is not provided under the Act, logically, in those instances no redressal mechanism has been provided under the Act as it was not anticipated. This aspect has been discussed in some of the dissenting orders of the Commission whether any orders of the Commission which do not mention clearly the section under which they were being passed are within the ambit of the Act or not. This is a wider issue which has been seperately dealt with by not only some of the dissenting orders in the Commission but also by many other authors as well. Apparently, by proposing an amendment to section 26(7) of the Act, a new Bill to amend the Act was before the last Parliament but fell with the dissolution of Lok Sabha. Had that Bill been enacted into law, the lingering doubts about the sustainability of such orders which are not catagorised under any section of the Act would have been laid to rest but the Bill not only has not been enacted into an Act but has also lapsed.

As is known worldwide, there is not much jurisprudence available in cases relating to mergers (or combinations as we call them in India) in comparison to the jurisprudence on antitrust cases or the cases relating to 'anti-competitive agreements' or 'abuse of dominant position' as we term them in India. The simple reason for this is that, in these matters, any potential delay in the consummation of the transaction may render the basic aim of the transaction meaningless. 'Delay is the deal breaker' is an old saying when it comes to mergers and acquisitions. Therefore any possibility of or a perception that the deal is going to take time either in consummation or getting the regulatory approvals is certainly a dampener for the merging parties. Any such sense either before the transaction starts taking shape or midway, generally, prompts the merging parties to start looking for other options instead of fighting out the objections of the regulatory bodies in the courts.

Therefore, generally, any impression with the merging parties that the deal is going to be delayed in any of competition merger law jurisdictions, is likely to lead the merging parties to call off the deal. The likely possibility of the regulatory approval taking a longer time period itself is enough to throw cold waters on the spirits of the merging parties. This is for the simple reason that, given a choice, no aspiring party planning any acquisition

or merger would like to invest its resources in court proceedings instead of doing business. If the proposed merger or acquisition is not likely to find favour with the applicable competition law jurisdiction, there is a very slim possibility of the merger or acquisition still going ahead. The merging parties are acutely aware of the fact that all aspects of merger or acquisition have got a temporal significance. Business landscape is dynamic and not static. What makes business sense for a merger today may not make it tomorrow. The judicial delays in India are well known. Whether it is the time taken by the Indian courts or time stretched by adjournments and stays by either of the parties to the proceedings as the cases may be, for postponing of an unfavourable out come if not being able to change it altogether, the fact remains that no litigant can be sure of an early and meaningful disposal of the matter if adjudicated before the Indian courts. This will always be an added disadvantage for India till the delays in judicial outcomes are fixed.

In the circumstances, for any proposal of merger review if it gets stuck in legal labyrinth, it may be too late for it to be still of relevance to the merging parties till the resolution of the legal/regulatory tangle is achieved. But for a few exceptions, not many cases actually travel to the higher courts for resolution not only in India but anywhere in the world as far as the merger control is concerned. It is for this reason that, unlike antitrust cases, in cases of merger control the evolution of jurisprudence has been much less and slow. Therefore, anything which leads to expeditious delivery of justice should be welcomed. To some extent, the judgement of COMPAT in case no. 43 of 2014 makes a journey in that direction. At least in antitrust cases, there is a possibility that in instances where the appellate body is convinced of an investigation, the matter can directly reach Director General (DG) instead of waiting for another round of consideration before the Commission which, in some instances, itself may prove to be inconclusive.

In this background, if we look at the cases which have been closed by the Commission at the first stage of forming the prima facie opinion, hitherto the success rate before COMPAT of such cases has not been very good. Not many appeals against the order of the Commission under section 26(2) of the Act have succeeded in getting a favourable outcome from the COMPAT. Many a time, the appellants, finding themselves not making much progress in the appeal, have opted for withdrawing the appeals instead of getting the appeals dismissed. There have also been instances where the appellants have been fined at the stage of exercising their very first right of appeal against the order of the Commission. This might have further discouraged the people aggrieved by the orders of the Commission to seek the Appellate relief from COMPAT.

There are possibilities that a case has been closed by the Commission because of lack of evidence. If such a matter goes in appeal, the evidence, even if available at the stage of appeal, cannot be looked into by COMPAT and it would only be logical for COMPAT to send the matter back to the Commission for being looked into in the light of the new evidence so presented. In the past, some such matters did come back to the Commission but they have not necessarily passed through to the investigation stage despite additional evidence having been produced before the Commission. This may not be very encouraging to the parties suffering from its earlierly held view that the case was not fit enough for investigation even after submission of the additionally tendered evidence while being still at *prima facie* stage.

It is in this back ground that the order passed by the COMPAT on 15.09.2015, in Appeal No. 43 of 2014, assumes

significance. This is the case in which the COMPAT directed the Secretary of the Commission to communicate its direction to DG of the Commission to conduct an investigation into the allegations contained in the information. This is the very significant departure from 'normally' expected norm where it is 'assumed' that the COMPAT would remit the matter back to the Commission and not directly direct the investigation to be conducted by DG. There have been write ups stating that COMPAT assumes the powers of directing the investigation. That may not really be true. The COMPAT has wide sweep of appellate powers and there is no need for it to assume any powers. The only thing needing to be seen is that how does it exercise those powers. For a ready reference, let us look at the remit of section 53 B of the Act which deals with the powers of the COMPAT on adjudicating after an appeal against the order of the Commission is filed before it. Section 53(3) of the Act is being extracted below for a ready reference:

"**Appeal to Appellate Tribunal**

53 B.(1) …….

(3) 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.

(4) ……."

Reading the above section makes it amply clear that the COMPAT can pass any orders as it thinks fit. Naturally, it should include a direction for investigation. This course of action eliminates another round of avoidable litigation, if the mind of the MCOMPAT is made up that the matter needs an investigation. This is the only way to ensure the desired outcome if the COMPAT is of the considered view that an investigation is needed and the Commission has erred in not directing an investigation by the DG while making a prima facie opinion.

Enumerating the detailed facts of the case, one Mr. Surendra Prasad filed an information before the Commission against Maharashtra State Power Generation Company Ltd. (MAHAGENCO) and others on account of allegations of cartelisation against M/s. Nair Coal Services Limited, M/s. Karam Chand Thapar & Bros.(C.S.) Ltd., and M/s. Naresh Kumar & Company. MAHAGENCO, operates steam power plants in the state of Maharashtra and needs coal as a raw material for running its powers stations. This coal is sourced from different subsidiaries of Coal India Limited. For facilitation in the coal procurement, in March 2005, MAHAGENCO invited bids for awarding the contract for facilitation/ liason work. Several entities, alongwith M/s B.S.N. Joshi & Sons Ltd. (BSNJS) and the three entities alleged to be indulging in cartelisation in the preceding paragraphs, submitted bids for the same. The information claims that though the rates quoted by the BSNJS were the lowest, MAHAGENCO did not award the work to it. Through a Writ Petition, this decision of MAHAGENCO was challenged by BSNJS before Nagpur Bench of Bombay High Court. This Writ Petition, questioning the decision of MAHAGENCO was dismissed by the Nagpur Bench of Mumbai High Court on the ground that it did not satisfy the conditions of eligibility.

BSNJS preferred a Special Leave Petition, converted into Civil Appeal No. 4613 of 2006, against the orders of High Court and this was allowed by Hon'ble Supreme Court through an order passed in Oct 2006. After examining the recordings made by different officials of MAHAGENCO, Hon'ble Supreme Court took note of the fact that all these officials had opined that the three entities mentioned in the preceding paragraphs

and others submitted the bids for liason work in procurement of coal which was higher by amounts varying from Rs. 51 to 52 Crores in comparison to the offer made by BSNJS. Hon'ble Supreme court did not find any justification in MAHAGENCO rejecting the bid of BSNJS which has been in this business for last 52 years. The Hon'ble Supreme Court gave one more opportunity to MAHAGENCO to consider the offer of BSJNS and see if they fulfilled the essential conditions of the tender. Further, it directed that if tender conditions were satisfied, the tender was directed to be awarded in favour of BSJNS for one year after ensuring that the continuity of business is maintained and so was the coal supply for MAHAGENCO.

It is seen that MAHAGENCO did not comply with the directions contained in the order the of Hon'ble Supreme Court. Thereafter, BSJNS filed a petition, registered as Contempt Petition No. 245 of 2007 before Hon'ble Supreme Court. Hon'ble Supreme Court, after going through to the explanation given by the concerned party i.e. MAHAGENCO, was not satisfied by its conduct and the apology tendered by them was accepted by the Hon'ble Supreme Court. Hon'ble Supreme Court also observed that it was distressed to see that MAHAGENCO was encouraging formation of a cartel. The rate of transportation of coal and, consequently, the electricity was going to go up as a result of this action.

As a sequel to disposal of this Writ Petition, the MAHAGENCO awarded the contract of liasoning work to BSJNS w.e.f. 03.01.2009. Surprisingly, this was terminated on 12.09.2209 on the ground of un-satisfactory performance of the contract. Thereafter, from September 2009 and 2013, MAHAGENCO did isue four advertisements for award of contract of liason work but, on each occasion, the invitation to bid appears to have been cancelled and the three parties viz. Nair Coal Services Ltd., Karam Chand Thapar& Bros(C.S.) Ltd. And Nareshkumar & Co. were allowed to do liason work on an ad hoc basis by dividing the State into different regions.

The information was filed by Mr. Surendra Prasad, a consumer of electricity, who was also practicing as an Advocate in Nagpur, Maharashtra. The information alleged that MAHAGENCO was facilitating the formation of a cartel by the above mentioned 3 companies and was awarding contract to them in clear violation section 3(3)(c) and (d) of the Act.

The Commission heard the informant and, thereafter, by a majority decision closed the matter under section 26(2) of the Act forming the *prima facia* that no AECC against by conduct in information. The Commission did not even refer to the finding recorded by the Hon'ble Supreme Court nor considered the documents filed by the appellant. The Commission agreed that the rates quoted by the parties were in a narrow band but did not conclude that this can be described as identical and similar and stated that, in absence of evidence or circumstance, it is difficult to infer any anti-competitive agreement solely on the basis of the chart containing quotes of the three parties. On the other count of allegation of corruption or favouritism, the Commission held that it was beyond the preview of the jurisdiction of the Commission.

It may be mentioned that Justice S. N. Dhingra did not agree with the majority view and passed a dissenting order. In the dissenting order, he referred to the order of the Hon'ble Supreme Court. He also analysed the information from the perspective of competition law and reached the prima facie opinion that the conduct of the parties resulted in competition law violations. He also took support from the fact that no one hand MAHAGENCO was not able to finalise the tender but on the other hand the work

orders were being continuously renewed in favour of the three parties named in the preceding paragraphs for over two years at the rates quoted by BSNJS at time of initial bid. This was taken to be violation of competition by Justice Dhingra thus forming a *prima facie* opinion for ordering investigation by DG under section 26(1) of the Act.

The appellant,Mr. Surender Prashad, has questioned the orders of the majority before COMPAT, in view of the order of the Supreme Court and findings of senior officers of MAHAGENCO. Appellant stated that 3 entities formed a cartel and, therefore, the Commission was not justified by closing the case under section 26(2) of the Act and the Commission did not apply its mind to the information and documents filed on 15.10.2015.

In its order, unlike the Commission, the COMPAT did not consider the litigant to be have not come with clean enough hands. COMPAT went into the duties of the Commission and provisions of section 19 of the Act and held that it is the duty of the Commission to eliminate anti-competitive practices and promote competition. There is no need for the informant to have a grievance from the anti-competitive practice and the fact that any person has an information about competition law violations and is willing to come forward with the information is good enough for beginning of a cause of action. What, at the maximum, needs to be seen by the Commission is that there exist a prima facia case warranting an investigation. The COMPAT also mentioned that Hon'ble Supreme Court also recorded the allegation of a cartel of the basis of finding of the recording of the executives of MAHAGENCO and on that basis it could reasonably be said that appellant, Mr. Surendra Prasad, had succeeded in showing that a prima facie case warranting investigation into the matter existed and by the not ordering investigation the Commission committed a grave error.

The COMPAT also took a serious view of the fact that CCI did not order investigation despite Hon'ble Supreme Court's observation on record. On different aspects of the information also, the COMPAT did not approve of the Commission not taking note of all the allegations and documents filed alongwith the information. Thus COMPAT agreed with the minority order of Justice S.N. Dhingra and also the information on the issue of prima facie indication of violation of section 3(3) and (4) of the Act. The order of Justice Dhingra was approved by the COMPAT. It was allowed after majority of the order was set aside and the DG was directed to cause an investigation.

Thus COMPAT allowed the appeal and the majority order of the Commission was set aside. The DG shall now conduct investigation into the allegations contained in the information filed by the appellant/ informant under section 19(1) (a) of the Act and submit a report to the Commission within three months. However, it was made clear that while making investigation, the DG shall not proceed on the premise that MAHAGENCO was a part of the cartel. The Secretary of the Commission was directed to forward a copy of the information and documents filed by the appellant to the DG for the purpose of conducting investigation.

From the above, this is seen that after the majority order of Commission is set aside, the only surviving order shall be the order passed by the minority Member, Justice S.N. Dhingra which had directed investigation by DG. Therefore, this direction for conducting the investigation into the allegations was the only appropriate course left. In the circumstances, it may not be correct to say that the COMPAT has assumed powers to order investigation as has been stated in some write ups.

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hands as directly as possible after agreeing with the dissenting order of Justice S N Dhingra and disagreeing with the majority view of the other Members of the Commission. As a matter of fact, once the majority view falls, the only view surviving in the matter would be that of the minority Member which wanted the investigation to be taken up by the DG. Therefore, if the COMPAT disagrees with the view of majority Members of the Commission and agrees with the Minority view which recommends the investigation by DG, it is only logical and natural that the investigation should proceed In the matter. In the alternate course, if the matter was reverted back to the Commission, it had the potential of majority view in the Commission sticking to its old stand and Minority member view might not even had survived as the concerned Member, Justice S N Dhingra has since retired.

Therefore, in all fairness, the COMPAT has ensured that instead of taking a long and uncertain route of sending the matter back to the Commission and waiting, helplessly, for the outcome which might further necessitate its internvention, it was a better course to order an investigation into the matter as was permissible under law.

On a comparative note, in situations where the appellate order is against an order Section 26(2) of the Act, referring/ remanding the matter back to the Commission may or may not always result in an investigation by DG. If the COMPAT sets aside the order of the Commission to be decided afresh by the Commission after evaluating the information alongwith all the material evidence afresh there is no certainty that, in the second round, the Commission would form a prima facie opinion to direct an investigation into the matter by the DG. The Commission, despite its composition remaining the same, may continue to hold its earlier view. It is also possible that the composition of the Commission may change by the time the matter comes up for discussion second time because of retirement of the earlier Member(s) and appointment of new Member(s). If the case under discussion was sent back to the Commission for being examined afresh as the Member, Justice S N Dhingra, who gave the dissenting order already stood retired, there was a possibility that the Commission would have passed the majority order again. In that event, a new appeal would have been necessitated against the new order of the Commission.

Thus, it appears, in the direction of expeditious justice, it is a good trend. Not only it saves some three months from the entire cycle but it also avoids of the issues going in circles if COMPAT differs, on substance, with the Commission on the basic issue if the matter needs to go in for investigation or not. On the whole, this is a commencement of a new beginning in the direction of expeditious delivery of justice in competition law which appears to be clearly in tune with the future.