



Delhi High Court Holds Certain Provisions of the Competition Act to be Unconstitutional

Summary

On 10 April 2019, a Division Bench of the High Court of Delhi pronounced its judgment in *Mahindra & Mahindra v. Competition Commission of India*,¹ which challenged the constitutional validity of a number of provisions of the Competition Act, 2002 (**Competition Act**). In addition to holding the provision of a casting vote to the Chairperson of the Competition Commission of India (**Commission**) to be unconstitutional, the Division Bench issued directions to the Commission, which could have a significant bearing on previous decisions and the future functioning of the Commission.

Background

The genesis of these challenges was a complaint by Mr. Shamsheer Kataria who alleged car manufacturers were abusing their dominant position in the provision of spare parts and after sales services. After an investigation was directed, a number of parties not named in the original complaint challenged the expansion of the scope of investigation into their conduct by the Director General's office (**DG**). Eventually, the Commission passed its final order dated 25 August 2018 (**Final Order**) and held that all the car manufacturers had contravened the provisions of the Competition Act by entering into anti-competitive vertical agreements

and abusing their dominant positions in the provision of spare parts and after sales services.

Aggrieved by the decision of the Commission, a number of car manufacturers instituted writ proceedings challenging the constitutional validity of a number of provisions of the Competition Act.² Three car manufacturers opted to challenge the Final Order on merits before the erstwhile Competition Appellate Tribunal (**COMPAT**), which has now been replaced with the National Company Law Appellate Tribunal (**NCLAT**). The COMPAT, through an order dated 9 December 2016, substantially upheld the Final Order of the Commission, which was then appealed before the Supreme Court of India. The Supreme Court has granted an interim stay on the operation of the order of the COMPAT, pending the final outcome of the appeal.

Findings

Functioning of the Commission

The Division Bench held that the provision of a casting vote to the Chairperson of the Commission can result in decisions which lead to rights of parties being decided and therefore a vote that counts twice is an *"anathema to and destroys the Rule of Law in the context of the Indian Constitution"*. Accordingly the only provision that survives is

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the proviso to Section 22(3) which mandates a minimum quorum of 3 Members (including the Chairperson) during a meeting of the Commission.

The proviso to Section 22(3) was also challenged on the grounds that it allowed a “revolving door” of Members to hear the matter in violation of the principle that “*he who hears must decide*”. In this case, 7 Members heard the matter, whereas only 3 of the 7 issued the Final Order. The Division Bench held that the mere possibility of abuse of power is not a ground to hold the provision arbitrary. The Division Bench, however, has directed that the Commission frame guidelines to ensure that once a matter is finally being heard on merits, the composition of the bench hearing the matter does not change.

The other significant direction by the Division Bench is for the Commission to ensure that a judicial member is present and participates at all times in a final hearing as in such hearings the Commission is performing an adjudicatory / quasi-judicial function.

Role of the Commission

The Division Bench has held that the Commission does not perform only or purely adjudicatory functions and is, in parts, administrative, expert (with regard to its advisory and advocacy roles) and quasi-judicial (when it proceeds to issue final orders, directions and penalties).

This finding reiterates the position of the Supreme Court in *Competition Commission of India v Steel Authority of India Limited*³ (**CCI v SAIL**) and does not significantly alter the status quo. The reasoning does, however, manifest itself later in the decision, where the Division Bench holds that since the appellate tribunal is primarily adjudicatory in nature, a selection committee under Section 53E of the Competition Act, comprising members of the executive branch who outnumber the judicial

branch, was unconstitutional. This provision has, however, been repealed by the Finance Act, 2017 which replaced the COMPAT with the NCLAT. The relevant provisions for repealing and replacing Section 53E of the Competition Act are separately under consideration before the Supreme Court⁴ and therefore the findings of the Division Bench are subject to such decision.

Scope of Investigations

The Division Bench has held that the direction to expand the scope of the investigation into car manufacturers not named in the complaint did not require a specific authorization order for each car manufacturer. However, the Division Bench did note that the order directing an investigation should be reasoned and disclose application of mind by the Commission based on the evidence on record before it, as required by the Supreme Court in *CCI v. SAIL*.

Imposition of penalties

The Division Bench has held that Section 27(b) of the Competition Act which allows the Commission to penalize enterprises without providing a separate hearing on penalties is not unconstitutional as parties have adequate opportunity to address the Commission on these issues in the current framework.

The parties also challenged the unfettered ability of the Commission to impose penalties (subject to a statutory cap). The Division Bench has held that the Supreme Court of India in *Excel Crop Care v Competition Commission of India*⁵ sets out adequate guidance in determining penalties. Such guidelines are required to be followed by the Commission and a failure to issue separate guidelines on penalties does not render the provision unconstitutional.

Conclusion

The Division Bench has substantially upheld the provisions of the Competition Act and

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the provisions declared unconstitutional have limited bearing on the decisions and functioning of the Commission, on a day to day basis.

However, the directions issued by the Division Bench, including the requirement to necessarily have a judicial member present in all final hearings, does raise questions on previous decisions of the Commission where no judicial member was present. The car manufacturers

that filed this challenge, as well as other appellants subject to Commission decisions with similar infirmities, may raise these issues as grounds of appeal. As the Division Bench did not set aside the Final Order despite its findings, it would be open to the NCLAT to consider the same on merits. In the meantime, it remains to be seen whether the Commission will conduct final hearings in light of the Delhi High Court judgment, as it currently does not have a judicial member.

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- 1 *Mahindra & Mahindra Ltd. v. Competition Commission of India and Another* WP(C) 6610/2014 and other connected matters.
- 2 In addition to car manufacturers, Super Cassettes Industries Pvt. Ltd., a leading producer of music in India also challenged the constitutional validity of similar provisions of the Competition Act in WP(C) 7186/2014 which was tagged to the main challenge.
- 3 *Competition Commission of India v Steel Authority of India Limited and Another* (2010) 10 SCC 744
- 4 *Madras Bar Association v Union of India and Others* WP(C) 267/2012
- 5 *Excel Crop Care Limited v Competition Commission of India and Another* (2017) 8 SCC 47

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