

## ENFORCING DUE PROCESS IN COMPETITION LAW - PROACTIVE ROLE OF THE COMPETITION APPELLATE TRIBUNAL

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*Competition law in India is evolving gradually. While we have come a long way in creating substantive jurisprudence on competition since the past two decades, the Competition Appellate Tribunal has ensured that procedural fairness is also maintained while the legal architecture is developing at its own pace. Through this note, the author focusses on the proactive role of the tribunal in enforcing the principle of natural justice in administration of competition complaints by the Competition Commission of India. The author also discusses two recent judgments by the tribunal that could have laid down substantial jurisprudence for section 3 and section 4 respectively, but rather lay down jurisprudence for procedural issues of the Competition Commission.*

### I. TOWARDS PROCEDURAL FAIRNESS - A PARADIGM SHIFT IN COMPETITION JURISPRUDENCE

*“Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action..... The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affect?”<sup>1</sup>*

The appellate court for regulating competition in India, Competition Appellate Tribunal (“COMPAT”) is playing a proactive role in enforcement of the principle of natural justice which is an essential facet of the Indian legal system. Over the past couple of years, the orders passed by the COMPAT have vouched for procedural fairness in the assessment of cases by the Competition Commission of India (herein after CCI/Commission). One recent order by COMPAT overturning the Commission’s order finding cement companies guilty of cartelization is a vivid example.<sup>2</sup>

The principle of natural justice is based on two facets of law. First is ‘*Nemo Judex in Sua Causa*’ which means judge should be free from every type of bias and he must not have any kind of interest

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<sup>1</sup> Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

<sup>2</sup> Lafarge India &Ors. v. CCI &Ors. (2016) CompLR 23 (CompAT).

in a particular case; and the second principle is '*Audi Alteram Partem*' which means a person affected by a decision has a right to be heard. The act in violation of the principles of natural justice or a quasi-judicial act in violation of the principles of natural justice is void or of no value.<sup>3</sup>

A plain reading of section 26(1) of the Competition Act, 2002 ("Act") implies that CCI is an inquisitorial body, which primarily deals with the economic issues and have no judicially manageable standards. However, 26(1) of the Act cannot be read in isolation to 36(1) of the Act, barring based on total misunderstanding of the scheme of the Act. The SAIL judgement also presses upon the inquisitorial nature of 26(1).<sup>4</sup>This implies that a quasi-judicial authority like the CCI is also bound by the natural justice principle. The principle is envisaged under Section 36 (1) of the Act which states that in discharge of its functions, CCI shall be guided by the "principles of natural justice". The term "natural justice" is not defined or explained but left for the authorities to interpret.

The COMPAT has enforced the principle of natural justice in various cases<sup>5</sup> citing its importance quoted by the Hon'ble Supreme Court as an integral part of the procedural safeguard evolved by the Courts against arbitrary exercise of power by judicial, quasi-judicial and administrative bodies/authorities and any violation of the rule of hearing and the rule of bias/ predetermination has the effect of vitiating the final decision/ order.<sup>6</sup>

However, the Tribunal does not stretch the principle of natural justice to every case and decides this issue on a case to case basis. In a case where issue on bid rigging by companies in an auction held by Coal India Limited was brought before COMPAT, the Tribunal did not accept the plea by companies on violation of principle of natural justice by CCI. It held that principle of natural justice is trite and cannot be put in a straightjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.<sup>7</sup>

## II. PROCEDURE BEFORE SUBSTANCE

<sup>3</sup> H.W.R. Wade, Administrative Law, 310-311(5th Ed, 2014).

<sup>4</sup> Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744.

<sup>5</sup> BCCI & Ors. v. CCI, (2015) CompLR 548 (CompAT); All India Organization of Chemists & Druggists & Ors. v. CCI, III(2015)CPJ4(TA); Dr. L.H.Hiranandani Hospital v. CCI & Anr., 2016 CompLR 129 (CompAT).

<sup>6</sup> A. K. Kripak & Ors. v. Union of India, (1969) 2 SCC 262; Mahipal Singh Tomar v. State of UP, (2013) 16 SCC 771; Manohar v. State of Maharashtra, (2012) 13 SCC 14; Bharat Sewak Samaj v. Lt. Governor, (2012) 12 SCC 675; Swadeshi Cotton Mill v. Union of India, (1981) 1 SCC 664.

<sup>7</sup> Gulf Oil Corporation Ltd. CCI, 2013 CompLR 409 (CompAT).

In the Order dated 11<sup>th</sup> December, 2015, the Hon'ble COMPAT held, "...the law on the issue can be summarized to the effect that the very person/ officer, who accords the hearing to the objector must also submit the report/ take decision on the objection and in case his successor decides the case without giving a fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice".<sup>8</sup> The tribunal found that actual prejudice had been caused by this lapse as the Chairperson had lent his signature to the final order without having heard the various substantive arguments raised by the parties during oral hearing. The order highlighted a third facet to principle of natural justice that is quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably.<sup>9</sup>

As an appeal court, the COMPAT would be reluctant to re-try matters of fact which had already been properly resolved by the regulators. The Tribunal is not concerned with *de novo* hearings and is likely to focus on the potential errors of law and fact, including those within the sphere of regulatory judgment. The same was emphasized in the order, "It should be realized that much of the appellate litigation would be obviated if a just and fair procedure is adopted for conducting investigation and inquiry and passing of orders under the ...(Competition) Act."<sup>10</sup>

### III. BCCI ORDER: OLD WINE IN A NEW BOTTLE

Deciding on procedural grounds before substance is not a novice practice established by the Tribunal. In an older case, the CCI had found that BCCI, India's governing body for cricket had abused its dominance, but the Competition Appellate Tribunal reversed on the ground that the Commission had not made available to the respondent all the evidence that was used against it in coming to a decision.<sup>11</sup> Tribunal held that the exercise required to be undertaken by the Commission under Sections 26(7) or 26(8) read with the relevant regulations<sup>12</sup> and an order passed under Section 27 which visits the concerned person with civil consequences makes the functions of the Commission adjudicatory/quasi-judicial.<sup>13</sup> Therefore, before recording an adverse finding against a person and holding him guilty of violating Section 3 or 4 of the Act, the Commission is obliged to comply with various facets of the principle of natural justice.

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<sup>8</sup> Supra note 266.

<sup>9</sup> *In re H.K. (An Infant)*, [(1967) 2 QB 617]; 1969 SCR (1) 317.

<sup>10</sup> Supra note 2102.

<sup>11</sup> *BCCI & Ors. v. CCI*, (2015) CompLR 548 (CompAT)

<sup>12</sup> The Competition Commission of India (General) Regulations, 2009, Regulation 18, 19 & 20.

<sup>13</sup> BCCI supra note at 11.

This necessarily implies that while holding an inquiry under Section 26(7) or Section 26(8) the Commission is required to comply with the rule of *audi alteram partem* and give an effective opportunity of hearing to the person against whom a finding is likely to be recorded on the issue of contravention of Section 3 or Section 4 of the Act not only to controvert the allegation made against him as also the evidence/material proposed to be used in support of such allegation but also produced evidence to show that he/she/it has not violated any provision of the Act.<sup>14</sup> The merits of the matter were not considered by COMPAT and the importance of abiding by procedure and principles of natural justice have been upheld by the tribunal. The tribunal order indicates that all future orders by the Commission would need to undergo the filter of procedural law before coming on to the merits of the case.

#### IV. OPENING UP PANDORA'S BOX

Another case<sup>15</sup> that could have laid down substantial jurisprudence on abuse of dominance under the Competition Act was remanded back by the appellate Tribunal due to natural justice violation. Finding Coal India violating fair trade norms with regard to fuel supply pacts, CCI had penalized the company in December 2013. Following an appeal by Coal India, the tribunal had stayed implementation of the regulator's order in February 2014.<sup>16</sup>

Coal India issued a Letter of Assurance<sup>17</sup>, to the Informant, who required coal for running its captive power plant, calling upon it to fulfil various conditions precedent to enter into a Fuel Supply Agreement (hereinafter referred to as 'FSA') for supply of coal. As per the prevailing Coal Distribution Policy, 2007, the FSA was mandatory for commencing supply of coal. Informant was required to execute a Memorandum of Understanding along with the FSA. The terms and conditions of FSA were non-negotiable and any delay or failure to execute the FSA within the stipulated time period would result in the invocation of the bank guarantee issued by the Informant. The Informant was required to furnish a Commitment Guarantee (CG) in the form of a bank guarantee of INR 1, 00, 38,900, equivalent to 10% of the base price of indigenous coal as on the date of application for issue of LoA. Nevertheless, the terms and conditions of FSA has been drafted by the Coal India unilaterally and there is no consultation process with the other parties

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<sup>14</sup>*Id.* at 10

<sup>15</sup> Coal India &Ors. v. CCI &Ors. 2016 CompLR 716 (CompAT).

<sup>16</sup> Sponge Iron Manufacturer's Association v. Coal India &Ors., 2014 CompLR 68 (CCI).

<sup>17</sup> See GHCL v. CCI, 2015 CompLR 357(CCI).

either at the time of drafting of the FSA or at the time of modifications. The following terms and conditions have been found to be unfair or discriminatory, as per section 4(2)(a).

- (i) The sampling and testing procedure in clause 5.7 of FSA are found to be unfair and discriminatory.
- (ii) Provisions in clause 5.2 of FSA relating to charging the transportation and other expenses from the buyers on supply of ungraded coal have been found to be unfair.
- (iii) Coal India and other opposite parties have been found to impose unfair and discriminatory conditions regarding putting capping on compensation for stones in clause 4.6.3(e) of the FSA for new Power Producers.
- (iv) The provisions relating to review and termination of the agreement in clause 2.5 to 2.6 of the FSA have been found to be unfair and discriminatory.
- (v) The provisions relating to waiver of sellers Condition precedents in clause 2.8.3 have been found to be unfair.
- (vi) Discriminatory provisions for new PPs by removing the provisions for review of grade in case of consisting grade slippage for 3 months. Later on during the pendency of investigation these provisions have been re-inserted in clause 5.5 of the FSA.
- (vii) Incorporating the conditions in force majeure clause which are not normally treated as force majeure in clause 17.1 of FSA for new Power producers have been found to be unfair and discriminatory. These conditions have been modified during the pendency of investigation.

The natural justice violation argument was promptly made by Coal India before the Tribunal as reliance could be placed upon the cement cartel judgement of COMPAT<sup>18</sup>. Thus, It was alleged that then Chairperson of CCI, Mr. Ashok Chawla and three other Members namely, Dr. Geeta Gouri, Mr. S.N. Dhingra and Mr. S.L. Bunker heard the arguments on 16th and 17th July, 2013. However, the final order was passed on 09.12.2013 by the CCI comprising of five Members namely; Dr. Geeta Gouri, Mr. Anurag Goel, Mr. M.L. Tayal, Mr. S.N. Dhingra and Mr. S.L. Bunker along with the Chairperson. The other two members, Mr. Anurag Goel and Mr. M.L. Tayal were not party to the hearing held on 16th and 17th July, 2013, whereby penalty @ 3% of the average turnover of preceding three years total amounting to INR 1773.05 crores was imposed on Coal India Limited.

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<sup>18</sup> Lafarge India &Ors. v. CCI &Ors. MANU/TA/0067/2015.

The Commission rebutted stating that the CCI functions as an executive/administrative body and is thus not bound by the principles of natural justice and fairness. COMPAT out rightly rejected the argument reiterating Supreme Court's position that the functions performed by the bodies like the CCI which are clothed with the power to decide the rights of the parties or pass order adversely affecting a person are quasi-judicial in nature and are bound to comply with different facets of the principles of natural justice.<sup>19</sup> The Tribunal stated that it would be 'wholly misconceived' to find that CCI is not bound by the principles of natural justice and procedural fairness.

### V. NEED FOR REFORMATION IN THE LAW

With respect to natural justice, there also exists a lack of an established procedure for the Director General Competition (DG) to conduct the investigation, as directed by the Commission, under the Competition Act, 2002 and the Competition Commission of India (General) Regulations, 2009. The DG starts an investigation after the CCI is of the opinion that there exists a prima-facie case of violation of the provisions of the Act.<sup>20</sup> This implies that a direction of investigation by the CCI to the DG is deemed to be the commencement of an enquiry under the Act.<sup>21</sup>

The DG as soon as it receives the prima-facie order along with other relevant document from the CCI, issues a notice<sup>22</sup> to the opposite parties without forwarding a copy of the *prima facie* order passed by the CCI along with other relevant documents. Also, the DG does not supply the copies of additional information collected during investigation from the informant or a third party to the opposite parties against whom the information is being used in the DG Report. Furthermore, no opportunity for cross examination of the informant and/or third party is given to opposite parties by the DG.

**Conclusion** - The evidence upon which a particular case is built must be transparent in order for the accused to have a meaningful opportunity to rebut that evidence or to contest the inferences the

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<sup>19</sup> Manak Lal, Advocate v. Dr. Prem Chand Singhvi & Ors., AIR 1957 SC 425; Khemchand v. Union of India, AIR 1958 SC 300; Jagdish Prasad Saxena v. The state of Madhya Bharat, AIR 1961 SC 1070; State of Orissa v. Dr. (Miss) Binapani Dei, AIR 1967 SC 1269; Maneka Gandhi v. Union of India, AIR 1978 SC 597; S.L. Kapoor v. Jagmohan, AIR 1981 SC 136; Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818; Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180; Institute of Chartered Accountants of India v. L.K. Ratna, AIR 1987 SC 71; Baldev Singh v. State of Himachal Pradesh, AIR 1987 SC 1239; Gokak Patel v. Collector of Central Excise, AIR 1987 SC 1161; State of Haryana v. Ramlakhan, AIR 1988 SC 1301; Dipti Prakash Banerjee v. SNB National Centre for Basic Sciences, AIR 1999 SC 983; V P Ahuja v. State of Punjab, AIR 2000 SC 1080; Rajesh Kumar & Ors. v. D. Income Tax Commissioner & Ors., AIR 2007 SC 181.

<sup>20</sup> The Competition Act, 2002, Section 26(1).

<sup>21</sup> Supra note 12 at 18(2).

<sup>22</sup> Harmonious reading of Section 41(2), Section. 36(2) and Regulation 18 of CCI General Regulations, 2009.

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agency might draw from it. The COMPAT order observed that "the time has come for the Commission (CCI ) to evolve a comprehensive protocol and lay down guidelines for conducting investigation/inquiry in consonance with the rules of natural justice".<sup>23</sup> The Tribunal clearly implied that while it is not mandatory to grant an oral hearing in proceedings before the CCI, once granted, such an oral hearing must conform to the rules of natural justice.

It may be concluded that COMPAT is examining the procedural loopholes in the law and rectifying the Commission's failure to comply with the principles of natural justice. Consequently, one can hope that the appellate Tribunal will reposition the procedural fairness in the competition law regime of India through enforcement of principle of natural justice as and when the need arises.

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<sup>23</sup> Supra note 2102.