

(2014) 12 DEL CK 0231

In the Delhi High Court

Case No : LPA 715/2014

Competition Commission of India

APPELLANT

Vs

JCB India Ltd.

RESPONDENT

Date of Decision : 02-12-2014

Acts Referred:

Companies Act, 1956 — Section 240(A)

Competition Act, 2002 — Section 16, 16(1), 19, 19(1)(a), 26

Citation : (2014) 146 DRJ 531

Hon'ble Judges : G. Rohini, C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Sanjay Jain, ASG, Vaibhav Gaggar, Abhimanyu Chopra, Nitish Sharma and Vidur Mohan, Advocate for the Appellant; A.M. Singhvi, Rajiv Nayyar, Sr. Advocates, G.R. Bhatia, Kanika Nayar, Nidhi Singh Prakash, Deeksha Manchanda, Tripti Malhotra, Advocates and Udayan Jain, Advocate for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—Three interim orders passed by the learned Single Judge in W.P.(C) No.2244/2014 are assailed in this appeal filed by the Competition Commission of India (for short "CCI") .

2. The essential facts of the case are as under:-

Bull Machines Pvt. Ltd. (respondent No.2 herein) filed information before CCI under Section 19(1)(a) of the Competition Act, 2002 alleging contravention of the provisions of Section 4 of the said Act by JCB India Ltd. (respondent No.1 herein) which is a wholly owned subsidiary of JC Bamford Excavators Ltd. (respondent No.3 herein). On 11.03.2014, CCI passed an order under Section 26(1) recording its prima facie satisfaction and accordingly directing the Director General to cause an investigation into the matter and to complete the investigation within a period of 60 days.

3. JCB India Ltd. and JC Bamford Excavators Ltd. together filed W.P.(C) No.2244/2014 with a prayer to quash CCI's order dated 11.03.2014. On

04.04.2014, the learned Single Judge passed an interim order in terms of the order dated 21.01.2014 passed in a similar matter being W.P.(C) No.464/2014 titled Telefonaktibolaget LM Ericsson (Publ) vs. Competition Commission of India and Anr. which is pending on the file of this Court. By virtue of the said interim order dated 04.04.2014 the information as called upon by the Director General of Competition Commission of India has to be given by the petitioners i.e. JCB India Ltd. and JC Bamford Excavators Ltd., however, no final order/report shall be passed either by the Competition Commission of India or by its Director General. Further, in case the Director General of the Competition Commission of India feels that it is necessary for the presence of an officer stationed abroad, he shall notify the petitioners about the same and in case the petitioners feel that the request is unreasonable, it would be open to the petitioners to move an application in the writ petition for appropriate directions.

4. On 16.09.2014, the petitioners moved a fresh application being CM No.15787/2014 alleging that the Director General, in gross violation of the order of this Court dated 04.04.2014 as well as the order passed by the Chief Metropolitan Magistrate, Delhi issuing warrants in terms of Section 41(3) of the Competition Act, conducted search of the premises of the petitioner No.1 and seized the records/files available in the office premises. Accordingly, a direction was sought to restrain the Director General from proceeding with the further investigation and also to restrain him from relying upon any of the seized material.

5. After hearing both the parties, the learned Single Judge passed an order on 26.09.2014 which reads as under:-

"The Director General of respondent no.1 shall file a personal affidavit indicating the material available and the reasons that prompted him to take the drastic action. The material placed before the Magistrate also be separately placed before this Court on the next date of hearing. This Court on 04.04.2014 had observed that "a substantial question of jurisdiction of respondent No.1 to entertain respondent No.2's petition arises in the proceedings" and directed that order passed in Telefonaktiebolaget LM Ericsson (Publ) Vs. Competition Commission of India and Anr.: W.P.(C) 464/2014 on 21.01.2014 as modified by Division Bench in LPA 182/2014 would continue to operate till further hearing. In terms of the order, this Court had directed that "while the petitioner may give information as called upon by the Director General of Competition Commission of India, no final order/report shall be passed either by the Competition Commission of India or by its Director General." In light of the aforesaid order and given the manner in which the action has been taken by the respondent, I am prima facie, of the view that further proceedings in the matter before the respondent be stayed. It is, accordingly, so directed. All hardware seized by the respondent shall be placed in a sealed cover and kept in safe custody by respondent No.1. List on 08.12.2014."

(emphasis supplied)

6. Subsequently, the petitioners filed CM No.16305/2014 seeking clarification of the order dated 26.09.2014 wherein the learned Single Judge ordered that the documents and the records seized by the respondents would also be kept in safe custody.

7. Challenging the abovesaid orders dated 13.10.2014 and 26.09.2014 read with order dated 04.04.2014, the Competition Commission of India filed this appeal contending inter alia that the orders under appeal are contrary to the well settled principle of law that the Court should not interfere with the investigation or guide the manner in which such investigation should be conducted.

8. While submitting that the Director General is duly empowered to conduct the search and seizure in terms of Section 41(3) of the Competition Act, it is vehemently contended by Sh. Sanjay Jain, the learned ASG appearing for the appellant that the learned Single Judge failed to appreciate that the search and seizure conducted by the Director General on 19.09.2014 would not invalidate the investigation in any manner whatsoever.

9. On the other hand, it is contended by the learned counsel for the respondents that the appeal itself is not maintainable at this stage since the matter is yet to be heard by the learned Single Judge on merits.

10. A doubt was also raised as to the locus of CCI to prefer an appeal and it was prima facie felt that though it is open to the informant to prefer an appeal since he is aggrieved by the order staying investigation, no such appeal can be maintained by CCI which itself ordered investigation. It was also felt that CCI cannot defend its own order directing investigation by the Director General.

11. In the present case, the proceedings before CCI are admittedly at the stage of the inquiry under Section 26(1) of the Act. CCI by order dated 11.03.2014 directed investigation by the Director General and the learned Single Judge by order dated 04.04.2014 declined to stay the investigation. However, it was added that no final order/report shall be filed and that for the presence of an officer stationed abroad, the Director General shall notify the petitioners.

12. From the averments in CM No.15787/2014 it appears that the petitioners are aggrieved by the manner in which the Director General conducted the search at the office premises of the petitioners on 19.09.2014 and seized the records/files and other equipment. The allegations in the application included that the Director General conducted the search and seized the documents without making any prior attempt to require the petitioners to furnish the information and that the search was in complete contravention of the orders of this Court as well as Section 240(A) of the Companies Act.

13. The learned Single Judge by the order under appeal had not only directed that the Director General shall file a personal affidavit indicating the material available and the reasons that prompted him to take the drastic action, but also stayed the further proceedings before the CCI.

14. In the facts and circumstances noticed above, the first question that requires consideration is whether CCI has locus to prefer the present appeal challenging the order of the learned Single Judge staying the investigation by the Director General.

15. The Competition Act, 2002 is an Act to provide for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India and for matters connected therewith. CCI has been established by the Central Government under Section 7(1) of the Competition Act, 2002 for the purposes of the said Act. Section 7(2) states that CCI shall be a body corporate having perpetual succession and a common seal with a power to acquire, hold and dispose of property both movable and immovable and to contract and shall by the said name sue or be sued. Chapter IV of the Act deals with the duties, powers and functions of CCI. As held in *Competition Commission of India Vs. Steel Authority of India Ltd. and Another*, the CCI under the scheme of the Act, is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction.

16. Chapter IV includes Section 19 of the Competition Act which provides for inquiry by the CCI into any alleged contravention of the provisions contained in Section 3(1) or Section 4(1) on its own motion or on receipt of any information from any person, consumer or their association or trade association. Inquiry may also be initiated by CCI on a reference made to it by the Central Government or a State Government or a statutory authority. On receipt of such information/reference or on its own knowledge under Section 19 if CCI is of the opinion that there exists a prima facie case it shall direct the Director General to cause an investigation to be made in the matter.

17. The definition of "Director General" under 2(g) of the Act read with Section 16, which provides for appointment of Director General, shows that the Central Government may by notification appoint a Director General for the purposes of assisting the CCI in conducting inquiry into contravention of any of the provisions of the Act and for performing such other functions as may be provided by the Act. It has been held in *CCI v. SAIL* (supra) that the Director General appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. So far as the functions of CCI are concerned, the Supreme Court held that the CCI, under Section 26(1), exercises regulatory jurisdiction and that the order passed under Section 26(1) is merely administrative in nature. It was also observed that any order passed under Section 26(1) is an administrative order akin to departmental proceeding and is without entering upon any adjudicatory process. At that stage CCI therefore does not exercise any adjudicatory power and the functions performed do not involve the element of decision making.

18. Sri Sanjay Jain, the learned ASG while reiterating the legal position that the

order of CCI under Section 26(1) is only an administrative order would contend that CCI is an aggrieved party and it has locus to maintain the present appeal.

19. The law is well settled that a statutory appeal is neither a natural nor an inherent right vested in a party. It is also a well settled principle of law that appeal being a statutory right, no party can have a right to file appeal except in accordance with the procedure prescribed by the statute. However, in the present case, we are not dealing with the question of locus to maintain a statutory appeal.

20. It is also relevant to note that CCI was impleaded as respondent in the writ petition which was filed assailing the order of the CCI directing investigation by the Director General. By the order under appeal, the investigation itself has been stayed by the learned Single Judge. In *CCI v. SAIL* (supra) , it was explained by the Supreme Court that the Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act expeditiously and even in a time bound programme and that in view of the nature of the controversies arising under the provisions of the Act and larger public interest, the matter should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay since in the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly country's economy cannot be ruled out.

21. It may also be pointed out that the Competition Act does not provide for a remedy of appeal against an order passed under Section 26(1) of the Act and only the order passed by the CCI under Section 26(2) is made appealable under Section 53-A. It was made clear in *CCI v. SAIL* (supra) that the directions passed by CCI in exercise of its powers under Section 26(1) forming a prima facie opinion and issuing a direction to the Director General for investigation cannot be treated appealable by implication. In so far as the further question whether the CCI would be a necessary or at least a proper party in the proceedings before the tribunal in an appeal preferred under Section 53-A by any party is concerned, the Supreme Court held:

"104. The above stated provisions clearly indicate that the Commission a body corporate, is expected to be party in the proceedings before the Tribunal as it has a legal right of representation. Absence of the Commission before the Tribunal will deprive it of presenting its views in the proceedings. Thus, it may not be able to effectively exercise its right to appeal in terms of Section 53 of the Act.

105. Furthermore, Regulations 14(4) and 51 support the view that the Commission can be a necessary or a proper party in the proceedings before the Tribunal. The Commission, in terms of Section 19 read with Section 26 of the Act, is entitled to commence proceedings suo moto and adopt its own procedure for completion of such proceedings. Thus, the principle of fairness would demand that such party should be heard by the Tribunal before any orders adverse to it

are passed in such cases. The Tribunal has taken this view and we have no hesitation in accepting that in cases where proceedings initiated suo moto by the Commission, the Commission is a necessary party.

106. However, we are also of the view that in other cases the Commission would be a proper party. It would not only help in expeditious disposal, but the Commission, as an expert body, in any case, is entitled to participate in its proceedings in terms of Regulation 51. Thus, the assistance rendered by the Commission to the Tribunal could be useful in complete and effective adjudication of the issue before it."

22. As could be seen, CCI which is a body corporate in terms of Section 7(2) of the Act, having perpetual succession and a common seal with power to sue and be sued in its name, has a right of representation in any appeal before the tribunal as has been specifically mentioned under Section 53-S(3) and it even has a right of appeal under Section 53-T before the Supreme Court. In this context, it would also be appropriate to refer to the following observations made in CCI v. SAIL (supra) with regard to the purpose and object of the power conferred on CCI under Section 26(1) :

"92. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This investigation is directed with dual purpose: (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously.

93. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. That is the precise reason that the legislature has used the word "direction" to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission.

23. For the reasons stated supra, we are of the view that since the investigation by the Director General forms part of the regulatory jurisdiction exercised by CCI, any order hampering the investigation process directly affects the statutory functioning of CCI. Under the circumstances, the right to assail an order staying the investigation cannot be confined only to the informant, but the CCI also

being an equally aggrieved party, is entitled to do so.

24. Having regard to the object sought to be achieved by enacting the Competition Act, 2002 and keeping in view the observations made in CCI v. SAIL (supra) with regard to the need for expediency in dealing with the matters at the stage of formation of prima facie opinion and the role to be played by CCI in larger public interest, we agree with the submission of learned ASG that CCI has locus standi to present the appeal against the order of the learned Single Judge staying investigation by the Director General.

25. Further, this is a case where the CCI was impleaded as a respondent in the writ petition and being a party to the order passed by the learned Single Judge staying the investigation, the right of appeal under Clause 10 of the Letters Patent cannot be taken away from CCI.

26. Coming to the merits of the case, it is relevant to note that the learned Single Judge initially by order dated 04.04.2014 allowed the Director General to proceed with the investigation, however, granted stay only to the extent of passing a final order/report. The said order has been accepted and acted upon by both the parties. It appears that the whole grievance of the writ petitioner is only with regard to the manner in which the Director General has been proceeding with the investigation. The Director General who was directed to file his personal affidavit is not a party to the proceedings before the learned Single Judge and admittedly the matter is being contested by the CCI alone. Be that as it may, since the matter is still pending before the learned Single Judge and the counters are yet to be filed by the CCI and other respondents therein, it is always open to the CCI/appellant herein to file the necessary counter and seek for vacating the order dated 26.09.2014 including the direction that the Director General shall file his personal affidavit. Therefore, according to us, the interference by us at this stage is unwarranted.

27. Accordingly, the appeal is disposed of leaving it open to both the parties to urge their respective contentions before the learned Single Judge. The appellant is at liberty to seek advancement of hearing before the learned Single Judge, if so advised.