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Appellate Jurisdiction of the Competition Appellate Tribunal

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The Supreme Court in the *SAIL* judgment [(2010) 10 SCC 744)] decided, *inter alia*, on the scope of appellate jurisdiction of the Competition Appellate Tribunal ('COMPAT') and this article endeavours to address related matters arising therefrom. When the case was appealed to the COMPAT, it was argued that under Section 53B (1) of the Competition Act, 2002 (hereinafter referred to as 'Act') an appeal would lie only in relation to a direction, decision or order referred to under Section 53A (1) (a). The specific issue was whether an order directing the DG to initiate investigation under Section 26 (1) was appealable or not. For ease of reference, Sections 53A (1) (a) and 53B (1) are extracted below:

> "53A.(1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –
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> to hear and dispose of appeals against *any* direction issued or decision made or order passed by the Commission under *sub-sections (2) and (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;
>
> …
>
> 53B.(1)The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order *referred to in clause (a) of section 53A* may prefer an appeal to the Appellate Tribunal." (Emphasis supplied)

Thereby, it was argued that directions issued or decisions made or orders passed were used in a conjunctive sense and not a disjunctive way. Therefore, since an order under Section 26 (1) was not specifically referred under Section 53A (1) (a), such an order was not appealable.

It was held by COMPAT that in the enumerated provisions there was no express provision for direction or decision[1] and, therefore, the legislative intention in Section 53A (1) (a) was to use 'or' in the disjunctive sense (Para 13 & 15). It was further held that the natural and ordinary meaning of the words have to be given effect as the principle rule of interpretation and uninfluenced by policy dictates (Para 17 & 18). The COMPAT also found support in the term 'any' in Section 53A (1) (a) to qualify the noun 'direction', 'decision' and 'order (Para 18).

On appeal, the Supreme Court, relying on the earlier judgment of *Super Cassettes Industries Limited v. State of UP* [(2009) 10 SCC 531], held that when the legislature had specifically identified specific orders, decisions and directions to be appealable, the implication would be that all other orders, directions and decisions that have been excluded are not appealable, since the object of the Act was to provide a very limited right of appeal.The Supreme Court further held that as appeal was a statutory right, such a right may be lost by a party in the face of relevant provisions of

[1] However, contrary to the finding of the COMPAT, please see Sections 27 (a), (d), (e), (g) which makes a reference to directing enterprises and issuing appropriate directions; Section 31 (2) & (11); See also Section 42A read with Section 27, 28, 31, 32, 33.

law and in the absence of a provision enabling an appeal against an order, a right to appeal against such an order may not lie.

Therefore, Supreme Court held that only the orders, decisions or directions under the provisions specifically mentioned under Section 53A are appealable . In fact the Court even observed that in the present scheme of the legislature even a direction of the CCI to the DG to investigate further under Section 26 (7) is not appealable. Also, the Supreme Court held that Section 53B was an indicator of the reasoning that not all orders, directions or decisions are appealable for the said provision provided that any person aggrieved by direction, decision or orders 'referred' to in Section 53A may prefer an appeal. The Supreme Court held that had it not been the intention to limit the appeal, Section 53B would have been worded otherwise.

Therefore, the Supreme Court concluded that appeals will lie only from decisions, orders or directions specifically mentioned under Section 53A (1) (a) of the Act.

The case of Section 26 (8)

As a result of *SAIL* judgment, not all orders or decisions or directions are appealable but only those that have been mentioned under Section 53A. It will be relevant to note that Section 26 (8) is not referred to in Section 53A. Section 26 (8) reads as:

> "(8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act."

It may be pertinent also to note Section 26 (2) and (6) at this stage, from which appeals may lie to the COMPAT. Under Section 26 (2), the CCI finds that there is no prima facie case and closes the matter and under Section 26 (6) after the CCI finds a prima face case and the DG presents a report to the CCI recommending no contravention of Section 3 or 4, the CCI thereon agrees with the recommendation of the CCI and closes the matter. However, under Section 26 (8), where the DG recommends that there is a contravention of Section 3 or 4, the CCI shall inquire into the matter thereon.

In this circumstance, the CCI may either come to a conclusion that there is either a contravention or non-contravention of Sections 3 or 4. If the CCI agrees with the recommendation of the DG, it may pass necessary orders or directions under Section 27, which would be appealable before the COMPAT. However, if the CCI comes to a conclusion that there is no contravention, then Sections 27 and 28 will not be applicable as they would apply only when there is a contravention of Section 3 or 4; Section 31 will not be applicable as it applies to combinations; Section 32 may not be applicable if the order of the CCI is not on the extraterritorial jurisdiction of the CCI; Section 33 will not be applicable for the reason that the present circumstance is not in relation to an interim order and similarly the other provisions under Section 53A will also not be attracted. Therefore, such an order of the CCI will not be an appealable order.

Therefore, as a result of the judgment passed by the Supreme Court, in a case where the DG

holds that there is a contravention and the CCI thereon holds that there is no contravention and closes the case therewith, no appeal will lie against such an order of the CCI.

In fact it will also be relevant to note that in the Competition (Amendment) Bill, 2012 that is pending consideration before the Parliament, in clause 17 it is now proposed that Section 53A would be amended to include Sections 26 (7) and (8) also as appealable orders. This thereby indicates that until now orders under Section 26 (8) are not appealable orders.

Present Scenario

In fact the COMPAT is seized of this very point presently in certain appeals that are pending adjudication before it. It appears that as a result of the *SAIL* judgment, such appeals will not be maintainable and the aggrieved parties in such cases can only approach the writ court and not COMPAT or may file an SLP before the Supreme Court.

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Circulars

ECB - Liberalization for entities under investigation: Entities contesting investigations, adjudications or appeals related to violation of the Foreign Exchange Management Act, 1999 and related regulations shall now be eligible to borrow in foreign exchange under the automatic route. As per RBI A.P. (DIR Series) Circular No.87 dated 5-3-2013, such entities shall be required to intimate the Authorized Dealers (AD) about the pending investigations, adjudications or appeals and the Authorised Dealer will have to intimate the concerned agencies by endorsing copy of the approval letter. The Reserve Bank of India has amended Schedule I of Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 by Notification No. FEMA. 256/2013-RB published in the gazette on 26th February, 2013.

IDRs - Guidelines for partial two way fungibility: The Securities and Exchange Board of India (SEBI) has issued detailed guidelines enabling partial two way fungibility for future issue of Indian Depository Receipts (IDRs) as well as existing IDRs through Circular No. CIR/CFD/DIL/6/2013 dated 1st March, 2013. IDRs shall be convertible into underlying equity shares and *vice versa* within the available headroom i.e. number of originally issued IDRs less the number of outstanding IDRs subject to a lock-in period of one year from the date of listing of IDRs. One of the key features of the guidelines is that the issuer may provide the IDR holder option for fungibility by conversion into underlying shares, and/or conversion into underlying shares, sale of the shares in the foreign market where they are listed and remittance of sales proceeds to the IDR holder. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 have also been suitably amended vide notification dated 27th February, 2013.

News Nuggets

SEBI regulations on non-convertible redeemable preference shares

In a move to widen its regulatory reach, the SEBI, in its Board Meeting on March 8, 2013, has approved the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013. The regulations once notified shall provide an extensive regulatory framework for the issue of non-convertible redeemable preference shares and listing of privately placed redeemable preference shares. To minimize the risk of investment, SEBI is contemplating certain mandatory requirements for the public issue and listing of such instruments such as a minimum tenure of three years, minimum application size of INR 10 lakh per investor, minimum rating of AA- or equivalent etc. The proposed regulations shall also be made applicable *mutatis mutandis* to non-equity instruments such as Perpetual Non-Cumulative Preference Shares and Innovative Perpetual Debt Instruments issued by banks as per Basel III norms.

SEBI seeks more powers

In an attempt to overcome roadblocks encountered by the regulator in investigations and enforcement of orders, various measures to boost SEBI's powers have been recently discussed at its Board Meeting. SEBI is in the process of sending proposals to the Ministry of Finance suggesting amendment to various securities laws to give more teeth to it. Some of the proposed amendments include power to conduct search and seizure in order to increase the success rate of convicting manipulators and power to demand information to aid investigations. It has also been proposed that SEBI may recover monetary penalties through the Income Tax arrears mechanism. Other changes may include setting up of special courts for criminal prosecution for violation of securities laws and recognition of SEBI's counsels as 'Public Prosecutors'.

Ratio Decidendi

Land acquisition when cannot be annulled: The Supreme Court of India has held that the legal proposition that a purchaser, subsequent to the issuance of a Section 4 Notification in respect of the land, cannot challenge the acquisition proceedings, and can only claim compensation as the sale transaction in such a situation is void qua the government, is settled. It was held that any such encumbrance created by the owner, or any transfer of the land in question, that is made after the issuance of such a notification, would be deemed to be void and would not be binding on the government. The Court stated that even if the lands of other similarly situated persons in case of the present acquisition has been released, the respondent must satisfy the court that it is similarly situated in all respects, and has an independent right to get the land released. It was also held that even if the government wanted to exempt the land, it would require a notification by the

government and also that the same is permissible only prior to taking possession of the land. It was noted that application for release of land is acceptable if the purpose for which the land is acquired and the purpose for which land release is sought is the same and as in the instant case, land had been acquired for industrial development and the respondent-society wanted the land for developing the residential houses, such a demand was not acceptable. In this case, certain portion of land stood notified in 1979 under the Rajasthan Land Acquisition Act, 1953 (the Act) for a public purpose i.e. industrial development, to be executed by the RIICO. The respondent claimed to have entered into an agreement to sell this land in 1981. Possession of land was taken by the government, after making a public declaration, in 1982 and handed over to RIICO in 1983. Acquisition proceedings were challenged by the respondents and the purchasers. [*Rajasthan State Industrial Development and Investment Corporation (RIICO)* v. *Subhash Sindhi Cooperative Housing Society Jaipur* – Supreme Court Judgement dated 12-2-2013 in Civil Appeal No. 7254 of 2003 with Civil Appeal No. 853 of 2013].

Proof of existence of anti-competitive agreement: The Competition Commission of India has held that in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, constitute evidence of the existence of an agreement. The Commission noted that even if there is evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will be fragmented and sparse, and so it is necessary to reconstitute certain details by deduction. Noting that the opposite parties had not disputed the evidence against them, the Commission held that it was safe to infer from a number of coincidences and indicia like identical rates, division of quantity, similar handwriting, format of covering letter, tender fee payment, past conduct, etc. that the bidders entered into an agreement to directly or indirectly determine the prices as also to rig the bid in question. Further, as existence of the agreement was established, relying on Section 3(3) of the Competition Act, the Commission presumed that the agreement had an appreciable adverse effect on competition. The CCI however, did not impose penalty on the firms as facts revealed complete lack of awareness by the opposite parties which were small and micro enterprises, noting also that offers made were also not in terms of the requirement of the tender and that the bids were not lowest. [*South Eastern Railway* v. *Orissa Concrete and Allied Industries Ltd.* – Competition Commission Order dated 21-2-2013 in Ref. case No. 5 of 2011].