

# Competition Law Hotline

May 20, 2015

## DELHI HIGH COURT: CCI HAS INHERENT POWERS TO REVIEW/ RECALL ITS ORDERS

- Writ Petition under Article 226 is maintainable against CCI orders directing investigation.
- Power of review is not inherent, yet Delhi HC holds that CCI has power to recall or review its orders directing investigation
- Exercise of such power should be subject to certain restrictions, without delaying the investigation process.
- Parties can now challenge the proceedings even at initial stage of investigation and seek opportunity of hearing in the absence of appeal provisions.

### INTRODUCTION

The Delhi High Court ("**Delhi HC**"), in *Google Inc. & Ors* ("Appellants") vs. *Competition Commission of India & Anr.*<sup>1</sup> ("Respondents") has held that Competition Commission of India ("**CCI**") has the power to recall its orders of investigation under Section 26(1) of the Competition Act, 2002 ("**Act**") though it is not an inherent power or expressly provided under the Act. The Delhi HC's decision is a breeze of fresh air allowing parties to challenge decisions preliminary stage despite no appeal being allowed under the Act. Relying on principles of due process, Delhi HC held that CCI does indeed have the power to recall or review its orders and remanded the matter back to CCI.

### BACKGROUND FACTS

CCI had passed an order on April 15, 2014 ("**Investigation Order**") based on *prima facie* opinion, under Section 26(1) of the Act<sup>2</sup> directing Director General ("**DG**") to investigate the matter. Appellants filed an application for recalling the Investigation Order as it was passed without giving them an opportunity of hearing. The application was dismissed by CCI on July 31, 2014 ("**Impugned Order**") for the following reasons:-

- CCI was of the *prima facie* view that a case for investigation under Section 26 (1) was made out;
- Issues could be dealt at a later stage post completion of the investigation;
- In any event, the power of review was not conferred upon the CCI under the Act and therefore it was impermissible in law for an authority to review/recall its orders;

As there was no statutory provision for appeal against such an order, the Appellants filed a writ petition before the Delhi High Court against the Impugned Order.

### ISSUES

- Whether CCI has inherent powers to recall/ review its investigation orders in exercise of powers under Section 26 (1) of the Act?
- Whether any provision of the Act indicates that an order under Section 26(1) cannot be reviewed or recalled?
- Whether Writ Petition filed against CCI order directing investigation is maintainable?

### APPELLANT'S ARGUMENTS

Appellants contended that CCI had ordered the investigation without affording an opportunity of hearing. The application for recalling the order was dismissed by CCI on grounds of lack of territorial jurisdiction. The Appellant's relying on the Supreme Court's ruling in *Competition Commission of India vs. Steel Authority of India* ("**SAIL**")<sup>3</sup> submitted that merely because Section 37 of the Act<sup>4</sup> had been deleted taking away the power of review does not mean that the power to recall an order also ceases, as recall and review are not the same.

### RESPONDENT'S ARGUMENTS

Counsel for the Respondents submitted that though CCI did have the power to review its order, with the deletion of Section 37 of the Act<sup>5</sup>, the said power had been taken away. The scheme of the Act does not permit review or recall of the orders.<sup>6</sup> CCI also submitted that since investigation was at an initial stage and not determinative in nature, the Appellants would not suffer any prejudice and therefore no right of hearing existed.<sup>7</sup>

Respondents submitted that the application was made only to receive a complete hearing at the initial stage, which can be entertained even at a subsequent stage. Power of substantial review is expressly prohibited. Any interference in the investigation would only lead to unnecessary delay in the proceedings as CCI's jurisdiction to deal with a matter is a mixed question of fact and law.<sup>8</sup> The Act does not permit any interference in the investigation once set in motion. CCI clarified that applicability of Section 26 (1) of the Act is at a preparatory stage and therefore not appealable.

### JUDGMENT

The Delhi HC relying on series of judgments held that power to recall exists irrespective of whether jurisdiction being exercised is judicial, quasi-judicial or administrative.<sup>9</sup> The Delhi HC held that CCI order directing investigation in

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exercise of its power under Section 26(1) of the Act is capable of review/ recall even in absence of specific power/provision under the Act and is passed in exercise of its administrative powers based following reasons.

- The Act does not provide any remedy to a party in these situations but to subject itself and participate in the investigation as hearing is not mandatory at that stage;
- Orders under Section 26 (1) of the Act are not appealable;
- Applying the same logic as done in cases under Article 226 for quashing of investigation under Code of Criminal Procedure, 1973 ('Cr.P.C.')<sup>10</sup>, a petition against CCI order directing investigation under Section 26(1) of the Act would also be maintainable especially when the powers of the DG investigating are far more sweeping, being almost similar to that of a civil court, than the powers of Police of investigation under the Cr.P.C. The principles of *audi alteram partem* are applicable in civil proceedings unlike investigation by police under Cr.P.C.;
- Availability of an opportunity to be heard during the course of proceedings before the CCI after the report of the DG is submitted cannot always be a ground to deny remedy under Article 226 against the order of investigation<sup>11</sup>;
- If there is a right to approach the High Court under Article 226, such a substantive right cannot be defeated on the ground that it would cause delay<sup>12</sup>;
- The deletion of Section 37 of the Act cannot be a conclusive indication of the legislature having intended to divest CCI of its review powers. Legislature may have deleted Section 37 finding the same to be superfluous in view of the inherent power of the CCI to review/ recall its orders<sup>13</sup>;
- The Respondents were not able to demonstrate as to why the CCI does not have an inherent power to review or recall its order under Section 26(1);
- Mere filing of an application for review/ recall would not stall or delay the investigation by the DG as CCI still has the discretionary powers to decide, depending on the facts and circumstances of the case whether the investigation is to, in the interregnum proceed or not.
- As per Section 36 of the Act, CCI was empowered to regulate its own procedure during the discharge of its functions and does not become *functus officio* after ordering investigation.

The Delhi HC emphasized that while it is indeed within the inherent powers of the CCI to review/ recall its orders under Section 26(1), it should be mindful of inordinate delays and also ensure that such applications should be disposed of within a definite time period to prevent undermining the entire purpose of the investigation as ordered for in the first place. Such a power of CCI should only be exercised without entering into any factual controversy.

## ANALYSIS

The Delhi HC holds that an investigation cannot be conducted without a *prima facie* opinion or where such an opinion is palpably unsustainable.<sup>14</sup> This ruling has laid emphasis on liberty as guaranteed under the Constitution of India, 1950, and has concluded that if grounds for investigation are not borne out in material on record an investigation ought not be permitted leading to harassment parties.<sup>15</sup> However, the Delhi HC specified that such power is to be exercised within certain parameters and subject to certain restrictions without causing delay in the investigation process.

This judgment would definitely encourage CCI to improve administration of its own functions as it is granted flexibility to recall its orders where the circumstances warrant a modification. While the judgment lays down certain conditions subject to which CCI can review its own orders, it is a settled principle of law that the power to review is not an inherent power.<sup>16</sup> CCI may challenge this ruling before the Division Bench of the Delhi HC. However, as the judgment stands today, companies may choose to exercise the option and in appropriate cases, challenge an order directing investigation. This would help effectively conclude investigations which do not meet the threshold required under the Act.

— Payel Chatterjee, Siddharth Ratho, M.S. Ananth & Pratibha Jain

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<sup>1</sup> W.P. (C) No. 7084/ 2014

<sup>2</sup> Section 26. (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter: Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

<sup>3</sup> (2010) 10 SCC 744

<sup>4</sup> Prior to Section 37 of the Competition Act read as follows:-

*"Any person aggrieved by an order of the Commission from which an appeal is allowed by this Act but no appeal has been preferred, may, within thirty days from the date of the order, apply to the Commission for review of its order and the Commission may make such order thereon as it thinks fit:*

*Provided that the Commission may entertain a review application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time: Provided further that no order shall be modified or set aside without giving an opportunity of being heard to the person in whose favour the order is given and the Director General where he was a party to the proceedings."*

<sup>5</sup> Repealed by the Competition (Amendment) Act, 2007 with effect from 12<sup>th</sup> October, 2007

<sup>6</sup> Deep Chand vs. Additional Director, Consolidation of Holdings: MANU/PH/0572/1963

<sup>7</sup> South Asia LPG Company Pvt. Ltd. vs. Competition Commission of India: MANU/ DE/2053/ 2014

<sup>8</sup> Aamir Khan Productions Private Limited v. Union of India MANU/MH.1025/2010

<sup>9</sup> Calcutta Discount Company Limited v. Income-Tax Officer AIR 1961 SC 372; R.R. Verma v. Union of India (1980) 3 SCC 402; S Nagaraj v. State of Karnataka 1993 Supp (4) SCC 595

<sup>10</sup> State of Haryana vs Bhajan Lal 1992 Supp (1) SCC 335

<sup>11</sup> A.R. Antulay Vs. R.S. Nayak (1988) 2 SCC 602.

<sup>12</sup> Madhu Limaye vs State of Maharashtra : (1977) 4 SCC 551.

<sup>13</sup> K.K. Velusamy vs. N. Palanisamy : (2011) 11 SCC 275.

<sup>14</sup> Madras Bar Association vs Union of India: (2014) 10 SCC 1.

<sup>15</sup> State of Haryana vs Bhajan Lal 1992 Supp (1) SCC 335.

<sup>16</sup> Patel Narshi Thakershi & Ors. v. Pradhyumansinghji (1971) 3 SCC 844.

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