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SUPREME COURT UPHOLDS TRAI'S JURISDICTION IN TELECOM OPERATORS CASE

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On 5 December 2018, the Supreme Court dismissed an appeal by the Competition Commission of India (**CCI**) challenging a Bombay High Court order in a matter alleging cartelisation by telecom companies Airtel, Vodafone and Idea (collectively, the **IDOs**). The central issue before the Supreme Court was the jurisdiction of the CCI to probe allegations of cartelisation by IDOs and the Cellular Operators Association of India (**COAI**).

Brief Background

Reliance Jio Infocomm Limited (**Reliance Jio**) and two others filed a complaint with the Competition Commission of India (**CCI**) alleging cartelisation and abuse of dominance by the IDOs and the industry association COAI in violation of Sections 3 and 4 of the Competition Act, 2002 (**Competition Act**). The CCI found a *prima facie* case of cartelisation by the IDOs and the COAI, and directed the Director General (**DG**) to cause an investigation into the matter (**Prima Facie Order**). Thereafter, investigation commenced, and the DG issued notices to the parties.

The IDOs and the COAI filed writ petitions before the Bombay High Court, praying for quashing of the *Prima Facie* order and the DG notices, on the grounds that the CCI did not have jurisdiction considering that the Telecom Regulatory Authority of India (**TRAI**) was already seized of the matter. The Bombay High Court set aside the *Prima Facie* Order and the DG notices vide its judgment dated 21 September 2017 (**Impugned Order**) observing that the TRAI, being the sectoral regulator, has the technical expertise to deal with and decide the issues in the telecom sector. It was also held that the *Prima Facie* Order is not an administrative order, and the CCI ought to have waited for the final decision of the TRAI, before arriving at a *prima facie* finding of anti-competitive conduct.

The Impugned Order was challenged by way of a special leave petition before the Supreme Court, by the CCI and Reliance Jio. The Supreme Court has now dismissed these appeals while largely affirming the findings of the Impugned Order.

Key Issues and Observations

➤ Jurisdiction of the CCI

The central issue before the Supreme Court dealt with the jurisdiction of the CCI to probe into the allegations of cartelisation by IDOs and COAI. While the Supreme Court noted that the CCI has exclusive jurisdiction to adjudicate upon issues governed by the Competition Act. However, the issue of denial of points of inter-connects is a technical issue pending before the TRAI and that the TRAI is the more appropriate authority and best suited to consider these issues.

The Supreme Court affirmed the findings in the Impugned Order and held that only when the jurisdictional facts are determined by the TRAI against the IDOs, would the issue of any concerted agreement between the IDOs and COAI arise. It further observed that it is the mandate of the TRAI to ensure technical compatibility and effective interrelationship between different service providers; ensuring compliance of licence conditions by all service providers; and settlement of disputes between service providers. Further, the Supreme Court noted that permitting the CCI to intervene at this stage would result in it having to decide issues which were best left to TRAI, the sectoral regulator.

Separately, the Supreme Court also held that the Competition Act is a special statute and if there is anti-competitive conduct it is within the exclusive domain of the CCI to examine and rule upon it. Even if TRAI finds anti-competitive conduct, its powers would be limited to the action under the TRAI Act alone. In the context of the present matter, it further stated that once the TRAI *prima facie* finds that the IDOs indulged in anti-competitive practices, the CCI can investigate the matter under the Competition Act. Thus, the jurisdiction of the CCI is not barred, but simply pushed to a later stage.

➤ *Maintainability of writ before High Court*

The CCI had argued that the Bombay High Court could not have entertained the writ petitions against an order passed under Section 26(1) of the Competition Act, because it is an administrative order and only forms a *Prima Facie* view. However, the Supreme Court held that even if the order is administrative in nature, the question pertaining to the very jurisdiction of the CCI would be clearly maintainable in a writ petition under Article 226 of the Constitution. The Supreme Court however agreed with the CCI's contention that the High Court was not competent to adjudge the validity of *Prima Facie* Order on merits.

Comments:

The turf wars between the CCI and sector-specific regulators have been rife in the recent past and therefore, this decision will likely have far reaching consequences for the CCI vis-à-vis sectoral regulators. It would be interesting to see how this decision impacts ongoing proceedings in cases where a sectoral regulator is present. One could also argue that the decision provides some clarity on the stage at which the CCI would now get involved, in cases involving expert bodies /sectoral regulators.

Further, it is unclear how the decision and its aftermath would align with Sections 21, 21A (dealing with cross-referencing matters between CCI and other statutory regulators) of the Competition Act.

On a separate note, the judgment clears the air on jurisdictional challenge and maintainability of writ petitions against *prima facie* orders passed by the CCI, both of which have been highly contentious issues until now.

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