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DELHI HIGH COURT CLARIFIES THE INTERPLAY BETWEEN THE JURISDICTION OF THE CCI AND OTHER STATUTORY REGULATORS

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Setting the stage

The case finds genesis in the Competition Commission of India's (CCI) order of investigation against Mahyco Monsanto Biotech (India) Private Limited's (Mahyco Monsanto) conduct in relation to the sub-licensing of a patented gene. The patent, Bt Cotton Technology, is a technology that consists of two genes to make cotton seeds resistant to bollworms. The technology was patented by Monsanto Company under the Patents Act, 1970 (Patents Act), and licensed to Mahyco Monsanto. Mahyco Monsanto, in turn, sub-licensed the technology to various seed manufacturers in India.

The consideration for sub-licensing the technology comprises of two parts i.e., a non-refundable fee and a recurring fee which is also referred to as trait fee. It is the rate of trait fee and certain terms of the sub-licensing agreement which became the subject matter of a dispute between Mahyco Monsanto on one hand, and the seed manufacturers and the Department of Agriculture, Cooperation and Farmers Welfare, on the other.

Subsequently, a complaint was filed before the CCI alleging that Mahyco Monsanto had indulged in abusive conduct by charging excessive royalties and imposing of unfair conditions in its sub-licensing agreements. The CCI found that Mahyco Monsanto was *prima facie* dominant in the relevant market of "*provision of Bt. Cotton Technology in India*". Further, the sub-license agreements *prima facie* discouraged seed companies from dealing with Mahyco Monsanto's competitors. They also purportedly restricted the development of alternate technologies. Accordingly, the CCI passed an order directing an investigation into the allegations.

The jurisdictional tussle

Mahyco Monsanto and its group entities (Petitioners) disputed the CCI's authority to investigate the sub-licensing agreements since they concerned the exercise of rights granted under the Patents Act. They contended that the Patents Act was all-encompassing legislation that regulated every aspect of the exploitation of a patent. This included remedying any potential abuse of dominant position resulting from patent exploitation. As such, the comprehensive scheme of the Patents Act impliedly excluded the applicability of the Competition Act, 2002 (Competition Act). Consequently, issues such as unreasonable and excessive trait value being charged / imposition of unfair terms could only be investigated by the Controller of Patents (Controller) and *not* the CCI.

The Petitioners' also relied on the seminal *Bharti Airtel*[1] case to argue that the CCI could not parallelly investigate allegations whose subject matter is covered by a separate special law (in this case, the Patents Act) due to the possibility of conflicting decisions.

Revisiting Ericsson: Does it still hold good?

It is noteworthy that for the most part, the Petitioners' submissions concerning the exclusion of the CCI's jurisdiction had already been agitated before the Court in an earlier case (i.e., the *Ericsson*[2] order). The *Ericsson* order concluded that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. Therefore, the CCI's jurisdiction to entertain complaints regarding abuse of dominance in respect to patent rights could not be excluded. However, the Petitioners argued that the *Ericsson* order was not good law in light of the judgment in the *Bharti Airtel* case. The legality of *Ericsson* proceeded to become the real bone of contention in the dispute.

Tying the ends: What does Bharti Airtel mean for Ericsson?

The Court held that *Bharti Airtel* did not invalidate the findings in the *Ericsson* order. Firstly, *Bharti Airtel* held that the CCIs' jurisdiction could not be ousted due to the presence of a sectoral regulator (such as the Telecom Regulatory Authority of India (TRAI)). It merely deferred the exercise of jurisdiction until TRAI arrived at a finding in relation to the subject matter. Secondly, *Bharti Airtel* case did not imply that the CCI can never exercise concurrent jurisdiction in the presence of another statutory regulator. Concurrent jurisdiction in *Bharti Airtel* case was not exercised because the factual aspect of the dispute before the CCI (i.e., the sufficiency of points of interconnection) required TRAI's technical evaluation involving the exercise of its domain expertise. Accordingly, the CCI's examination was deferred until the conclusion of the technical evaluation.

The Court further observed that, *Bharti Airtel* was inapplicable at this stage since TRAI's role could be distinguished from that of the Controller (i.e., unlike TRAI, the Controller isn't a sectoral regulator since *patents* do not constitute a sector). While,, the scope of TRAI's jurisdiction was all-pervasive (including powers to make recommendations and pass regulations) , the Controller's role did not extend to the regulation of the exercise of rights between a patent holder and a third party, in the same manner as TRAI.[3] The principal function of the Controller was to examine the application for grant of patents (and grant patents if the applicant is entitled to such rights). This was unlike TRAI, which was both a regulator and a controller.

The Court also re-affirmed the *Ericsson* order by highlighting the legislature's intention for the concurrent operation of the Competition Act and Patents Act. This is evidenced by two provisions, namely a *non-obstante* clause[4] and a clause that explicitly clarifies that the Competition Act operates in addition to any other law in force[5]. Moreover, it could not be said that the entire field of patents is regulated by the Patents Act. The exercise of rights in relation to a patent may give rise to a contravention under the Competition Act (e.g., abuse of dominant position) and simultaneously require intervention under the Patents Act (e.g., a grant of a compulsory license in the public interest)[6]. Further, an order remedying a contravention under the Competition Act will not be inconsistent with the grant of a compulsory license under the Patents Act. The harmonious interpretation is bolstered by the Competition Act which allows the CCI to

[1] *Competition Commission of India* v. *Bharti Airtel Limited and Other* (Civil Appeal No. 11843 of 2018)
[2] *Telefonaktiebolaget L.M. Ericsson* v. *Competition Commission of India and Another* (Writ Petition (C) 464 of 2014)
[3] The Court observed that the distinction between the role of the TRAI and the Controller has been confirmed by the High Court of Bombay in Writ Petition No. 8594 of 2017.
[4] Section 60 of the Competition Act, 2002.
[5] Section 62 of the Competition act, 2002.
[6] Section 84 of the Patents Act, 1970.

refer a matter to any other statutory regulator (and vice-versa), during its investigation / proceedings[7].

Conclusion

Pursuant to confirming the CCI's jurisdiction, the Court refused to further interfere with the order of investigation. It held that the order of investigation was an *administrative order* and could only be interfered with if it was *arbitrary*, *unreasonable*, and *failed* the Wednesbury test. Since this was not found to be the case, the Court dismissed the petition, thereby allowing the CCI to proceed with investigating the conduct of Mahyco Monsanto.

Comment

The order is a welcome clarification regarding principles that form the foundation of the exercise of the CCI's jurisdiction in the presence of another statutory regulator. In affirming the *Ericsson* order, the Court has confirmed the CCI's exclusive jurisdiction over matters relating to the Competition Act. Thereafter and perhaps, more importantly, it has clarified the import of *Bharti Airtel* case wherein the exercise of the CCI's jurisdiction was deferred to until after certain findings were returned by TRAI.

The Court has observed that *Bharti Airtel* case could not be extrapolated to suggest that the CCI's jurisdiction will always be deferred if another statutory authority was involved contemporaneously. As a general matter, when determining whether the CCI could concurrently investigate a dispute, the Court will be guided by all or any of the following factors: whether the regulator was an industry / sectoral regulator (such as TRAI) or whether it was a sector-agnostic statutory regulator (such as the Controller); whether the primary issue in the competitive claim was directly / explicitly required to be adjudicated by the statutory regulator in terms of the special law (for instance, determination of the sufficiency of points of interconnection by TRAI); whether the operation of the statutory regulator is all-pervasive and extends to oversight over the exercise of the rights of the market player (as opposed to a limited role such as the grant of a compulsory license by the Controller); and the degree of domain knowledge / expertise of the statutory regulator.

Interestingly, the implication of the order on the findings of the High Court of Karnataka[8] where the CCI's investigation was stayed, inter alia, due to parallel proceedings by the Directorate of Enforcement's under Foreign Exchange Management Act, 1999, remains to be seen.

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[7] Sections 21 and 21A of the Competition Act, 2002.
[8] *Amazon Seller Services Private Limited* v. *Competition Commission of India, Delhi Vypaar Mahasangh and Flipkart Internet Private Limited* (Writ Petition (Civil) 3363 of 2020).

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