# What is the CCI's Real Role?

*A Discussion of the Delhi High Court's decision in Mahindra & Mahindra v Commission, W.P.(C) 11467/2018*

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A Division Bench of the High Court of Delhi (hereinafter, the "Court") pronounced judgement in Mahindra Electric Mobility v Competition Commission of India on 10 April 2019 (hereinafter, the "Decision"), bringing to an end a five-year long challenge to the constitutionality of several provisions of the Competition Act 2002. This challenge arose in what is popularly known as the Spare Parts decision from the Competition Commission of India (hereinafter, "CCI"), levying a fine of about 2544 crore on prominent car companies. Though certain other companies chose to approach the erstwhile Competition Appellate Tribunal (now defunct), about 12 car companies approached the Court contesting the constitutionality of sections 22(3), 27(b), 53A-53F and 61 and the Notification dated 31.03.2011 amending Regulation 48(1) of the Competition Commission of India (General) Regulations 2009.

Save the challenges to sections 22(3) and 53E, all other challenges have been dismissed. Of interest, however are the guidelines imposed by the Court at paragraphs 179 and 213 of the Decision, directing that all proceedings shall be heard *en banc,* and no addition or change in members shall be permitted during a final argument. The Court also directed the CCI to frame guidelines regarding the same. The Court has also directed that parties shall in all cases address the factors in *Excel Crop Care* v *Union of India* (hereinafter, "Excel Crop") as to the determination of relevant turnover and other relevant factors through written submissions, as well as address mitigating factors.

## Grounds for Consideration

The Court laid out the following grounds for consideration:

*(1) Is the CCI a tribunal exercising judicial functions, or is it performing administrative and investigative functions and also adjudicating issues before it;*

*(2) Is the CCI unconstitutional inasmuch as it violates the separation of powers principle, which underlies the Constitution and is now recognized as a basic or essential feature of the Constitution of India;*

*(3) Is Section 22 (3) unconstitutional for the reasons urged by the petitioners;*

*(4) Does the revolving door practice vitiate any provision of the Act or the decisions rendered by the CCI;*

*(5) Was the power exercised by the CCI to expand the scope of inquiry and notice under Section 26 (1) in an illegal and in an overboard manner;*

*(6) Is Section 27 (b) of the Act and the provision for penalties unconstitutional or the orders impugned arbitrary, for the reason that no separate hearing is provided, and the statute provides no guideline for exercise of discretion.*

**Is the CCI a tribunal exercising judicial functions, or is it performing administrative and investigative functions and also adjudicating issues before it;**

In paragraphs 75-85, the Court affirms that the CCI was not merely a judicial tribunal, relying on the decision of the Supreme Court in *Competition Commission of India* v *Steel Authority of India Ltd.*

While the Court's exposition on this point correctly explains the CCI's duties and functions and adheres to precedent, the distinction made between a regulator and a tribunal here perhaps defeats the remainder of the Decision. In essence: the Court explains that the functioning of the Commission is merely administrative at the time a complaint is referred to it, while quasi-judicial orders are passed at the very end. There are two instances, subsequently, where the Court seems uncomfortable with its own reasoning.

In 2017 the Supreme Court passed judgement in *National Securities Depository Ltd.* v. *Securities and Exchange Board of India.*After relying on several of the precedents that the Petitioners to the present matter cited, the Court came to the conclusion that where a body, under duty to act judicially had the power to affect the rights of individual parties, it automatically exercised a quasi-judicial function regardless of whether it was seized of a *lis.* It follows, therefore that the argument that the CCI does not execute an adjudicatory function is not tenable. As one can see in the narrative in paragraphs 83 and 163, the Court uses examples that would run contrary to the principle that the CCI is not an adjudicatory authority.

**Is the CCI unconstitutional inasmuch as it violates the separation of powers principle, which underlies the Constitution and is now recognized as a basic or essential feature of the Constitution of India;**

The Petitioners contended here that considering orders under section 27 affected the rights of parties, being quasi-judicial orders, the same could not possibly be passed without a legal expert on the bench. The Court disagrees. In doing so, the Court noted that the functioning of other regulators, *viz.* the Telecom Regulatory Authority of India and the Disputes Settlement Appellate Tribunal, the Electricity Boards and Central and State Commissions, the Securities Exchange Board of India and the Airports Regulatory Authority of India had a common, overwhelming feature: that none of these regulatory authorities mandated a judicial member on their bench. Furthermore, the Court disagrees with the Petitioners' application of the Supreme Court rulings in *Union of* India v *R. Gandhi* and *Madras Bar Association* v *Union of India.* The Petitioners claim that these judgements ruled on tribunals eroding the powers of the judiciary, while the Court claims that those decisions only address the divestment of the Court's powers to tribunals that were not nearly as effective. The proper test, the Court rules, is to see whether the agency in question takes over an 'essential function', *viz.* adjudication and does it less efficaciously (see *Rai Sahib Ram Jawaya Kapur* v *State of Punjab* AIR 1955 SC 549). The Court's final answer is that the CCI, not having an adjudicatory function to begin with, need not be subjected to this test.

## *Is Section 22 (3) unconstitutional for the reasons urged by the petitioners;*

### *Does the revolving door practice vitiate any provision of the Act or the decisions rendered by the CCI.*

The Court determines these two issues together, in dealing with the casting vote and the revolving door policy adopted. The Court rejects the CCI's argument here that the casting vote is not alien to Indian regulators, distinguishing them (taking the SEBI as an example) as only in administrative matters. On this front, the Court relies on the decision of the Bombay High Court in *Shobhana Shankar Patil* v *Ramchandra Shirodkar* to hold Section 22(3) unconstitutional in this regard.

The Court does not hold the revolving door policy invalid *per se,* but only based on where a person who did not hear the matter decided the case. As was demonstrated by the CCI, Mr S.L. Bunker, despite having been present at the hearings after the retirement of Mr Ratneshwar Prasad, took no part in the decision.

The Court therefore rules that section 22 could not be held invalid merely because of the revolving door policy, but the directions at paragraph 179 also include directions for a bench's composition to remain consistent throughout a proceeding, even allowing the matter to be heard afresh if necessary (considering the slow disposal rate of competition cases by the CCI, this could derail the process further).

Of note here is the illustration in paragraph 163: the Court here explains that where a four-member bench reviews a complaint and concludes that no *prima facie* case is made out, the Chairperson can use the casting vote to direct that a *prima facie* case does exist. That should not matter, considering that the Supreme Court has already directed, as does the High Court in the preceding sections of the Decision under discussion that a decision under Section 26(1) is an administrative decision, with no rights affected. Refer to the preceding paragraphs about the Court's determination of the first issue.

*Was the power exercised by the CCI to expand the scope of inquiry and notice under Section 26 (1) in an illegal and in an overboard manner?*

The Court observes here that the same is already decided by the Supreme Court of India in *Excel Crop,* and is settled law.

*Is Section 27 (b) of the Act and the provision for penalties unconstitutional or the orders impugned arbitrary, for the reason that no separate hearing is provided, and the statute provides no guideline for exercise of discretion.*

The Petitioners finally challenge the penalty imposed, on the grounds that there are no statutory guidelines for the grant of penalty and a separate penalty hearing. In doing so, they rely on the decisions of the Supreme Court in *S.L. Kapoor* v *Jagmohan & Ors.* and *Canara Bank* v *VK Awasthy and Ors.*The Court distinguishes these judgements, demonstrating that they arose in the factual context of the authority not adhering to the specified regulations. In contrast, the CCI had adhered to the rules here exactly.

The Court then goes on to observe that Chapter VI of the Competition Act 2002 has adequate safeguards in place to guide accused enterprises as to the limits of penalty that may be imposed. Moreover, there is no plausible reason for the petitioners to claim, by right that a pre-penalty show cause notice be issued where the parameters of the quantum are already determined in the Act (see paragraph 197).

The Court also holds that the decision in *Excel Crop* provides adequate guidelines for the determination of penalty. Of course, the preceding discussion does recognise the possibility of judge-made regulations in *United States* v *Chenery Corporation* and *PTC India* v *Central Electricity Regulatory Commissioner*. That said, the Excel Crop decision was issued where the CCI had no legislative guidance to adjudicate upon disputes correctly, and the same remains a problem today; unlike the EU Commission or the United States trade regulator, the CCI has no guidance available to it to determine the penalty accurately, or framework to determine anticompetitive conduct. In practice, the CCI largely relies on the guidelines published by the EU Commission. While the Court's reasoning here cannot be faulted, the Petitioners are correct in averring that the penalty determination by the CCI is not done accurately.

## Conclusion

In closing: the Court is, today, faced with challenges to the functioning of what it calls the new age regulators, which do not conform with the older tribunals. Through this decision, the Court upholds the CCI's powers to a great extent; I do believe, however that a review of the role needs to be made.

**DISCLAIMER: The views expressed herein are personal. They do not reflect those of the team at the Center for Innovation, IP and Competition, or of any other organisation.**

Lead Writ Petition W.P.(C) 6610/2014, decision in W.P.(C) 11479/2018.

Case 3 of 2011, *Shamsher Kataria* v *Honda Siel Motors and Ors.,* Competition Commission of India (hereinafter, "Spare Parts")

(2017) 6 SCALE 241.

(2010) 10 SCC 744.

(2017) 5 SCC 17,

(2010) 11 SCC 1 and (2015) 8 SCC 583

Decision, paragraphs 130-145.

AIR 1996 Bom 217.

(1980) 4 SCC 379, (2005) 6 SCC 321.

332 U.S. 194 (1947) and (2010) 4 SCC 603.

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