

# Role of Courts in Settling Conflict of Jurisdiction Between Sector Regulators and Competition Regulator in India

M. M. Sharma

Competition Law is relatively of nascent origin in India. There have been some cases of conflict of jurisdiction between sector specific regulators and CCI, particularly, in relation to enforcement of intellectual property rights, which has attracted judicial intervention by writ courts. The higher judiciary in India has played a significant role in resolving this conflict and the issue of conflict of jurisdiction or “forum shopping” is likely to continue to arise in India. However, some recent judgements of the Supreme Courts seem to have been resolved the issue to large extent in India. The article outlines the role of higher judiciary in resolving this source of conflict during the enforcement of the competition law in the last nine years and how it has helped in developing a robust jurisprudence on competition law in India.

*Keywords:* writ jurisdiction, jurisdictional issue, competition, sectoral overlap

## Introduction

The conflict of jurisdiction between sector specific regulators and CCI has been a perennial source of litigation between the parties which has attracted judicial intervention by writ courts. The higher judiciary in India, including the Competition Appellate Tribunal (COMPAT) has played a significant role in resolving this conflict and the issue of conflict of jurisdiction or “forum shopping” seems to have been resolved to large extent in India with few latest judgments of the Supreme Court, the *ratio decidendi* of which have now been followed by the CCI. Let us review how this resolution of conflict emerged historically in India.

**Competition Law vs. Intellectual Property Rights**—The major challenge against the jurisdiction of the CCI has been raised by parties holding the Intellectual Property Rights (IPR) in view of Section 3(5) of the Competition Act, 2002 (Act) which protects the monopoly created by statutes relating to patents, copyrights, etc. to protect one’s IPR rights. The protection, however, is restricted by the “reasonableness” of the conditions which may be imposed by the holders of the IPRs on their licensees and this provision allows CCI the power to test whether the conditions imposed by the IPR holder while granting the license are reasonable and not unduly restrictive of competition. Apart from this specific provision regarding agreements between IPR holders and their licensees, there is no protection to the possible abuse of dominant position by the holders of the IPR under

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Section 4 of the Act if any of the prohibited effects<sup>1</sup> are visible in the market.

The first dispute arose in the case of *Super Cassettes Industries Ltd. vs. UOI & Ors*<sup>2</sup>, where the issue related to the conflict between section 4 of the Act and the Copyright Act (1957). In this case, the holder of copyrights over the largest number of Bollywood film songs, the Super Cassettes Industries Ltd. (“T-Series” brand) challenged the prima facie order passed by CCI under Section 26(1) of the Act directing investigation based on information filed by M/s HT Media Limited (Radio 104.4 FM) alleging abuse of dominance by Super Cassettes Industries Ltd. (T-Series) before Delhi High Court on the grounds that the: (i) case involved a license of rights, and such a right cannot be considered to be a “good” or a “service”, it cannot be brought under the purview of the Section 4 of the Act; (ii) appropriate authority to address the grievances of the informant is the Copyright Board—facts stated, issues raised, and reliefs prayed for before the Copyright Board are identical/substantially overlapping; and (iii) Copyright Board is the only authority to decide whether the terms of a license between copyright owner and a radio broadcaster are reasonable and set new terms if existing terms are unreasonable. The Delhi High Court, accepting the response filed by CCI that: (i) none of the areas covered under Section 3 or 4 of the Act is covered under the Copyright Act; (ii) powers of the Commission and Copyright Board govern different aspects of law; and (iii) the Copyright Board cannot serve as an effective instrument for promotion of competition, dismissed the writ petition filed by T-Series and held that in case of conflict between the Act and the Copyright Act (1957), the jurisdiction issue will be decided by CCI.

The second major challenge against the jurisdiction of CCI was raised by telecom major Ericsson in the case titled *Telefonaktiabolaget LM Ericsson (Ericsson) v CCI and Anr*<sup>3</sup>, in which the Delhi High Court had to decide whether the CCI has jurisdiction to examine the allegation of anti-competitive conduct and abuse of dominance even if the Patents Act (1970) provides for efficacious remedies in the nature of grant of compulsory licenses. In this case also, like the previous case of T-Series, CCI had directed investigation u/s 26(1) on information filed by Micromax and Intex that Ericsson has a large portfolio of Standard Essential Patents (SEPs) in respect of technologies used in mobile handsets and network stations, has abused its position of dominance while charging royalties. Ericsson contended that any issue regarding a claim for royalty would fall within the scope of Patents Act (1970) and cannot be a subject matter of examination under the Competition Act. Writ Petitions were filed by Ericsson against order of the CCI under Section 26(1). The High Court held that the jurisdiction of CCI under the Act to probe allegations of anti-competitive practices and abuse of dominance arising out of the monopoly granted by patent rights cannot be taken away even if the Patents Act (1970) provides for efficacious remedies *inter alia* in the nature of grant of compulsory licenses.

**CCI vs. Sector specific regulators**—There have been few cases of conflict between the Act and the other statutes governing certain specific sectors of economy such as electricity, telecom, insurance and financial securities, etc. Statutory provision exists in the Act to avoid any confrontation between the CCI and the sector specific regulator by providing that if during the course of a proceeding before a sector specific regulator, any

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<sup>1</sup> Section 4 of the Act prohibits abuse of dominant position. The dominant position held by an enterprise is considered to have been abused, per se, if any of the five prohibited conducts are visible, i.e., (i) imposition of unfair or discriminatory price or condition etc., including predatory price; (ii) limit or restricting either the production of goods or provision of services or market therefore or technical or scientific development relating thereto to the prejudice of consumers; (iii) indulges in any practices which result into denial market access in any manner; (iv) forces the counter parties to accept supplementary obligations which do not have any connection with the subject of the main contract, and (v) uses its dominant position held in one relevant market to enter into or protect other relevant market.

<sup>2</sup> W.P.(C) 1119/2012 decided on 04.10.2012.

<sup>3</sup> W.P.(C) 464/2014 decided on 30.03.2016.

competition issue is raised then such regulator may make a reference to CCI and the CCI shall be bound to consider the same and give opinion on the same within 60 days of receipt of such reference and the regulator shall consider the opinion of CCI while deciding the main issue pending before it<sup>4</sup>. Similarly, where in the course of proceeding before the CCI, an issue has been raised which requires the expert knowledge or opinion from any statutory authority or sector specific regulator, then CCI may also make a reference to such sector specific regulator and the said regulator shall also consider and give his expert opinion on the issue within 60 days to CCI which shall consider the opinion of the sector regulator while deciding the competition issues<sup>5</sup>.

Let us examine few landmark decisions of COMPAT and higher courts which have helped resolving this long-debated issue in India.

The first such issue of conflict of jurisdiction between the Act and the Electricity Act (2003) arose in the case titled *Anand Prakash Agrawal v Dakshin Haryana Bijli Vitram Nigam and Ors*<sup>6</sup> before COMPAT. In this case, COMPAT held interestingly, that Electricity Act (2003) had an overriding effect over the Competition Act, 2002. Information was filed before the CCI by a consumer (*Anand Prakash Agarwal*) of DHBVN (sole supplier of electricity in the area of residence) that it was charging higher Fuel and Power Purchase Cost Surcharge Adjustment charge (FSA) from the consumers whose consumption of electricity was higher thereby discriminating between its consumers. CCI, while agreeing that DHBVN is dominant, did not agree that the differential pricing amounted to abuse of dominant position. Further CCI held that case essentially related to the functions discharged by the Electricity Distribution Company and the State Electricity Regulatory Commission in respect of fixation of FSA and no competition issue was discernible from the facts presented in the information. Case was subsequently closed under Section 26(2) of the Act. Appeal was filed before COMPAT by the informant. The Appellate Tribunal observed that even though Section 60 of the Act contains a “non-obstante clause”, the Electricity Act (2003) would prevail as it is a “later special statute”. In addition to this, the COMPAT observed that the Electricity Act (2003) has its own system to check on abuse of dominance and the Electricity Act specifically mentions certain Acts which would have an overriding effect on it, and the Competition Act is not mentioned.

However, contrary to above view of the erstwhile COMPAT, the Supreme Court in *Competition Commission of India vs. Fastway Transmissions Pvt. Ltd*<sup>7</sup> held that Section 60 of the Act, gives it an overriding effect in case of a clash with other statutes, keeping in mind the economic development of the country as a whole.

More recently, the Supreme Court in the case titled *Competition Commission of India v. Bharti Airtel Limited and Others*<sup>8</sup> while dismissing the appeals filed by the CCI and Reliance JIO and by upholding the Bombay High Court judgment dated 21st September 2017 which had quashed the CCI prima facie order directing investigation under Section 26(1) of the Act against Bharti Airtel, Vodafone, Idea (existing telecom players) and the trade association, the Cellular Operators Association of India (COAI) has deftly found a middle path and resolved the long debated tussle for supremacy between the overarching fair market watchdog, the CCI and the sector specific regulators, the Telecom Regulatory Authority of India (TRAI), in this case, by

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<sup>4</sup> Section 21 of the Competition Act, 2002.

<sup>5</sup> Section 21A of the Competition Act, 2002.

<sup>6</sup> Appeal No. 33 of 2016 decided on 16.02.2017.

<sup>7</sup> Civil Appeal No. 7215 of 2014 decided on 24.01.2018.

<sup>8</sup> Civil Appeal No. 11843 of 2018 [Civil Appeal arising out of SLP (c) No. 35574 of 2017 & Ors.] decided on 05.12.2018.

postponing scrutiny into any possible co-ordination or collusion between the existing telecom players through the platform of COAI or otherwise by CCI. Further, the Apex Court, while upholding its earlier judgment in the Steel Authority of India Ltd. (SAIL) case<sup>9</sup> (*SAIL Case*) on the nature of the CCI prima facie order under Section 26(1) of the Act (administrative and not quasi-judicial as contended by the existing telecom players) also, for the first time, made a distinction between examination of competition issues by CCI in a sector having a statutory regulator and a sector without one. The Court invoked the need for use of Section 21A of the Act, which makes it mandatory for CCI to obtain opinion of the sector regulator on sector specific issues first.

This way, the Hon'ble Supreme Court finally showed a middle path to resolve the long-debated issue of jurisdictional conflict between the CCI and sector regulators. The Hon'ble Supreme Court, by invoking the doctrine of harmonious construction has balanced the stand by giving TRAI the power to determine the rights and obligations of the parties first, and then if it apprehends the existence of anti-competitive act, invokes the jurisdiction of CCI. It may be noted that in coming to this conclusion, the Apex Court, without making a special reference, followed the existing jurisprudence on this issue in the USA, illustrated in the noted cases of *Credit Suisse Case*<sup>10</sup> and the *Verizon Communications case*<sup>11</sup> decided by the US Supreme Court.

As if following the *ratio decidendi* of the judgment of the Supreme Court in the above case, in respect of apparent conflict of jurisdiction between the CCI and the regulator for financial securities market, the CCI has recently decided to cede jurisdiction to the Securities and Exchange Board of India (SEBI)<sup>12</sup> vide its order dated 07.01.2019. The information was filed by an Advocate namely Mr. Jitesh Maheshwari against the National Stock Exchange (NSE) alleging abuse of dominance in the sense of unfair and discriminatory treatment in the "market for providing services of trading in securities to the trading members in India".

The Commission acknowledged that the grievance of the informant is that the NSE by giving unfair preferential access to some trading members of its co-location services has limited and restricted the provisions of services to other trading members availing the co-location services which resulted in "denial of market access" to others. The CCI, however, decided not to go into the merits of the case and closed the case vide its order dated 7.1.2019 under Section 26(2) of the Competition Act 2002 (the Act) mainly for the reason that the "NSE Co-location Case" is currently under investigation by the Securities Exchange Board of India (SEBI). The Commission recognized that the genesis of the NSE Co-location case dates to 2015, when a whistle-blower wrote a letter to SEBI alleging that NSE gave preferential access to a few high-frequency traders and broker to its trading platform. The Commission accepted that SEBI is looking at similar issues alleged in the information; however, the exact role of NSE with respect to the preferential/discriminatory services is still at the stage of investigation. The Commission, however, also observed that the discriminatory and abusive conduct falls within the jurisdiction of the Commission and that it can be examined by the CCI based on cogent facts and evidence (apparently after the completion of investigation by SEBI). It observed that the allegations against NSE are yet to be established in an appropriate proceeding and also a lack of sufficient information about the role of NSE to arrive at a *prima facie* view. Accordingly, the case was closed under Section 26(2) of the Act.

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<sup>9</sup> CCI vs. SAIL (2010) 10 SCC 744.

<sup>10</sup> *Credit Suisse Securities (USA) LLC vs Glen Billing* [551 U.S. 264].

<sup>11</sup> *Verizon Communications Inc vs Law Offices of Curtis v. Trinko, LLP* [540 US 398].

<sup>12</sup> May also like to see <https://www.competitionlawyer.in/ci-cedes-jurisdiction-to-sebi-to-decide-upon-complaint-of-abuse-of-dominance-against-national-stock-exchange/>.

### Conclusion

CCI has been enforcing the main provisions relating to prohibition of anticompetitive agreements and abuse of dominant position since 2009 and that of regulation of mergers and acquisitions since 2011. Whereas there has been no major issues with the speed of regulation of merger and acquisitions by CCI since 2011, the enforcement of the provisions relating to anticompetitive agreements and abuse of dominant position have been marred with repeated challenges on grounds of sectoral overlaps or forum shopping between CCI and the Sector specific regulators, such as in Telecom, Petroleum sectors and also the Copyright Boards, Controller of Patents etc. The High Courts and the Supreme Court have played a major role in resolving the basic procedural issues affecting enforcement of competition law in India. Particularly, after the recent judgment of the Supreme Court in the *Bharti Airtel case*, at least the CCI seems to have understood its limits. However, whether the issue is finally resolved or there may be more such conflicts is yet to be known.

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