

**CASE COMMENT: ESS CEE SECURITIES PVT.
LTD. & ANR. V. M/S DLF UNIVERSAL
LIMITED & ANR.**

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1. INTRODUCTION

In the landmark case of Competition Commission of India v Steel Authority of India¹ ('SAIL's case'), the Supreme Court's interpretation of various provisions of the Competition Act, 2002 ('Act'), particularly the interpretation given to Ss. 26(1), 26(2), 53A(1)(a) and 53B(1) of the Act, has come to be considered as a touchstone against which the metes and bounds of the appellate jurisdiction of Competition Appellate Authority ('COMPAT') is to be decided. Nonetheless, this settled position has once again become unsettled. Recently, the scope of COMPAT's appellate jurisdiction vis-à-vis the extent of its power to pass orders under S. 53B(3) of the Act, was brought into question before the apex court in the ongoing proceedings

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¹ Competition Commission of India v Steel Authority of India, (2010) 10 SCC 744.

of *Uber India Systems Pvt. Ltd. v. Competition Commission of India &Ors.*²

It had been observed in a number of recent cases, that the Tribunal has passed certain orders and directions under S. 53B (3) of the Act, which are *ultra vires* to both the written word and the intent behind the said provision. However, the Tribunal in its latest judgment in *Ess Cee Securities Pvt. Ltd. & Anr. v. M/s DLF Universal Limited &Anr.*,³ might have tacitly shifted the prevailing trend towards the right direction by applying a restrictive approach while deciding its jurisdiction in this case. In this comment, this restrictive approach taken by the Tribunal in the present case would be analyzed from the standpoint of interpretation and contemporary judicial trend.

2. **FACTS**

2.1. **Preliminary facts**

In this case, the petitioners were two associated companies ('informants'), who had booked apartments in the respondent's project called 'DLF Capital Greens Phase-III'. Immediately after the bookings were made, the respondents started harassing

² *Uber India Systems Pvt. Ltd. v Competition Commission of India & Ors.*, C.A. no. 641/2017.

³ *Ess Cee Securities Pvt. Ltd. &Anr. vM/s DLF Universal Limited & Anr.*, Appeal No. 02/2016 [Decided on 09.02.2016].

the informants with frequent demand notices for payments, which were sent on monthly basis, and hefty fines, which were imposed on the informant for even minor delay in payment. The informants tolerated this behavior for nearly 30 months as the had their money tied up with the respondents.

However, three months prior to the stipulated date of delivery, the respondents conveyed their inability to deliver the project within the stipulated time due to delay in procurement of requisite approvals. They further offered the informants a meager compensation at Rs.10/- per square feet per month.

Aggrieved by these actions of the respondents, informants approached the CCI under S. 19(1)(a) of the Act seeking compensation for abuse of dominant position by the respondents. Till the date of information, both the companies had already paid a total of Rs. 3,86,54,205/- and Rs. 3,40,39,756.72/- respectively, to the respondents.

In their information to CCI, the informants stated that they were particularly looking for a 'luxury apartment' and the distinct facilities offered by respondents in their project that highly appealed to them and became the primary reason for their choice. They further averred that after doing the due diligence, they found that DLF ('respondents') had the largest market share

in ‘luxury residential apartments’ market in Delhi and no other project offered similar facilities as the respondents.

2.2. CCI’s order

Upon considering the information submitted by the informants, the Commission first ventured to determine the relevant market in the present case. It was found that, in this case the relevant product market would be ‘*provision of services relating to development and sale of residential apartments*’ as ‘no other product(s), such as services relating to development and sale of commercial/ industrial properties and residential plots may be considered as substitutable/ interchangeable with provision of services relating to development and sale of residential apartment.’⁴ Whereas Delhi was held to be the relevant geographical market in the present case.⁵

After ascertaining the relevant market, the Commission held that there were other real estate developers like Delhi Development Authority, Ansal API, CGHS Group, Parsvnath, etc. in Delhi, who posed competitive constraints to the respondents in the relevant market. It was deduced further that due to this position of respondents, the informants were not dependent upon them

⁴ *Supra* note 3 at ¶ 11.

⁵ *Ibid.*

for purchasing residential apartment.⁶ Therefore, the Commission could not make out any *prima facie* case of dominant position against the respondents and consequently matter was closed under the provisions of S. 26(2) of the Act.⁷

2.3. COMPAT's Judgement

The informants appealed against the above order before the Competition Appellate Tribunal ('Tribunal') under S. 53A(1)(a) of the Act. Upon analyzing the facts of the case and the order passed by the Commission, the Tribunal framed a singular issue that is 'whether the Commission was right in closing the matter and not ordering an investigation by the Director General'.⁸

After considering the material on record, the Tribunal held that the Commission had failed to properly appreciate the information submitted by the informants. Further, the Tribunal found that the Commission's order was inconsistent with its previous ruling in *Belaire* case⁹ where it had specifically explained the characteristics of 'high end' residential apartments and held them to be a separate product than 'regular' or 'economic' apartments. Finally, the Tribunal held that the

⁶ *Id.* at ¶ 12.

⁷ *Supra* note 3 at ¶ 13.

⁸ *Id.* at ¶ 4.

⁹ *Belaire Owner's Association v DLF Limited & Ors.*, Case No. 19/2010 dated 12 August 2011.

Commission had erred in determining the relevant market and it narrowed the scope of relevant market in this case to ‘*provision of services relating to development and sale of high-end luxury residential apartments in Delhi*’.¹⁰The case was then remitted back to Commission for deciding ‘whether the respondents are in a dominant position in the relevant market as determined above, and whether they have abused their dominance and thereby acted in contravention of S. 4(2) of the Act.’¹¹

3. ANALYSIS

The most noteworthy aspect of this judgement is the approach taken by the Tribunal while determining the extent of its jurisdiction under S. 53A (1) (a) vis-à-vis its power to issue orders under S. 53B (3) in the present case. From a contrast analysis of the restrict approach taken by the Tribunal in the present case vis-à-vis the approach taken by it in its previous judgements, substantial implications could be drawn as to the overall scope of the jurisdiction of the Tribunal under the Act.

¹⁰ *Supra* note 3 at ¶ 18.

¹¹ *Id.* at ¶ 19.

S. 53A(1)(a) of the Act provides for establishment of the Tribunal, and also provides for matters against which the Tribunal may hear and dispose of appeals. It reads as under:

“53A. (1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;” [1]
[SEP]

S. 53B(3) of the Act, provides for orders which the Tribunal may pass after hearing the as per the procedure laid down under S. 53B and it reads as under:

“53B.(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.”

3.1. **Interpretation**

As far as interpretation of these provisions is concerned, it may be seen that while S. 53A(1)(a) dictates as to against what matters an appeal shall lie before the Tribunal, it is S. 53B(3) ('impugned provision') which provides for orders which the Tribunal may pass while exercising its appellate jurisdiction under S. 53A(1)(a). It shall be noted that the latter states that the Tribunal may 'pass any such order as it may deem fit' but it continues further to specifically restrict the scope of 'such order' to precisely 'confirming', 'modifying' or 'setting aside' 'the direction, decision or order appealed against'.

In order to better understand this point, the above underlined portion of the impugned provision may be divided into two parts- (i) 'pass such orders thereon as it thinks fit', which is of very broad scope, and (ii) 'confirming, modifying or setting aside the direction, decision or order appealed against', the construction of which could either restrict the scope of the first part or deemed as merely illustrating its scope inconclusively, depending upon the meaning of ',' ('comma') placed between both the parts.

According to Crabbe (1993), punctuation forms part of the legislation.¹²A comma may be used: ‘for the purpose of facilitating the construction of a sentence, and the comprehension of the sentence’; ‘where the information conveyed is necessary to the main thought’; or ‘where the information conveyed is parenthetical’.¹³Hence, a comma may be placed where some supplementary information needs to be conveyed, it could be an addition to the preceding text or an exception to it, and its implication has to be deduced by its application.

By applying this logic to the impugned provision, we may find that, due to the use of multiple commas in the said provision, the context indicates that legislator’s intended for the whole provision to be construed in continuation. Also, as there is lack of any word like ‘includes’ or ‘etcetera’ at the beginning or end of the phrase ‘confirming, modifying or setting aside...’, the most suitable inference from this is that this second part of the impugned provision was added by the draftsmen so as to set out certain qualifications for the first part.i.e. ‘pass such orders thereon as it thinks fit’.

¹²Vcrac Crabbe, *Legislative Drafting* 91, (1st Ed. 1993).

¹³*Id.* at 95-97.

3.2. **Judicial Trend**

Nevertheless, *au contraire* to these technical deductions, the apex court is seen to have taken a different view in the *SAIL*'s case,¹⁴ where the jurisdiction of the Commission and the Tribunal were discussed at considerable length. In its *Obiter*, the Court explained the impugned provision as:

*"...S. 53B(3) further requires that the Tribunal, after giving the parties to appeal an opportunity of being heard, to pass such orders, as it thinks fit, and send a copy of such order to the Commission and the parties to the appeal."*¹⁵

It is evident from the above excerpt that the Court did not mention or recognize any qualification as suggested earlier. Nonetheless, it is submitted that the provisions under the spotlight in this case were S. 53A(1)(a) and S. 53B(1) with the special focus on whether an order made by the Commission under S. 26(1) could be appealed before the Tribunal under the aforementioned provisions. This question was answered in negative by the Court, however, no part of the judgment discussed in particular the scope of Tribunal's appellate jurisdiction with regard to orders made under S. 26(2), appeal against which lies directly under S. 53A(1)(a). The above quoted

¹⁴*Supranote 1.*

¹⁵*Id.* at ¶ 63.

description of the impugned provision was given only in a passing to explain the procedure laid down under S. 53B.

Howbeit, whatever the case maybe, it would be pertinent to see how the Tribunal had itself interpreted the impugned provision and passed orders thereunder.

In *North East Petroleum Dealers Association v. Competition Commission of India and Ors.*,¹⁶ where the appellants had alleged abuse of dominance by certain major Public Sector Undertakings (PSUs) involved in the business of sale of petrol, diesel and other allied petroleum products. Upon considering the material on record, the Commission found no weight in the allegations made by the appellant and passed an order u/s 26(2) to close the matter. However, on appeal against the said order, Tribunal found that there was a prime facie case arising out of the material placed on record and consequently, it ordered the setting aside of the Commission's order.

Interestingly, the Tribunal not only set aside the Commission's order but also gave its opinion as to the existence of *prima facie* case and further remanded the case back to the Commission, to comply with the procedural formality of passing directions to Director General to initiate the investigation. It is ironic that in

¹⁶North East Petroleum Dealers Association v Competition Commission of India and Ors., Appeal No. 51 of 2014 [decided on 26.11.2015].

the entire judgment the Tribunal dictates the reservations which must be observed by the Commission while forming an opinion regarding the existence of *prima facie* case, meanwhile it itself takes over the functions of the Commission as expressly prescribed by the Act and reduces the Commission's quasi-judicial role to a merely executive one.

Relevant excerpt from the judgment read as follows:

“11. We have refrained from examining the pleadings filed by the parties in this appeal and the documents produced by them in detail because then the Tribunal would be repeating the mistake committed by the Commission to go into the merits of the allegations. However, we have no hesitation to hold that a prima facie case is disclosed from the allegations made by the informant and the Commission committed an error by refusing to order an investigation under S. 26(1).

12. In the result, the appeal is allowed. The impugned order is set aside and the matter is remanded to the Commission for issue of a direction to the Director General under Section 26(1) for conducting an investigation...”

Nevertheless, it shall be noted that the Tribunal at least remanded the case back to the CCI for compliance with express procedure laid down under the Act. Compared to this, the other more recent decisions of the Tribunal could be deemed as far

more bold and straightforward and less considerate of the mandate of the statute.

In *Gujarat Industries Power Company Limited v. Competition Commission of India and Ors.*,¹⁷ where the appellant, a public limited company, filed an appeal against the Commission's order under S. 26(2). Tribunal, after appreciating the material on record, found that there existed a *prima facie* case against the respondent and further ordered directly for Director General to initiate the investigation. Unlike the *North East Petroleum Dealers* case, Tribunal, not only executed the quasi-judicial function of the Commission by itself, but also did not consider it necessary to even comply with the due procedure of the statute by indirectly ordering such investigation through the Commission. Relevant excerpt from the judgment reads as follows:

“27. In the result, the appeal is allowed. The impugned order is set aside and it is held that the appellant has succeeded in making out a prima facie case of violation of Section 4 of the Act which needs to be investigated. Therefore, the DG is directed to conduct an investigation into the allegations contained in the information filed by the appellant and submit a report to the

¹⁷Gujarat Industries Power Company Limited v Competition Commission of India and Ors., Appeal no. 3 of 2016 [decided on 28.11.2016].

Commission under Section 26(3) of the Act read with Regulation 20(4) of the Regulations within a period of sixty days from the date of receipt of this order...”

In *Meru Travels Solutions Private Limited. Competition Commission of India and Ors.*¹⁸, which immediately preceded the present judgment, the Tribunal passed a similar order to the Director General to initiate the investigation.¹⁹ This case was appealed against before the apex court and, interestingly, during the course of proceedings of this appeal, the renowned counsel for the respondents, Mr. Harish Salve, raised this same issue which has been discussed so far i.e. the Tribunal exceeded its power to pass orders under the impugned provision in its judgment.

When the bench asserted that it was within the appellate powers of the Tribunal to do so, and in turn questioned his premise for the said contention, the learned counsel replied during his submissions that:

“the power will depend on the nature of the statute. COMPAT can confirm or set aside CCI’s order and it can even modify it

¹⁸*Meru Travels Solutions Private Limited v. Competition Commission of India and Ors.*, Appeal No. 31/2016 [decided on 07.12.2016].

¹⁹*Supra* note 18 at ¶ 19, 20 & 21.

but COMPAT cannot say that the director general should investigate. This matter will have an impact on various cases.”²⁰

Therefore, from the discussion hitherto, it may be concluded that stand taken by the Tribunal may indicate a future paradigm shift, where the ambiguity in the impugned provision maybe dealt in the righteous manner by the Tribunal by self-limiting the exercise of its appellate jurisdiction to only conflicts of law or patent procedural errors viz. non-observance of principles of natural justice etc. However, whether the contention raised by the respondent in *Meru* case stands or if the Hon’ble Court gives any other interpretation to the impugned provision, would prove to be a major decisive factor on this issue.

4. CONCLUSION

In this comment, a significant aspect of the judgment at hand was analyzed i.e. the approach taken by the Tribunal to determine the extent of its power to pass orders while exercising its appellate jurisdiction under S. 53A(1)(a) as regards to appeals against orders passed under S. 26(2) of the Act. Upon considering the matter from point of views of interpretation and from the study of various relevant case laws, it was found that

²⁰Press Trust of India (PTI), *Uber says Supreme Court, COMPAT order suffers from jurisdictional flaw*, FINANCIAL EXPRESS, (Mar. 1, 2017, 8:24 PM) <http://www.financialexpress.com/industry/uber-says-supreme-court-compat-order-suffers-from-jurisdictional-flaw/571590/>.

the restrictive approach taken by the Tribunal in the present judgment was a plausible step towards rightful application of the impugned provision. However, as mentioned during the discussion, this issue being recently raised before the apex court in a high-profile case, it is highly probable that the Court's interpretation of the impugned provision would prove as a major decisive factor in determining the very scope of the jurisdiction conferred upon the Tribunal under the Act.