



## AAEC INVESTIGATIONS AND THE CCI

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### **ABSTRACT**

The following paper talks about and briefly explains the landmark 16<sup>th</sup> October, 2019 judgement of the Bombay High Court to adjudicate a jurisdiction matter between Star and Sony on one side and the CCI (Competition Commission of India) and Noida Software Technology Park Ltd. on the other. The crux of the matter revolved around 2 Investigation Orders that the CCI had issued against Sony and Star for probable AAEC (Appreciable Adverse Effect on Competition) and whether they had fit grounds for the same.

### **BACKGROUND**

The issue between NSTPL (Noida Software Technology Park Limited) and Sony Pictures Network India Pvt. Ltd. and Star India Pvt. Ltd, stemmed from the contention that a HITS (Head-end In The Sky) distributor, such as the NSTPL, is similar to DTH (Direct-To-Home) operators and pan-India MSOs, and thus, should not be offered rates less favorable than those by Media Pro Enterprises India Private Limited (Content Aggregator for Star) and MSM Discovery Pvt. Ltd. (Content Aggregator for Sony) to MSOs and DTH operators.

After NSTPL entered into RIO (Reference Interconnect Offer) Agreements with Sony and Star, TRAI published new guidelines which dis-allowed content aggregators (incl. Media Pro and MSM) from TV channel

distribution. So, NSTPL entered into new RIO Agreements with Sony and Star. But, owing to non-payment of dues, Sony and Sony discontinued signals to NSTPL.

NSTPL filed information under Section 19(1) against IBF (Indian Broadcasting Foundation) and Star and Sony in the CCI alleging collusion between Broadcasters which was in violation of Section 3(3), pertaining to price discrimination vis-à-vis other MSOs (Multi-System Operators) and anti-competitive practices.

The CCI passed 2 orders for investigation under Section 26(1) of the Competition Act to inquire possible contravention of Section 3(4) of the Competition Act. Ad-interim relief restrained CCI from taking coercive steps against Star and Sony.

### **ISSUE**

Whether the 7<sup>th</sup> December 2015 Order decided necessary jurisdictional facts, which enabled CCI to pass the Investigation Orders.

### **ARGUMENTS SUBMITTED BY PETITIONERS**

#### **Star**

1. As per *CCI v. Bharti Airtel*<sup>1</sup>, the CCI was beyond jurisdiction in passing those orders, as they could have only exercised their jurisdiction post the TRAI/TDSAT found that the parties have indulged in any anti-competitive practices.

2. CCI disregarded the pending adjudication of the price determination issue before the TDSAT.

3. The issues raised in the 2<sup>nd</sup> TDSAT Petition are jurisdiction facts which only expert regulatory bodies (such as the

<sup>1</sup> (2019) 2 SCC 521



TRAI/TDSAT) are equipped to adjudicate upon, creating a *sine non qua* for the exercise of power, as per *S.K. Maini v. Carona Sahu & Ors.*<sup>2</sup> and *Arun Kumar & Ors. v. Union of India & Ors.*<sup>3</sup>.

4. CCI must form a *prima facie* view with reasons before passing an order under Section 26(1), which is also a *sine non qua* for exercise of power.

5. CCI had not satisfied the ingredients of Section 3(4): *Prima facie* finding of: (i) existence of agreement refusing to deal and (ii) agreement causes/likely to cause AAEC.

6. CCI could not have formed any *prima facie* view without having undertaken of factors under Section 19(3).

7. A direction to the Director General to investigate will stain Star with a stigma.

### Sony

Excluding repeated submissions: Sony submitted that the Order ignored false statements and suppression by NTSPL to protect themselves from defaults.

### ARGUMENTS SUBMITTED BY CCI

1. CCI v. Bharti Airtel did not lay down the standard as crusaded by the Petitioners.

2. TRAI has conclusively ruled that anti-competitive behavior exists in relevant market under its Order.

3. 2 Forms of abuses exist in Section 3(4), “*tie-in-arrangement*” and “*refusal to deal*”, which are present and relevant to this case

and provide exercise of power to the CCI under Section 18 (Competition Act).

4. The Order formed a *prima facie* rationale and confirmed violative conduct.

5. The proceedings subsequent to passing of the December 7, 2015 Order were ‘*in personam*’ disputes between parties and are not relevant to the Competition Act issue pertaining to mandate.

6. The conduct of the NTSPL is irrelevant for the issue of investigation under the Competition Act, as they were mere informants.

7. The decision to investigate is a *prima facie* view taken in administrative capacity, as per CCI v. SAIL<sup>4</sup>.

8. The 7<sup>th</sup> Dec, 2015 Order was not a ‘general’ order. Disputes between NSTPL and the Petitioners are *in personam* whereas anti-competitive behavior and market abuse are matters *in rem*. The latter has been conclusively determined by the TDSAT.

9. The CCI does not have jurisdiction to grant party-specific relief, but that rests with the NCLAT. Also, CCI v. Bharti Airtel did not deal with similar facts to this case, with the exception of market abuse in the telecom sector.

10. ‘Refusal to Deal’ and ‘Refusal to Supply’ were ascertained a meaning by 2 documents on EU Competition Law.

### HELD

Writ Petitions against the Impugned Order are maintainable and Investigation Orders

<sup>2</sup> (1994) 3 SCC 510

<sup>3</sup> (2007) 1 SCC 732

<sup>4</sup> (2010) 10 SCC 744



passed under Section 26(1) quashed and set aside.

### ANALYSIS

The 7<sup>th</sup> December 2015 Order does not consider whether NSTPL is “similarly placed” with other distributors and that Order was a ‘general order’. The issues framed in the 1<sup>st</sup> TDSAT Petition were ‘industry-wide’. The Order adjudicates general issues and none of the NSTPL allegations have been settled by that Order. The 7<sup>th</sup> December 2015 Order was, thus, not an Order dealing with ‘*in personam*’ issues.

Petitioners and CCI were *ad idem* to the onus on CCI under Section 26(1). Thus a *prima facie* finding AAEC would be needed before CCI could investigate, which the Investigation Orders did not have. Forming an opinion was ruled *sine qua non* for CCI to exercise jurisdiction.

While CCI did establish that Sony and Star held a dominant market position, they failed to provide likelihood of AAEC under Section 19(3) while passing the Investigation Orders under Section 3(4). This was based on *Shri Sitaram Sugar Co. Ltd. v. Union of India*<sup>5</sup>.

To hold a *prima facie* contravention, CCI needs to form a *prima facie* view that an agreement exists between Star/Sony and NSTPL providing for refusal to produce, supply, distribute, store or trade in goods and provision of services with/to NSTPL and that such an agreement causes AAEC. CCI failed to reach such a finding, which formed the mandatory jurisdictional pre-requisite of a *prima facie* view of contravention of Section 3(4).

The factors to arrive at such *prima facie* view, as under Section 19(3), were not even considered.

As TDSAT ruled that *in personam* disputes survived despite the 7<sup>th</sup> December 2015 Order, a change of stance of Star India with respect to the same is irrelevant.

As TDSAT did not accept the contention that NSTPL signed RIOs in protest, the High Court also followed.

As the ‘price discrimination’ allegation is yet to be adjudicated in the 2<sup>nd</sup> TDSAT Petition, the Court cannot adjudicate the same, as the issue is pending adjudication in TDSAT and in accordance with CCI v. Bharti Airtel, the Court cannot go into the merits of the case.

Thus, essentially, the 7<sup>th</sup> December 2015 Order was a general order and did not address the needed jurisdictional facts to allow CCI to pass a valid Investigation Order.

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<sup>5</sup> (1990) 3 SCC 223