



COMPAT TO NCLAT: AFTERMATH OF THE MERGER

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Abstract

Company law and competition law both play a significant role in Business and Commercial sector, this article throws light on one of the major overlap between the two sectors of law, which is the merger of the Competition Appellate Tribunal to that with the National Company Law Appellate Tribunal. The authors have tried to analyse the merits and demerits of such merger. With the completion of almost two years of such merger, the authors believe that the Tribunals should have fetched some results specially in disposing of old cases for better understanding of which they have filed an RTI before the authorities the statistics of which are recorded in the article. The article contains essence of the Two hundred and Seventy Second Report of the Law Commission of India. It thus helps to clearly demarcate the areas to be focused on, in order to ensure smooth functioning of the National Company Law Appellate Tribunal in the additional jurisdiction that they have been assigned.

Keywords: COMPAT, NCLAT, Finance Act, Competition Act, Merger.

As per the Government the main objective of an Administrative tribunal is to provide speedy remedy and inexpensive justice to the people concerned by the Act under which the Tribunal is set up.¹ But our Head of the Government Mr. Narendra Modi has a different view point, in April, 2015 he said “there is a need to brainstorm over whether tribunals lead to faster delivery of justice or are acting as “barriers” to it and slowing it down.”² This idea of rationalizing the number of tribunals was again proposed in the Budget of 2017 by the Finance Minister Mr. Arun Jetley, who in between his speech mentioned the “issue of multiple tribunals with overlapping functions.”³

This was the onset of the Finance Bill of 2017 which received assent of the Hon’ble President on 31st March 2017 and came to be known as the Finance Act, 2017 (No. 7 of 2017) (hereinafter “Finance Act”) which resulted in, inter alia, the merger of 36 tribunals in India to 18.⁴ The Act brought in some sensible mergers like that of the Railway Rates Tribunal into Railway Claims tribunal⁵, but at the same time bought in some preposterous mergers, at least on the face of it, like that of Appellate Tribunal of Foreign Exchange with that of Appellate Tribunal of forfeiture of Property Act⁶, or Airports Economic Regulatory Appellate tribunal with Telecom Dispute Settlement and

¹ Govt. of India, Summary of Administrative Tribunals Act, 1985 (2014).
(July 31st, 2019, 4:30 PM)
https://dopt.gov.in/sites/default/files/Summary_ATA_ct_1985_15Dec2014.pdf

² Draft law on anvil to bring down number of tribunals from 36 to 18, Hindustan Times, Feb 22nd, 2017
<https://www.hindustantimes.com/india-news/draft-law-on-anvil-to-bring-down-number-of-tribunals->

[from-36-to-18/story-nb6jNY0LVfT5RbSS3ybGNO.html](https://www.supremoamicus.org/india-news/36-to-18/story-nb6jNY0LVfT5RbSS3ybGNO.html)

³ Budget 2017-2018 Speech of Arun Jaitley Minister of Finance, 25 Para 128 (2017) (July 31st, 2019, 4:55 PM) <https://www.indiabudget.gov.in/ub2017-18/bs/bs.pdf>

⁴ Financial Act §§ 156-189 (2017)

⁵ Financial Act § 162 (2017)

⁶ Financial Act § 165 (2017)



Appellate Tribunal⁷. However, the objective of this Research Article is to focus on whether the merger of Competition Appellate Tribunal (Hereinafter “COMPAT”) into National Company Law Appellate Tribunal (hereinafter “NCLAT”)⁸ falls under the category of sensible or preposterous amendments.

Rationale behind the formation of COMPAT:

To understand the requirement of any tribunal we need to analyse the objective behind the Act that sets up such body. The NCLAT was formed to deal cases related to company matters under the Companies Act which also heard matters under of the Insolvency and Bankruptcy Code, 2016⁹. While the COMPAT was formed to address issues of competition law under the Competition Act, 2002 (No. 12 Of 2003) (hereinafter “Competition Act”) which has a completely different objective from that of Companies Act, 2013¹⁰ (No. 18 of 2013) (hereinafter “Competition Act”). Thus seeing that the objective behind both the bodies were completely different.

In the case of Brahm Dutt vs. Union of India¹¹ the constitutionality of the Competition Commission of India (CCI) under the Competition Act was challenged by way of a Writ Petition, the main contentions of the Writ petition were that, the body is established as a Judicial body carrying out adjudicatory functions and is Constituted by the Government of India, which is why it encroaches upon the concept of Separation of

Powers.¹² Also the CCI consisted of qualified persons of other disciplines instead of judicial background. The Court declined to answer the contentions of the petition, however they observed that it would be better if the legislators took note of the point to establish two different bodies are established to perform two different kinds of function- advisory and adjudicatory. As a response to this judgment the COMPAT was established.¹³

Technical nitty-gritty and requirements of the Tribunals:

As we know, one most distinguishing character of a Tribunal is its understanding of the technical requirements of the Act establishing the body, through its members having specific knowledge in relation to field of the concerned tribunal, for example the National Green Tribunal has experts from the field of environmental studies to assist the judicial members who possess knowledge of the law in the Tribunal.

It was also pointed out in the 272nd Law Commission Report that:

Due to growing commercial ventures and activities by the Government in different sectors, along with the expansion of Governmental activities in the social and other similar fields, a need has arisen for availing the services of persons having knowledge in specialised fields for effective and speedier dispensation of justice as the traditional mode of administration of justice by the Courts of

⁷ Financial Act § 170 (2017)

⁸ Financial Act § 171-172 (2017)

⁹ Insolvency and Bankruptcy Code § 61 (2016)

¹⁰ Competition Act, Preamble (2002)

¹¹ See also, Brahm Dutt vs. Union of India, AIR 2005 SC 730

¹² See also, S.P. Sampath Kumar v Union of India, AIR 1987 SC 386

¹³ Abir Roy & Jayant Kumar, Competition Law in India, 29-33 (Revised Ed. 2018)



law was felt to be unequipped with such expertise to deal with the complex issues arising in the changing scenario.¹⁴

Which brings home the importance of a technical member in the bench of any Tribunal and role of such experts leading to effective adjudication.

As we can see that under § 411 of the Companies Act the NCLAT comprises of three types of members, the chairperson, a Judicial Member, and a technical member. While the Chairperson and Judicial Member required standard qualification as regard to any other tribunal, it is the technical member that describes how equipped the tribunal is to hear the matter under specific Acts that has been filed before it. As per § 411(3) a technical member of the NCLAT “shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than twenty-five years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.”

While under the original composition of COMPAT “the member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, competition matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which

in the opinion of the Central Government, may be useful to the Appellate Tribunal”¹⁵

In Madras Bar Association v. Union of India, AIR 2015 SC 1571, the SC held:

As the Tribunals are vested with the judicial powers which had been hitherto vested in or exercised by Courts, the Tribunals should possess the same independence, security and capacity which are possessed by the judges. However, if the Tribunals are intended to serve an area which requires specialised knowledge or expertise, the appointment of Technical members in addition to judicial members must always be welcomed, as they can provide an input which may not be available with the judicial members. When any jurisdiction is shifted from Courts to Tribunals on the ground of pendency and delayed Court proceedings and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only the judicial members. But when the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, the presence of Technical members would be useful and necessary.

Currently the NCLAT comprises of three members and the Technical member belongs to Commercial background with, very insignificant experience, if any, in the field of Competition Law.¹⁶

Thus we can see, that these two bodies had its own set of technical needs, which were

¹⁴ Govt. of India, 272nd Law commission report, Assessment of Statutory Frameworks of Tribunals in India, 22 para 3.4 (2017) <http://lawcommissionofindia.nic.in/reports/Report272.pdf>

¹⁵ Competition Act § 53D (2002), repealed by Finance Act (2017)

¹⁶ Also see, NCLAT website (August, 17th 2019 at 12:11 PM) https://nclat.nic.in/?page_id=802



almost mutually exclusive of each other, given the fact that Competition law is a different field altogether having negligible overlap with that of Companies law. Thus, in an ideal situation where one was merged with another, these exclusive technical requirements should also have been merged, or in easier words, the qualifications of the technical members of the NCLAT should have been revised to include members having sound knowledge of Competition Laws and requirements in order to fulfil the basic objective of any tribunal, but till date, the provisions of composition of NCLAT has not been amended to accommodate the needs of COMPAT.

Strength of the Tribunals:

It is also pertinent to mention here that the NCLAT currently comprises of 3¹⁷ members including the Chairperson, while the COMPAT alone comprised of 3¹⁸ members including the chairperson when it was in function. So we can say that the not only has the governing legislation not provided with an accommodation of a technical member in the field, but also has over-burdened the existing members of the NCLAT with competition cases without adequate increase in the required number

Disposal Rates:

As discussed in the beginning the main purpose behind establishment of a tribunal is speedy and inexpensive remedy. Therefore, we believe one of the major parameters to test the viability of the said merger is to see what the disposal rates of the NCLAT in case of competition law matters looks like.

¹⁷ NCLAT website (August, 7th 2019 at 12:11 AM) https://nclat.nic.in/?page_id=117

To find out the actual scenario and have a better understanding of the impact of the merger of COMPAT into NCLAT the authors filed a Right to Information application¹⁹ before the NCLAT enquiring the following:

- 1) What is the number of cases transferred from COMPAT to NCLAT after the enactment of the Financial Act, 2017?
- 2) What number of such transferred cases have been disposed of by the NCLAT as of 22nd January 2019?
- 3) What number of fresh applications have been filed before the NCLAT under the Competition Act, 2002?
- 4) What number of such fresh applications (Query No. 3) have been disposed of as of 22nd January 2019?

The same was filed on 22nd of January 2019, almost 2 years after the idea of the Bill was first proposed in the budget of 2017 by the finance minister. The reply to the said RTI did not paint a very glorious picture in regard to the merger of the tribunals.

The two-fold analysis of the said RTI is as follows:

1. Number of cases transferred from COMPAT to NCLAT were 47, with only 26 of them having been disposed of. Thus giving the disposal rates of 55% in case of transfer cases.
2. While fresh appeals filed before the NCLAT under the Competition Act in the past two years were 154, out of which only 18 were disposed of.

¹⁸ NCLAT Archives (August, 7th 2019 at 12:25 AM) <http://compatarchives.nclat.nic.in/FormerChairman.aspx>

¹⁹ NCLAT/R/2019/50002



Providing a 4% disposal rate in case of fresh applications.

In this chain of thought it is extremely important to mention that § 53B(5)²⁰ suggests that endeavours should be made in order to dispose of the cases before the appellate forum within 6 months from its filing. While the guidelines under the Companies Act, 2013 say that the cases before the tribunal should ideally be disposed of within 3 months, and on failure of the same the Tribunal should record the reason for such delay and the President or Chairperson may extend such time by a maximum of 90 days. However, the figures provided by the authorities shows a completely different statistical data when it comes to the status of disposal. The situation is even more worrisome since under § 53-N explanation (b)- an appeal before the forum is preferred only for determining the quantum of compensation and not for re-examination of the matter afresh. Which means ideally the NCLAT in its appellate jurisdiction does not carry on lengthy processes of investigation and examination, hence it should be able to dispose of matters in short periods, however in reality it does not.

As the 272nd Law Commission Report correctly pointed out that the compelling reason behind the establishment of a Tribunal was the pendency of large number of cases before the Courts, resulting in delay of justice. However, the above figures are evidence enough that the impugned decision of merging the two individual tribunals vitiates the whole purpose behind having a fast-track tribunal, because it is unable to provide speedy remedies even after being

free from the procedural trappings of a normal Court. Further, the situation, if not taken care of might worsen, for the simple reason that the NCLAT currently sits in three different jurisdictions which are all major thrust areas and attract huge number of litigations every year, thus simply adding on to the back log.

Discrepancies in the two Acts:

During the research, it was also found that the Act that should have been completely amended to accommodate the switch from COMPAT to NCLAT was not amended, rather only express provisions relating to composition and others were changed in places where the term “Appellate Tribunal” was used, hence giving rise to a number of confusions. Apart from the suggested disposal period of the two Acts and course of action to be taken when the deadlines are not met, some of the other main areas of such discrepancies are-

- The time limit to prefer an appeal under the Companies Act is 45 days from the date of availability of the copy of the order of the Tribunal²¹, while that under the Competition Act is 60 days.
- ii. Furthermore, the Competition Act still provides for a fine and/or imprisonment for contravention of orders of the appellate forum, extending up to as much as 1 crore and 3 years of imprisonment, but the Companies Act is silent about the same. Ideally when the tribunals are being merged there should be a uniform procedure and rule for appeal

²⁰ Competition Act, (2002)

²¹ Companies Act, § 421 (3) (2013)



before such forums so that there are no discrepancies.

Rules in furtherance of the Tribunals:

Further it is pertinent to mention that, the legislators have not only neglected to make new rules and guidelines in regard to the procedure, application format, the fees etc., of an appeal before the NCLAT, but also the old rules in relation to COMPAT have not been taken down and are still available on the Ministry of Corporate Affairs' website²². This is a matter of concern since it is unclear to the Appellants as to which rule to follow while making payment of the fees, or which format of application to follow, etc. Apart from the fact that the amended Competition Act does not mention that the existing NCLAT rules be read with the same, the very fact that there exist some key differences in few of the basic procedures of appeals, as discussed above, we cannot consider, that the rules existing for the NCLAT incidental to the Companies Act, be read as a part and parcel of the workings of the appellate authority as under the Competition Act, 2002, amended in 2017. Thus leaving the aggrieved party in an obscure situation and the law in sheer ambiguity.

Conclusion:

Thus, from the above research, the Authors have come to a conclusion that, the merger of COMPAT into NCLAT not only lacks in technical competence due to the reasons discussed above, the merger does not even

have sufficient manpower to tackle the legal hustles, which is one of the major reasons behind delay in disposal of cases. Such delay in disposal further leads to an expensive procedure for the aggrieved parties, leading to a violation of their Fundamental Rights, since the Right to Fair and Speedy Trial is very much a part of the Right to Life and Personal Liberty, a fundamental right guaranteed under Article 21 of the Constitution of India and therefore, any kind of delay in the expeditious disposal of cases infringes the same.²³ Furthermore the ambiguity in the existing laws and the absence of specific rules for such incorporation, adds to the confusion and decreases in efficiency of procedure. *Franks' Report (1957) identified the advantages of Tribunals as 'cheapness (cost effectiveness), accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.'*²⁴

Ergo, we feel that not only is the impugned merger preposterous, but also has not been thought through, which is why the authors believe that all that is good for the public exchequer is not necessarily good for the public too. Recently, the same has also been taken up for discussion before a five-judge Bench in the Supreme Court.

²² Ministry of Corporate Affairs, The Competition Act 2002, (August, 8th 2019 at 1:55 AM) <http://www.mca.gov.in/MinistryV2/competitionact.html>

²³ N. N. Mathur, Changes Required in Working and Procedural Laws for Speedy Processing, 32 IBR 337-344 (2005), Govt. of India, 272nd Law commission

report, Assessment of Statutory Frameworks of Tribunals in India, 34 (2017)

²⁴ Govt. of India, 272nd Law commission report, Assessment of Statutory Frameworks of Tribunals in India, 3 para 1.10 (2017) <http://lawcommissionofindia.nic.in/reports/Report272.pdf>