

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 04.12.2017
Pronounced on: 24.05.2018

+ **LPA 607/2016, C.M. APPL.41020/2016**

COMPETITION COMMISSION OF INDIA AND ANR..... Appellants

Through: Sh. Prashanto Sen, Sr. Advocate with Sh. Balaji Subramanian, Sh. Udayan Verma and Sh. Siddharth Nath, Advocates.

versus

ORIENTAL RUBBER INDUSTRIES PRIVATE LIMITED.... Respondent

Through: Sh. Sandeep Sethi, Sr. Advocate with Sh. Amitabh Kumar, Ms. Vibha Dhawan, Ms. Diksha Rai and Sh. Arif, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

MR. JUSTICE S. RAVINDRA BHAT

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Facts

1. The present appeal has been filed by the Competition Commission of India (“CCI/ Appellant”) against the judgment of the learned Single Judge of this Court dated 22.04.2016 passed in W.P. (C) 11411 of 2015. The question that needs to be addressed is whether a person summoned for investigation (and whose statement may be recorded) has the right to be represented by an advocate merely because the Authority investigating is empowered to take evidence.

2. The facts are that the CCI received information, indicating existence of a bid-rigging cartel in the Conveyor Belt Sector in India. On 06.11.2013, based on the information, the CCI found that there was an apparent *prima facie* case of contravention of Section 3 of the Competition Act, 2002 (hereafter “the Act”) and in *suo-motu* Case No. 06 of 2013 directed the Director General (“DG”) to undertake an exhaustive investigation into the matter against the parties for all kinds of violation of the Act, under an order

issued under section 26(1) of the Act.

3. Pursuant to the CCI's order, the DG on 27.05.2015, issued Notice to Oriental Rubber Industries Private Limited ("Respondent"), mentioning that its office was conducting investigation in the case and in terms of the powers vested in the DG as per Sections 36(2) and 41(2) of the Act, and asking the respondent to furnish information which *inter alia* included information with respect to the company and its business activities, plant addresses, names of the entire sales and marketing team and other persons responsible for tendering/bidding for contracts, explanation in detail with respect to process of supply of fabric conveyor belts in different market segments, etc.

4. On 04.06.2015, in furtherance of the above Notice, the respondent requested CCI for permission to inspect the records (of the case) in terms of Regulation 50 of the Competition Commission of India (General) Regulations, 2009. The respondent stated that it was not privy to the facts in respect of Case No. 06 of 2013 initiated by the CCI and thus sought the requisite permission to inspect the relevant records. On 10.06.2015, the respondent again wrote to the CCI seeking permission as requested in their letter dated 04.06.2015 for inspection of records of the case.

5. On 18.06.2015, the DG, in furtherance of the Notice dated 27.05.2015 rectified certain requirements of the said Notice and issued a show cause notice seeking explanation from the Respondent as to why their acts and conduct should not be treated in contravention of Section 3 of the Act. The DG, keeping in mind adherence to strict timeline, refused to grant extension of time to the Respondent for submission of remaining information/details. The Respondents were directed to submit the information/details latest by 30.06.2015.

6. Request for inspection of records was subsequently made again on behalf of the Respondent on 23.06.2015. On 30.06.2015, the CCI replied to the Respondent's request letters dated 23.06.2015 for inspection of record stating that the information of the case file was confidential and the application for inspection could not be allowed. The Respondent on 13.08.2015 vide letter to the CCI stated that it had submitted all the

relevant data that was available with them in connection with the investigation as required by the DG.

7. It transpires from the record that the DG subsequently called for further information from the Respondent and there were a series of correspondences exchanged between the Respondent and the CCI. Thereafter, the DG on 23.11.2015, issued summons under Section 41(2) read with Section 36(2) of the Act. In terms of provisions in the Act and regulations framed under it, the DG summoned the respondent under Section 36(2) to give evidence since there was information that the Respondent had knowledge of certain facts relating to the matter.

8. Aggrieved by the summons, the Respondent approached this Court by filing W.P. (C) 11411/2015, seeking *inter alia*, permission to inspect the documents/evidence that had been relied upon by the DG, directing the Commission and DG to allow the Respondent to cross-examine the witnesses and allowing the officers of the Respondent to be accompanied by legal counsel when giving their statements under oath. On 11.12.2015, the CCI stated in proceedings before the Court that the copies of the documents to be used against the respondent would be supplied and the Respondent would be allowed the right to cross-examine the witnesses whose evidence is intended to be used. However, the CCI declined the request that the officials of the respondent whose statements were to be recorded by the DG, be accompanied by advocates. On this issue, the parties, therefore, differed and advanced arguments before the learned Single Judge. By decision, dated 22.04.2016, the learned Single Judge held that the officials of the Respondent summoned by the CCI would be entitled to be accompanied by advocates. Aggrieved by this order, CCI has filed this appeal.

Contentions

9. Assailing the correctness of the impugned decision, learned senior counsel appearing for the Appellants/CCI, Mr. Prashanto Sen, argued that the learned Single Judge failed to appreciate the decision of the Supreme Court in *N.K. Bajpai v. Union of India*, AIR 2012 SC 1310, where the Court held:

“A bare reading of these three provisions clearly shows that this is a statutory right given to an advocate to practice and an advocate alone is the person who can practice before the courts, tribunals, authorities and persons. But this right is statutorily regulated by two conditions - one, that a - person's name should be on the State rolls and second, that he should be permitted by the law for the time being in force, to practice before any authority or person. Where the advocate has a right to appear before an authority or a person, that right can be denied by a law that may be framed by the competent Legislature. Thus, the right to practice is not an absolute right which is free of restriction and is without any limitation.”

On the strength of this decision, he contended that the right to practice under Section 30 of the Advocates Act, 1961 was not an unqualified right and it may be restricted “by law for the time being in force.”

10. Turning to the provisions of the Competition Act, learned senior counsel contended that the Act impliedly prohibits advocates from appearing before the DG in as much as Section 35 of the Act as well as the Competition Commission of India (General) Regulations, 2009 specifically provide for representation by a legal representative before the Commission; however, no such stipulation was made for representation before the DG during investigations.

11. The learned senior counsel further contended that under Section 41(2) of the Act, before the DG, the stage is that of investigation and not an enquiry, the latter being adjudicatory in nature. The counsel placed reliance on the decision of this Court in *South Asia LPG Company Ltd. v. Competition Commission of India*, (2014) SCCOnline Del 4502, where this distinction was explained. It is contended that at the stage of investigations being conducted by the DG, no person is indicted and hence the right of representation by an advocate does not get triggered. It is also urged that the DG’s investigation under Section 41 of the Act was an ongoing process till the report of the DG was placed before the Commission. Reliance was placed on the decision of the Supreme Court in *Competition Commission of India v. Steel Authority of India*, (2010) 10SCC 744 to contend that that the direction by the Commission under Section 26(1) after formation of a *prima facie* opinion is a direction simplicitor, to the DG to cause an investigation into the matter. Therefore, urged counsel, at this stage of investigation, the Respondent would

not be vested with any consequence and accordingly, its officials could not claim the right to be accompanied or represented by advocates at this stage. The CCI further argues that during the course of investigation and recording of evidence of a witness, the active participation of a counsel may not be conducive to the larger public interest in promoting competition, because the likelihood of a counsel cautioning (either orally, or through non verbal communication) a witness from making or refraining from making a statement is real. It is urged that there is no real *lis* at this stage (of investigation) when evidence gathering in primary form takes place. In the event, any statement is seen to be adverse, the company or concern facing investigation may seek cross-examination before the commission. However, the mere recording of statement of a witness – which is an important and crucial part of the fact finding done by the DG to be taken note of later by the commission does not result in any adverse consequence.

12. Reliance is placed on the decision of the Supreme Court in *Poolpandi vs. Superintendent, Central Excise*, (1992) 3 SCC 259 to contend that during enquiry or investigations, a person cannot as a matter of right insist on the presence of a lawyer and as such not allowing the presence of an advocate would not amount to a violation of Article 20(3) of the Constitution. It was contended that the purpose of enquiry under the Competition Act would get defeated if an advocate would accompany the person called for investigation, as it would become difficult to obtain full and accurate information. Further, it is contended that the Learned Single Judge fell into error in holding that the decision in the *Poolpandi (supra)* was inapplicable because it was rendered before the Advocates Act came into force. Placing reliance on the decision of the Supreme Court in *Senior Intelligence Officer vs. Jugal Kishore Samra*, (2011) 7 SCR 889, it is contended that the said decision reaffirmed the applicability of the law declared by the Supreme Court in *Poolpandi (supra)*. Reliance is also placed on a recent decision of the Gujarat High Court in *JigneshKishorbhaiBhajiawala v. State of Gujarat*, 2017 Cri. L.J. 1760, where the Court held:

“What is discernible from the decision of the Supreme Court in the case of Poolpandi (supra) is that whenever a person is called upon for questioning during investigation by the authorities under the provision of

the Customs Act, he is not accused. He cannot, therefore, claim that in view of the possibility of his being made an accused in future, he is entitled to the presence of a lawyer when he is questioned. Refusal to allow the presence of lawyer in such case would not be violative of Article 20(3) nor can it be said that when a person is called away from his own house and questioned in the atmosphere of the customs office without the assistance of the lawyer or his friends, his constitutional right under Art. 21 would be violated. It cannot be said that if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering the questions it amounts to mental torture. Thus, even on applying the 'just, fair and reasonable test' the refusal to allow presence of lawyer would not violate Article 21."

13. Opposing the CCI's contentions, learned senior counsel for the Respondent (the petitioner in the original writ petition), Mr. Sandeep Sethi argues that at the stage of Section 41 investigations, the DG would be recording evidence, by summoning persons and documents. Therefore, all statements recorded by the DG during investigations are evidence in the subsequent proceedings before the Commission. As such, it would not be in the form of an enquiry report. The evidence so recorded in the investigations would be placed before the Commission, which would then give its report. In this regard he relies on Regulation 41(4) and 41(6) of the CCI General Regulations. Counsel also drew the Court's attention to Regulation 43 which bars a party from producing any additional evidence before the CCI and which was not produced before the DG. These Regulations state:

"41. Taking of evidence

(4) The Commission or the Director General, as the case may be, may call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter.

(6) The Commission or the Director General, as the case may be, may, if considered necessary or expedient, direct that the evidence of any of the parties to be recorded by an officer or person designated for the said purpose

43. Production of additional evidence before Commission. –

(1) The parties to the proceedings shall not be entitled to produce before the Commission additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the

Director General during investigation under section 26 or sub-section (1A) of section 29 of the Act, but if the Commission requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the Director General has not given sufficient opportunity to the party to adduce evidence, the Commission, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.”

14. It was argued that the learned Single Judge’s reliance on the decision of this Court in *Google Inc. v. Competition Commission of India*, 2015 (150) DRJ 192 is warranted. It is urged that *Google Inc. (supra)* is authority for the proposition that the investigation by DG is equivalent to commencement of trial/inquiry on the basis of an *ex-parte* prima facie opinion. Since the DG’s powers under the Act are of widest amplitude and the consequences far-reaching, and that an investigation by the DG commences the trial/inquiry, it is, therefore, necessary that a person called for investigation by the DG has the right to be accompanied by counsel. The senior counsel also relied on the Competition Appellate Tribunal’s (COMPAT) decision in *Lafarge India Limited v. Competition Commission of India*, in Appeal No. 105/2012 where the COMPAT had held that the procedure required to be followed by the DG as a prelude to the passing of an order under Section 27 of the Act is akin to the provisions to be followed in a civil court in deciding a civil suit except that the DG is not bound by the technicalities of the procedure contained in the Code of Civil Procedure.

15. Mr. Sethi argues that unlike enactments like the Family Courts Act or the Industrial Disputes Act, the Competition Act did not contain any express prohibition on counsels accompanying the parties during the investigation stage. In fact, placing reliance on Regulation 41(5) of the CCI Regulations, the learned senior counsel contended that the same provides for a right of cross-examination and as such, it cannot be said that the presence of an advocate is contrary to the letter and intent of the Act and the Rules. Regulation 41(5) provides:

“(5) If the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered

necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross examine the person giving the evidence.”

16. Finally, Mr. Sethi took us through the relevant provisions of antitrust laws in the US, UK and the EU, to contend that even in those jurisdictions, a person who is called for giving evidence in an ongoing investigation by the relevant antitrust authorities, has the right to be accompanied by counsel. Thus urged Mr. Sethi, that this Court should follow a similar approach.

Analysis and Conclusion

17. The right of a party to be represented through counsel in legal proceedings, and the corresponding right of an Advocate to practice are so well entrenched as to not require further analysis. This right is provided under Section 30 of the Advocates Act, which provides:

“Subject to the provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which this Act extends,

- i. (i) in all courts including the Supreme Court;*
- ii. (ii) before any tribunal or person legally authorised to take evidence; and*
- iii. (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.”*

18. Interpreting Section 30 of the Act, the Karnataka High Court in *M/s. Kothari Industrial Corporation Limited v. The Coffee Board*, 1999 (5) Kar LJ 302, held:

“The right of an Advocate to practise before any Court or Tribunal is closely related to the right of his client to engage him for appearance before any such Court or Tribunal. Stated conversely, the right of a litigant to be represented by a Counsel is circumscribed by the right of the Advocate to appear before such Court, Tribunal, Authority or person. If the Advocate has in terms of Section 30 of the Advocates Act, 1961, the right to practise before any Court, Tribunal, Authority or person, it would necessarily mean that a litigant before any such Court, Tribunal, authority or person will have a right to engage and avail of the services of an Advocate.”

Therefore, Section 30 provides a right both to the advocate to the practice, and to the litigant to engage the services of an advocate. Doubtlessly however, as the Supreme Court has held in *Poolpandi (supra)* and *Jugal Kishore Samra (supra)*, this right is not absolute and a legislation that takes away this right or restrict that for limited purposes would not be invalid or unconstitutional for this reason. However, what must be seen is whether there is an express restriction on this right of practice under the applicable legislation. Since the rule is that advocates must have the right of practice under Section 30 of the Advocates Act, necessarily, any exception to this rule cannot be lightly presumed and must be specifically provided under the statute. This is also borne out from the decision of the Supreme Court in *N.K. Bajpai (supra)* where it was held:

“Where the advocate has a right to appear before an authority or a person, that right can be denied by a law that may be framed by the competent Legislature. Thus, the right to practice is not an absolute right which is free of restriction and is without any limitation. There are persons like Mukhtiar and Ors. who were earlier entitled to practice before the Courts, but the Advocates Act itself took away the right to practice which was available to them prior to its coming into force. Thus, the Advocates Act placed a complete prohibition upon the right to practice of those persons who were not advocates enrolled with the State Bar Council.”

19. Under the regime of the Competition Act, there can be no doubt that the DG is authorized to record evidence. Section 36(2) of the Act provides the DG powers similar to that of a Civil Court and allows him to take evidence. Section 36 is given further content through Regulation 41 and 43 of the CCI Regulations (reproduced in relevant part above), which also clarifies that the DG is authorized under the Competition Act to take evidence. That being the case, the DG would fall under Section 30(ii) of the Advocates Act, as being a person “legally authorized to take evidence”. Therefore, advocates under Section 30 would have the right to practice before such individual. That being the case, what the Court must then discern is whether the Act contains any restriction or prohibition on advocates from appearing before the DG during its investigations. Facially, the Court notices that there is no such restriction in the Act or the Regulations. Neither does the appellant’s argument that the Act in specifically providing for the right of legal representation before the Commission (through Section 35), impliedly rejects such a right

before the DG, persuade this Court. The right of practice of an advocate and the right of a litigant to engage the services of an advocate being firmly entrenched in the Advocates Act and through the Constitution, restrictions on such a right must be clearly spelt out in the legislation. In the absence of such express stipulation, this Court cannot impliedly read in such a restriction in the statute.

20. Since competition law in our country is in a nascent stage, the Commission, COMPAT and the Supreme Court have often relied on foreign jurisprudence and the position of EU antitrust laws and US in order to interpret the provisions of the Competition Act. Adopting a similar approach, it can be seen that both the US and the EU (or EC) allow parties to be represented by legal counsels at the investigation stage as well. For instance, in the U.S., 15 U.S.C. § 1312 deals with the procedure to be adopted in Civil Investigative Demands in antitrust investigations. 15 U.S.C. § 1312(i)(7)(A) provides:

“Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel’s own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 1314 of this title for an order compelling such person to answer such question.”

In the European Union, in the landmark case of *Hoechst v. Commission*, Case No. 46/87 and 227/88, with respect to antitrust proceedings at the stage of investigation, the ECJ held:

“Consequently, although certain rights of the defence relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation and the privileged nature of correspondence between lawyer and client

(recognized by the Court in the judgment of 18 May 1982 in Case 155/79 AM & S v Commission [1982] ECR 1575) must be respected as from the preliminary-inquiry stage.”

21. The matter can be viewed from a different compass as well. A Division Bench of this Court in *Google (supra)* held that the powers of the DG are very wide and extensive under the Competition Act, and the consequences of an investigation by the DG are also drastic. It was held by the Court:

“It would thus be seen that the powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on the Police under the Code of Criminal Procedure. While the Police has no power to record evidence on oath, DG has been vested with such a power. Our experience of dealing with the matters under the Competition Act has shown that not only statement on oath of witnesses summoned during the course of investigation is being recorded but the said witnesses are being also permitted to be cross examined including by the informant/claimant and which evidence as part of the report of the DG forms the basis of further proceedings before the CCI. Thus while in investigation by Police under the Cr.P.C., the rule of audi alteram partem does not apply, there is no such embargo on the DG, CCI. Thus, investigation by DG, CCI is tantamount to commencement of trial/inquiry on the basis of an ex parte prima facie opinion.”

22. Since the DG’s powers are so far-reaching and the consequences of an investigation by the DG so drastic, it would necessary that the right of a party/person to be accompanied by an advocate during the investigations by the DG, when the latter is collecting or recording evidence, not be taken away. This Court, therefore, finds that the Learned Single Judge’s reliance on *Google (supra)* as well as the decision in *Punjab National Bank (supra)*, to hold that when the consequences of an enquiry or investigation are severe and drastic, the right of a person to be accompanied or represented by an advocate cannot be extinguished, stands to reason and cannot be faulted with.

23. At the same time, this Court is alive to the concerns raised by the CCI that if parties are allowed to be accompanied or represented by advocates in investigations before the DG, the efficacy of the investigation may be hampered and the collection of evidence may become onerous or cumbersome. The concern of CCI, furthermore that during the course of investigation and recording of evidence of a witness, the active participation of a

counsel may not be conducive to the larger public interest in promoting competition, because the likelihood of a counsel cautioning (either orally, or through non verbal communication) a witness from making or refraining from making a statement. In that regard, the Commission or the DG, as the case may be, lay prescribe, in the order, during the course of proceeding, when a request for representation by counsel is made, an appropriate procedure to be followed during such investigation, where the counsel may be allowed to accompany the party, but not continuously confer with him when the DG is taking his or her testimony or asking questions. Therefore, while the party is allowed his right to be accompanied by an advocate, the DG's investigations are not unnecessarily hindered. The Commission having regard to the appropriate best practices across jurisdictions in antitrust matters may formulate such procedures and incorporate them in regulations; till then, it is open to the DG to make appropriate procedural orders. This court feels additionally that this precautionary note is essential, because often there can be situations where the prominent presence of a counsel might hinder questioning of the witness by the investigating officers or the Director General. Apart from non-verbal communication, the counsel might restrict the element of surprise that is essential when collecting such evidence. Therefore, the DG shall ensure that the counsel does not sit in front of the witness; but is some distance away and the witness should be not able to confer, or consult her or him. The Court does not deem it necessary or appropriate to say more on this aspect of the matter, leaving it to the Commission to decide the appropriate course.

24. The appeal is, therefore, dismissed, but subject to the above terms. No order on costs.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

MAY 24, 2018