

Piyush Joshi vs Competition Commission Of India & Ors on 2 July, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

TA (AT) (Competition) No. 32 of 2017
(Old Appeal No. 43 of 2016)

IN THE MATTER OF:

Mr. Piyush Joshi

...Appellant

Vs

The Competition Commission of India & Ors.

....Respondents

Present:

For Appellant: Mr. Piyush Joshi in person.

For Respondents: Mr. Gaurav Gupta, Advocate for R-1.
Mr. Navdeep Singh Suhag, Deputy Director, CCI.

Mr. Rajshekhar Rao, Mr. Anandh Vanakataramani,
Mr. Sagardeep Rathi, Ms. Sakshi Agarwal and Ms.
Swati Bala, Advocates for R-2 & 3.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- Mr. Piyush Joshi, Clarus Law Associates of New Delhi (Informant) filed information under Section 19 of the Competition Act, 2002 (the "Act", for short) in respect of Combination Registration No. C-2015/07/295. The information was given by letters dated 23rd September, 2015, 29th December, 2015 and 29th January, 2016 to the Competition Commission of India ("Commission" for short) regarding acquisition of 'BG Group Plc' by 'Royal Dutch Shell Plc' ("Combination").

2. The 'Commission' by impugned order dated 16th June, 2016 informed the 'Informant' ('Appellant' herein) that as per provisions of the Act and the 'Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011' ("Combination Regulations" for short), parties are required to notify a combination to the 'Commission' in Form I & II as applicable.

3. It was informed that these forms contain details/ information for assessing the competition concerns, if any, from the perspective of appreciable adverse effect on competition in relevant market(s) inter alia in terms of factors listed out under Section 20(4) of the Act. Further, in terms of Regulation 13 (1B) of the 'Combination Regulations', a summary of the Combination is placed on the website of the 'Commission' for the information of general public.

4. It was further informed that the aforementioned Combination was approved by the 'Commission' on 17th September, 2015. Subsequently, on receipt of first application dated 23rd September, 2015, the 'Commission' considered the submission in its meeting held on 27th October, 2015 and was of considered opinion that the combination is not likely to have any appreciable adverse effect on TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) competition which was conveyed to the Informant by letter dated 3rd November, 2015.

5. The issue wise observations of the 'Commission' was also communicated by impugned letter dated 16th June, 2016.

6. Learned counsel appearing on behalf of the Respondents while raised locus standi of the Appellant also raised question of the maintainability of the appeal under Section 53B of the Act.

7. Learned counsel appearing on behalf of the Appellant submitted that the appeal has been filed because the 'Commission' refused to consider and take note of the information submitted by the Appellant on 22nd September, 2015, 29th January, 2016 and 30th May, 2016, in respect of the failure of the Shell-BG combination to identify and disclose the relevant markets of: (i) LNG supply into India (ii) LNG regasification capacity and (ii) marketing of 'Regasified LNG' within India ("Undisclosed Relevant Markets"). This becomes critical as India is relying more and more on 'LNG' and 'Regasified LNG' to meet its demand for natural gas, as domestic supply of gas is steadily reducing.

8. It was submitted by the Appellant that in December, 2018, as per the Government of India data, LNG constituted 51% of the supply of natural gas for the demand in India.

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9. It was further submitted that the last communication received by the Appellant from the 'Commission' on 20th June, 2016 does not even refer to the information submitted on 30th May, 2016 by the Appellant.

10. Learned counsel appearing on behalf of the Appellant further submitted that application under Section 53B is maintainable as information provided was held to be not found relevant and the approval had already been given.

11. It was submitted that since the approval given by the 'Commission' issued under Section 31 of the Act, therefore, it is covered by the provisions of Section 53A (1)(a) of the Act read with Section 53B (1) of the Act. The Appellant is a 'person aggrieved' under Section 53B (1) of the Act in light of

Regulation 13 (1B) of the 'Combination Regulations' which was introduced by amendment and made effective as of 1st July, 2015 read with Section 20 of the Act.

12. It was submitted that there is no timeline for the 'Commission' to review information submitted at any time relating to the 'Shell-BG Combination'.

13. It was further submitted that the summary under Regulation 13(1B) of the 'Combination Regulations' is alleged to have been published without any disclosure of the 'Undisclosed Relevant Markets'.

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14. With regard to different information given by the Appellant on 22nd September, 2015 onwards, it was submitted that the relevant activity has taken place by 'Shell-BG Combination' which was approved on 23rd December, 2015 but it has been made available on the website much later.

15. Learned counsel for the 'Commission' while challenged the maintainability of the appeal under Section 53B, also submitted that no case has been made out on merit.

16. Learned counsel appearing on behalf of the 2nd and 3rd Respondents submitted that the 'Commission' passed order under Section 31(2) of the Act on 17th September, 2015 and approved the acquisition of the entire share capital of 'BG by Shell', resulting in 'BG' becoming a wholly owned subsidiary of 'Shell' in accordance with law.

17. Further, it was submitted that the Appellant had failed to establish locus standi as a person aggrieved by the 'Commission' to prefer the appeal under Section 53B.

18. It is further submitted that the 'Commission' neither issued any direction under Section 29(2) of the Act nor did invite any objection from any third party. More so, the 'Commission' never formed any prima facie view under Section 29(1) of the Act. TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016)

19. We have heard the parties, gone through the records and the provisions of law.

20. In terms of Section 6, the proposal for combination is required to be given to the 'Commission' by way of notice in the form as may be prescribed with the fee, which reads as follows:

"6. Regulation of combinations□(1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void. (2) Subject to the provisions contained in sub-section (1), any person or 13 enterprise, who or which proposes to enter into a combination, [shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the 14 proposed combination,

within [thirty days] of -

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

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(b) execution of any agreement or other document for acquisition referred to in clause

(a) of section 5 or acquiring of control referred to in clause (b) of that section. 15 [(2A) No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.] (3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Explanation - For the purposes of this section, the expression-

(a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961(43 of 1961);

(b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of section 10 of the Income-tax Act, 1961(43 of 1961)"

21. From the aforesaid provisions, following facts emerge:

i. Section 6 relates to 'Regulation of combinations'. Sub-

section (1) of Section 6 prohibits a person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition with the relevant market in India and if that be so, in such case, a combination shall be void.

TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) ii. As per sub-section (2) of sub-section (6), a person or enterprise, who or which proposes to enter into a combination is required to give notice to the 'Commission' in the form along with fee disclosing the details of the proposed combination within 30 days. iii. Sub-section 2A prescribes the time period of maximum two hundred and ten days for passing an order under Section iv. Under sub-section (3), the Commission after receipt of notice under sub-section (2) is required to deal with such notice in accordance with the provisions contained in Sections 29, 30 & 31.

22. Section 29 deals with 'Procedure for investigation of combinations', which reads as follows:

"29. Procedure for investigation of combination□(1) Where the Commission is of the 49 [prima facie] opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) why investigation in respect of such combination should not be conducted.

[1(A) After receipt of the response of the parties to the combination under subsection (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.] (2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, 51 [or the receipt of the report from Director General called under sub section (1A), whichever is later] direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

(3) The Commission may invite any person or member of the public, affected or likely to be TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).

(4) The Commission may, within fifteen working days from the expiry of the period specified in sub-

section (3), call for such additional or other information as it may deem fit from the parties to the said combination.

(5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within fifteen days from the expiry of the period specified in sub-section (4).

(6) After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section

31."

23. From the aforesaid procedure, it is clear that where the 'Commission' is of the prima facie opinion that a combination is likely TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) to cause, or has caused an appreciable adverse effect on competition within the relevant market in India then it is required to issue a notice to show cause to the parties to combination and further required to call for report from the Director General.

24. As per sub-section (2) of Section 29, the 'Commission' if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall within seven working days from the date of receipt of the response of the parties to the combination or the receipt of the report from Director General direct the parties to the said combination to publish details of the combination in the manner as the time stipulated therein.

25. As per sub-section (3) of Section 29, the 'Commission' may invite any person or member of the public, affected or likely to be affected by the Commission, to file his written objections, if any.

26. On plain reading of Section 6 with Section 29, it is clear that if a person or enterprise, who or which proposes to enter into a combination is required to give notice to the Commission and the Commission only if comes prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, is required to follow the procedure under Section 29 and Section 30 of the Act. TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016)

27. On the other hand, on receipt of notice from a person or enterprise, who or which proposes to enter into a combination, if the Commission forms opinion that no prima facie case emerges to hold that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, is not required to follow the procedure under Section 29 and Section 30 of the Act and required to pass order of approval under Section 31, approving the combination, which reads as follows:-

"31. Orders of Commission on certain combinations□(1) Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.

(2) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect. (3) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.

(4) The parties, who accept the modification proposed by the Commission under subsection (3), shall carry out such modification within the period specified by the Commission.

(5) If the parties to the combination, who have accepted the modification under subsection (4), fail to carry out the modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and the Commission shall deal with such combination in accordance with the provisions of this Act.

(6) If the parties to the combination do not accept the modification proposed by the Commission under sub-section (3), such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission under that subsection.

TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) (7) If the Commission agrees with the amendment submitted by the parties under subsection (6), it shall, by order, approve the combination. (8) If the Commission does not accept the amendment submitted under subsection (6), then, the parties shall be allowed a further period of thirty working days within which such parties shall accept the modification proposed by the Commission under sub-section (3).

(9) If the parties fail to accept the modification proposed by the Commission within thirty working days referred to in sub-section (6) or within a further period of thirty working days referred to in sub-section (8), the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act.

(10) Where the Commission has directed under sub-section (2) that the combination shall not take effect or the combination is deemed to have an appreciable adverse effect on competition under sub-section (9), then, without prejudice to any penalty which may be imposed or any prosecution TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) which may be initiated under this Act, the Commission may order that -

(a) the acquisition referred to in clause (a) of section 5; or

(b) the acquiring of control referred to in clause

(b) of section 5; or

(c) the merger or amalgamation referred to in clause (c) of section 5, shall not be given effect to:

Provided that the Commission may, if it considers appropriate, frame a scheme to implement its order under this sub-section. (11) If the Commission does not, on the expiry of a period of 54 [two hundred and ten days from the date of notice given to the Commission under subsection (2) of section 6], pass an order or issue direction in accordance with the provisions of sub-

section (1) or sub-section (2) or sub-section (7), the combination shall be deemed to have been approved by the Commission. Explanation - For the purposes of determining the period of 55[two hundred and ten] days specified in this subsection, the period of thirty working days specified in sub- TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) section (6) and a further period of thirty working days specified in sub- section (8) shall be excluded. (12) Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties. (13) Where the Commission has ordered a combination to be void, the acquisition or acquiring of control or merger or amalgamation referred to in section 5, shall be dealt with by the authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly. (14) Nothing contained in this Chapter shall affect any proceeding initiated or which may be initiated under any other law for the time being in force."

28. If Section 6(2) is read with Section 31, then it is clear that in absence of prima facie case being made out that the combination has, or is likely to have an appreciable adverse effect on competition, the 'Commission' is bound to approve that combination under Section 31 of the Act.

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29. On the contrary, on receipt of notice under Section 6(2), if the 'Commission' is of the prima facie opinion that the combination has, or is likely to have an appreciable adverse effect on competition, it is required to follow the procedure as laid down in sub-sections (2), (3), (4), (5) & (6) of Section 29 and if so necessary Section 30.

30. Therefore, we hold that for forming prima facie opinion as to whether the combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, the Commission is required only to go through the information given under sub-section (2) of Section 6 therein including the details of combination. For forming such opinion, the Commission is not required to follow the procedure as laid down under Section 29 or Section 30 of the Act.

31. Section 4 of the Act is different and distinct from sub-section (1) of Section 6 of the Act. The 'Commission' on receipt of information under sub-section (2) of Section 6 if finds prima facie case and after following all the procedure under Section 29 & 30 comes to a definite conclusion that the

combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, then in terms of sub-section (1) of Section 6 such combination is to be declared as void.

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32. On the other hand, as per Section 4, the Commission is required to notice only with regard to abuse of dominant position, as apparent from Section 4, and quoted below:

"4. Abuse of dominant position—[(1) No enterprise or group shall abuse its dominant position.] (2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group] -

(a) directly or indirectly, imposes unfair or discriminatory-

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.-- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts-

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(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation - For the purposes of this section, the expression -

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to -

(i) operate independently of competitive forces prevailing in the relevant market; or TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016)

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

[(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]"

33. The violation of Section 4 (i.e. Abuse of dominant position) is completely different than the violation of Section 6(1) (i.e. combination is likely to cause or has caused an appreciable adverse effect on competition), therefore, while passing order under sub-section (2) of Section 6, the Commission cannot hold abuse of dominant position, though it may hold that the combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India and thereby void in terms of Section 6(1).

34. For determining abuse of dominant position (Section 4) a different procedure has to be followed, than the procedure to be followed for finding out whether the combination is likely to cause, or TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) has caused an appreciable adverse effect on competition within the relevant market in India.

35. In the present case, the Appellant alleges violation of Section 4 and not challenged the order dated 17th September, 2015 passed by the Commission under Section 31 of the Act. Further, as the question of abuse of dominant position will arise only after combination comes into effect in terms of sub-section (2) of Section 6 read with Section 31, the allegation of abuse of dominant position cannot be looked at the stage of approval of combination under Section 31.

36. The first information was given by the Appellant- ('Informant') on 23rd September, 2015 i.e. much after approval of the 'Commission' on 17th September, 2015. This is the reason no order was required to be passed on such information. For the same very reason, the 'Commission' by letter dated 3rd November, 2015 conveyed the decision to the Appellant that the combination is not likely to have any appreciable adverse effect on competition in India.

37. The intimation given by the 'Commission' by letter dated 3rd November, 2015 to the Appellant is also not under challenge. The Appellant has also suppressed the aforesaid fact. It is the second time when such intimation given by letter dated 16th June, 2016, the present appeal has been preferred.

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38. The intimation given to the Appellant do not fall under any provisions as stipulated under clause (a) of Section 53A, therefore, we hold that the appeal under Section 53B preferred by the Appellant

is not maintainable.

39. Section 53A deals with 'Establishment of Appellate Tribunal' which reads as follows:

"53A. Establishment of Appellate Tribunal. (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;

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) under sub-section(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act. (2) The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify."

40. Section 53B deals with 'Appeal to Appellate Tribunal', which reads as follows:

"53B. Appeal to Appellate Tribunal (1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016) Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(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.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal."

41. From the combined reading of aforesaid provisions, it is clear that this Appellate Tribunal can 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, Sections 27, 28, 31, 32, 33, 38, 39, 43, 43A, 44, 45 or Section 46 of the Act. TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016)

42. Apart from the aforesaid facts, we have noticed that no case has been made out by the Appellant to hold that the combination has appreciable adverse effect on competition in relevant market.

43. In absence of any merit, the appeal is dismissed. No costs.

[Justice S.J. Mukhopadhaya] Chairperson [Justice Bansilal Bhat] Member (Judicial) NEW DELHI
2nd July, 2019 AR TA (AT) (Competition) No. 32 of 2017 (Old Appeal No. 43 of 2016)