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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 6661/2019 & CM APPL. 28107/2019, 28108/2019**

**CADD SYSTEMS AND SERVICES PRIVATE
LIMITED**

..... Petitioner

Through Mr Raj Shekhar Rao, Mr Tushar
Gupta, Mr Sumit Mishra, Mr Pramod Singh,
Mr Siddharth H. Raval, Advocates.

versus

COMPETITION COMMISSION OF INDIA..... Respondent
Through Mr Samar Bansal, Mr Devahuti
Pathak, Mr Manan Shishodia, Advocates for
CCI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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17.07.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning the orders dated 23.04.2019 and 08.05.2019 (hereafter 'the impugned orders') passed by the respondent (Competition Commission of India – CCI) in *Case No. 12 of 2017* titled as "*Nagrik Chetna Manch v. SAAR IT Resources Private Limited and Ors*". By the order dated 23.04.2019, CCI adjourned the final hearing of the said case to 08.05.2019. On 08.05.2019, CCI heard detailed arguments and reserved the matter for judgment.

2. The petitioner contends that the impugned orders were passed without the presence of a judicial member and therefore, were in

contravention of the law laid down by the Division Bench of this Court in ***Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.: W.P.(C) 11467 of 2018***. The petitioner contends that the impugned orders are adjudicatory in nature and hence, the presence of a judicial member was mandatory as per the law.

3. The petitioner is a company which is engaged in the business of topographical land survey, differential GPS (DGPS)/ GPS survey, GIS, civil consultancy and supervision of quality control in dam projects.

4. In March, 2017, Nagrik Chetna Manch, filed an information under Section 19(1)(a) of the Competition Act, 2002 (hereafter ‘the Act’) before CCI alleging cartelization among the petitioner and certain other parties (hereafter ‘the Opposite Parties’), who bid for Tender No. 338 of 2015 floated by Pune Municipal Corporation (PMC) for conducting trees census within the PMC jurisdiction area, using GIS and GPS Technology, in contravention of Section 3(3)(d) of the Act.

5. CCI considered the information as filed under Section 19(1) (a) of the Act and passed a *prima facie* order dated 03.10.2017 under Section 26(1) of the Act, directing the Director General (DG) to conduct an investigation in the said matter.

6. On 20.09.2019, Director General submitted a report to CCI (hereafter ‘the DG report’) concluding that the petitioner and the other

Opposite Parties as named in Case No. 12 of 2017, have acted in an alleged collusive arrangement while bidding for the Tender No. 338 of 2015.

7. The report was considered by CCI on 23.01.2019 and forwarded to the parties, vide order dated 23.01.2019. The parties were directed to file replies/objections to the DG report by 28.02.2019 and to appear for a final hearing before CCI on 27.03.2019.

8. The petitioner filed its replies/objections to the report with CCI on 25.02.2019. One of the Opposite Parties in Case No. 12 of 2017 sought adjournment of the hearing and CCI, vide order dated 07.03.2019, adjourned the final hearing to 25.04.2019.

9. On 23.04.2019, CCI vide the impugned order provided a last opportunity to some of the Opposite Parties (not including the petitioner) to submit copies of their financial statements by 03.05.2019, failing which they would render themselves liable under Section 43 of the Act. Upon request of one of the Opposite Parties, the final hearing was further adjourned to 08.05.2019. Two members and the Chairperson of CCI were present when the impugned order was passed.

10. On 08.05.2019, the Opposite Parties made their respective detailed submissions in the matter. After hearing the said submission, CCI decided to pass an appropriate order in due course. CCI also granted liberty to the parties to file their respective synopsis of arguments within seven days. On the said date, two members and the

Chairperson of CCI were present.

11. Mr Raj Shekhar Rao, learned counsel appearing for the petitioner referred to the decision of this Court in ***Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.*** (*supra*) and drew the attention of this Court to paragraph 148 of the said decision, wherein the Division Bench of this Court had held that at all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary. He further pointed out that the Court had issued directions to the Central Government to take expeditious steps to fill all existing vacancies in the CCI within a period of six months. He contended that since the Central Government had not appointed a person having the requisite qualification/experience in the field of law, CCI could not hold any final hearings. He also submitted that the doctrine of necessity cannot be invoked as CCI could continue to discharge other functions while awaiting appointment of a judicial member.

12. Mr Samar Bansal, learned counsel appearing on behalf of the respondent countered the aforesaid submissions. He submitted that the Central Government had accepted the decision of the Division Bench of this Court in ***Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.*** (*supra*) and had issued a circular inviting application from persons with the requisite qualifications for appointment as a judicial member of CCI. He stated that notwithstanding the same, the functioning of CCI could not be paralysed and CCI could function notwithstanding any vacancy. To

substantiate his contention, he referred to Section 15 of the Act.

13. He further submitted that in *Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.* (*supra*), the Division Bench had relied upon the decision of the Supreme Court in *Tamil Nadu Generation and Distribution Corporation Limited vs PN Power Generating Co. Pvt Ltd.:* (2014) 11 SCC 53 and *State of Gujarat v. Utility Users Welfare Association:* (2018) 6 SCC 21. He submitted that the Supreme Court had subsequently clarified in the order dated 10.09.2018 passed in *MA No. 2217 of 2018* in *T.C. (C) No. 137/2015* captioned *K.R. Tamizhmani & Ors. v. The State of Tamil Nadu & Ors.* that till such time a reconstitution of the Tribunal does not take place arising from a retirement of a member from the legal field, the existing Tribunal will decide all the cases.

14. He submitted that in view of the above clarification, the decision in *Mahindra & Mahindra Ltd. & Ors v. Competition Commission of India & Anr.* (*supra*) could not be read as interdicting CCI from deciding matters, pending appointment of a member having legal and judicial background. He also referred to the decision of the Supreme Court in *B.K. Srinivasan and Ors. v. State of Karnataka and Ors.:* (1987) 1 SCC 658 in support of his contention that by virtue of Section 15 of the Act, any defect in constitution would not invalidate the orders passed by CCI.

15. I have heard the learned counsel for the parties.

16. The contentions advanced on behalf of CCI are merited.

Although in *Mahindra & Mahindra (supra)*, the Division Bench had unequivocally expressed its opinion that it was necessary for CCI to include a judicial member as observed by the Supreme Court in *Utility Users Welfare Association (supra)*, however, the Court did not interdict the functioning of the CCI pending such appointment. There is no specific direction that was issued to the aforesaid effect. The Central Government was directed to fill the vacancy within the period of six months and it cannot be assumed that the Court had interdicted the working of the CCI during this period.

17. There is also much merit in the contention that the orders passed by the CCI cannot be called into question on account of any vacancy or any defect in the constitution. Section 15 of the Act is relevant and is set out below:-

“15. Vacancy, etc., not to invalidate proceedings of Commission.—No act or proceeding of the Commission shall be invalid merely by reason of—
(a) any vacancy in, or any defect in the constitution of, the Commission; or
(b) any defect in the appointment of a person acting as a Chairperson or as a Member; or
(c) any irregularity in the procedure of the Commission not affecting the merits of the case.”

18. The aforesaid Section makes it amply clear that no Act or proceedings of CCI would be invalid by reason of any vacancy or any defect in its constitution. Thus, notwithstanding, that a judicial member is required to be appointed to CCI, the orders passed by the CCI pending such appointment cannot be called into question.

19. In *B.K. Srinivasan and Ors. v. State of Karnataka and Ors.* (*supra*) the Supreme Court had referred to Section 76-J of the Mysore Town and Country Planning Act, 1961 which expressly provided that “no act done or proceeding taken under this Act would be questioned on the ground merely of existence of any vacancy in, or any defect in the constitution of the Board or any Planning Authority”. The Supreme Court had referred to the said Section 76-J as the Ganga Clause – alluding to the belief of Hindus that waters of Ganga purify, cleanse the sins and remedy all insufficiencies. The Court observed that “provisions similar to Section 76-J are found in several modern Acts and their object is to put beyond challenge defects of constitution of statutory bodies and defects of procedure which have not led to any substantial prejudice.”

20. In the present case, the petitioner had participated in the proceedings before CCI and it has reserved orders after hearing submissions made on behalf of the parties. It is clearly not open for the petitioner to now seek a rehearing of the matter after appointment of a judicial member.

21. The petitioner’s contention that the functioning of CCI would not be paralysed if it is interdicted from passing final orders, is unmerited. Whilst, it is correct that CCI is also required to pass administrative orders as well, its principal function is to dispose of cases instituted either on an information or complaints. Plainly, interdicting CCI from passing final orders would effectively bring its functioning to a standstill. As observed above, this is not the import of

the order passed by the Division Bench of this Court in *Mahindra & Mahindra's* (*supra*) case.

22. In view of the above, the petition is unmerited and, accordingly, dismissed. The pending applications are disposed of.

JULY 17, 2019

pkv

VIBHU BAKHRU, J

