



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.35047 of 2013
and
M.P.Nos.1 & 2 of 2013

Tamil Nadu Generation and
Distribution Corporation Limited
(TANGEDCO) represented by the
Chief Engineer / Commercial,
144, Anna Salai, Chennai - 600 002.

... Petitioner

Vs

1. Competition Commission of India,
Hindustan Times House,
(3rd, 4th & 7th Floor)
18-20, Kasturba Gandhi Marg,
New Delhi - 110 001.
2. Additional Director General,
Competition Commission of India,
'B' Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.
3. Southern India Engineering Manufacturers'
Association,
Rep.by Mr.T.C.Thiagarajan, President,
8/4, Race Course, Coimbatore - 18.

...Respondents

PRAYER : Writ Petition filed Under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records relating to the Impugned Order dated 8.10.2013 of Case No.38 of 2013 on the file of the 1st respondent and to the consequent letter dated 3.12.2013 on the file of the 2nd respondent and quash the same.

For Petitioner : Mr.J.Ravindran
Additional Advocate General
Assisted by Mr.L.Jai Venkatesh



WEB COPY

For Respondents: Mr.N.Venkata Raman
Additional Solicitor General of India
Assisted by Mr.P.Mahaadevan
[For R1 & R2]

Mr.H.Karthik Seshadri
For M/s.Iyer and Thomas
[For R3]

O R D E R

The impugned order dated 08.10.2013 of Case No.38 of 2013 and the consequential notice dated 03.12.2013 on the file of the second respondent are under challenge in the present writ petition.

2. The Competition Commission of India on receipt of complaint from the third respondent / Southern India Engineering Manufacturers' Association, found that it is evident prima facie Opposite Party was abusing its dominant position by imposing discriminatory conditions in the sale of electricity in the relevant market within the meaning of section 4 (2) (a) (i) of the Competition Act, 2002. Thus, the Competition Commission of India formed an opinion that it is a fit case for Director General investigation. The Director General has to investigate the matter for violation of any / all provisions of the Competition At and the said proceedings of initiation states that "Nothing stated in this order shall tantamount to a final expression of opinion on merit of the case and the Director General shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein". Thus, the proceedings dated 08.10.2013 is only an acceptance of complaint and thereafter, a notice under Section 41(2) read with Section 36 (2) of the Competition Act, 2002 in CCI Case No.38 of 2013 was issued to the writ petitioner in notice dated 03.12.2013, which is under challenge in the present writ petition.

3. There is no need to adjudicate the merits of the case in the present writ petition as the respondents are yet to adjudicate the merits of the case by providing opportunity to the parties concerned. Thus, any discussion on merits would cause prejudice to either of the parties and thus, this Court is not inclined to adjudicate the merits with reference to the allegations raised.

4. The issues raised in the lis on hand are that the complaint filed by the third respondent before the Competition Commission of India is not maintainable and the Competition Commission of India has no power to entertain any such complaint



against the TANGEDCO overriding the provisions of the Electricity Act and issue notice, which is without jurisdiction. The Electricity Regulatory Commission is empowered to adjudicate all such complaints or allegations relating to supply, services, etc., of electricity.

5. Regarding the maintainability of the writ petition under Article 226, no writ needs to be entertained against a notice in a routine manner. A writ against a notice may be entertained only on limited grounds. If the notice has been issued by an incompetent authority having no jurisdiction or directly hitting the provisions of the Act, or if any allegations of mala fides are raised, then the writ petition is maintainable. Even in case of raising an allegation of mala fides, the authority against whom such an allegation is raised, must be impleaded as party respondent in the writ proceedings in his personal capacity.

6. This Court is of the considered opinion that all the writ petitions are maintainable under Article 226 of the Constitution of India. It is not the question regarding the maintainability of the writ petition, but the entertainability of the writ petition is to be looked into. The Courts are bound to consider, whether there is a need to entertain a writ petition and if so, what would be the grounds available for the purpose of entertaining the writ petition.

7. The learned Additional Advocate General appearing on behalf of the petitioner / TANGEDCO mainly contended that the complaint filed by the third respondent before the Competition Commission of India itself is not maintainable. Section 23 of the Electricity Act 2003 provides "Directions to licensees". Accordingly, If the Appropriate Commission (TNERC) is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

8. Therefore, the Tamil Nadu Electricity Regulatory Commission is empowered to adjudicate all subjects relatable to efficient supply, securing the equitable distribution of electricity and promoting competition. When the Electricity Act is a Special Act as far as the TANGEDCO is concerned, the provisions of the Competition Act is inapplicable and the Electricity Act will prevail over the Competition Act. No doubt, in the absence of any such Regulatory Commission, the respondents would have justified in entertaining a complaint under the Competition Act. When there is an effective redressal mechanism provided by constituting Tamil Nadu Electricity Regulatory Commission, there is no reason whatsoever to



entertain a complaint under the Competition Act and thus, the impugned notice issued by the first respondent is beyond the scope of jurisdiction and further, the Competition Act itself is inapplicable with reference to the nature of complaint filed by the third respondent and in view of Section 23 of the Electricity Act, 2003.

9. The learned Additional Advocate General relied on Section 2 (64) of the Electricity Act, which defines "State Commission" means the State Electricity Regulatory Commission constituted under sub-section (1) of Section 82 and includes a Joint Commission constituted under sub-section (1) of Section 83. When Section 23 deals with the powers of the Regulatory Commission, to regulate the supply, distribution consumption or use of electricity thereof, then the powers of the Competition Commission of India stands ousted and thus, the impugned registration of a case and issuance of notice are improper and without jurisdiction.

10. The learned Additional Advocate General contended that a holistic approach is required with reference to the provisions of the Electricity Act and thus, the writ petition is liable to be allowed.

11. In support of the contentions, the learned Additional Advocate General relied on the judgment of the Hon'ble Supreme Court of India in the case of Competition Commission of India Vs. Bharti Airtel Limited and others, reported in (2019) 2 SCC 521. The learned Additional Advocate General relied on certain paragraphs, which reads as under:

"83. The aforesaid provisions would indicate that the Act deals with three kinds of practices which are treated as anti-competitive and are prohibited. These are:

83.1. Where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;

83.2. Where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and

83.3. Regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

85. It is for the aforesaid reason that CCI is



WEB COPY

entrusted with duties, powers and functions to deal with three kinds of anti-competitive practices mentioned above. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by the other participants, in India. For the purpose of conducting such an inquiry, CCI is empowered to call any person for rendering assistance and/or produce the records/material for arriving at even the prima facie opinion. The regulations also empower CCI to hold conferences with the persons/parties concerned, including their advocates/authorised persons.

98. Thus, with the advent of globalisation/liberalisation leading to free market economy, regulators in respect of each sector have assumed great significance and importance. It becomes their bounden duty to ensure that such a regulator fulfils the objectives enshrined in the Act under which a particular regulator is created. Insofar as the telecom sector is concerned, the TRAI Act itself mentions the objective which it seeks to achieve. It not only exercises control/supervision over the telecom service providers/licensees, TRAI is also supposed to provide guidance to the telecom/mobile market. "Introduction" to the TRAI Act itself mentions that due to tremendous growth in the services it was considered essential to regulate the telecommunication services by a regulatory body which should be fully empowered to control the services, in the best interest of the country as well as the service providers. Likewise, the Statement of Objects and Reasons of this Act, *inter alia*, stipulates as under:

"1. In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers' demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value-added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value-added



WEB COPY

services in which private operator will be competing with Government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest.

4. The powers and functions of the Authority, inter alia, are-

- (i) ensuring technical compatibility and effective inter-relationship between different service providers;
- (ii) regulation of arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
- (iii) ensuring compliance of licence conditions by all service providers;
- (iv) protection of the interest of the consumers of telecommunication service;
- (v) settlement of disputes between service providers;
- (vi) fixation of rates for providing telecommunication service within India and outside India; and
- (vii) ensuring effective compliance of universal service obligations."

99. TRAI is, thus, constituted for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest. It is assigned the duty to achieve the universal service which should be of world standard quality on the one hand and also to ensure that it is provided to the customers at a reasonable price, on the other hand. In the process, purpose is to make arrangements for protection and promotion of consumer interest and ensure fair competition. It is because of this reason that the powers and functions which are assigned to TRAI are highlighted in the Statement of Objects and Reasons. Specific functions which are assigned to TRAI, amongst other, including ensuring technical compatibility and effective inter-relationship between different service providers; ensuring compliance of



licence conditions by all service providers; and settlement of disputes between service providers.

103. We are of the opinion that as TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by TRAI in the first instance. These are jurisdictional aspects. Unless TRAI finds fault with the IDOs on the aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated 6-9-2016 that the matter related to interconnectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated 27-9-2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated 21-10-2016 on the issue of interconnection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that interconnectivity is not provided by the IDOs in terms of the licences granted to them. The TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIs. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned.

104. We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by TRAI which would bring on record findings on the aforesaid aspects, CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of "subscriber", "test period", "reasonable demand", "test phase and



WEB COPY

commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of the TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 72 and 102 above are determined by TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage CCI can go into the question as to whether violation of the provisions of the TRAI Act amounts to "abuse of dominance" or "anti-competitive agreements". That also follows from the reading of Sections 21 and 21-A of the Competition Act, as argued by the respondents.

105. The issue can be examined from another angle as well. If CCI is allowed to intervene at this juncture, it will have to necessarily undertake an exercise of returning the findings on the aforesaid issues/aspects which are mentioned in para 102 above. Not only TRAI is better equipped as a sectoral regulator to deal with these jurisdictional aspects, there may be a possibility that the two authorities, namely, TRAI on the one hand and CCI on the other, arrive at conflicting views. Such a situation needs to be avoided. This analysis also leads to the same conclusion, namely, in the first instance it is TRAI which should decide these jurisdictional issues, which come within the domain of the TRAI Act as they not only arise out of the telecom licences granted to the service providers, the service providers are governed by the TRAI Act and are supposed to follow various regulations and directions issued by TRAI itself.

113. The conclusion of the aforesaid discussion is to give primacy to the respective objections (sic objectives) of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, CCI can be activated to investigate the matter going by the criteria laid down



in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.

WEB COPY

120. Thus, even when we do not agree with the approach of the High Court in labelling the impugned order as quasi-judicial order and assuming jurisdiction to entertain the writ petitions on that basis, for our own and different reasons, we find that the High Court was competent to deal with and decide the issues raised in exercise of its power under Article 226 of the Constitution. The writ petitions were, therefore, maintainable."

12. In the case of Gujarat Urja Vikas Nigam Limited Vs. Essar Power Limited, reported in (2008) 4 SCC 755, the Hon'ble Supreme Court of India held that Electricity Act being a Special statute would have overriding effect over the 1996 Act the general statute.

13. In the case of Anand Parkash Agarwal Vs. Dakshin Haryana Bijli Vitran Nigam, reported in 2017 SCC OnLine Comp AT 18, the Competition Appellate Tribunal decided the issues relating on the judgment of the Hon'ble Supreme Court of India in 'Bharti Airtel case' (cited supra).

14. The learned Additional Advocate General made a submission that the judgment of the Competition Appellate Tribunal has got persuasive value as the judgment of the Hon'ble Supreme Court has been relied upon. Relevant paragraphs are extracted hereunder:

"9. The Commission further held that, the case essentially related to the functions discharged by the Electricity Distribution Company and the State Electricity Regulatory Commission in respect of fixation of FSA and no competition issue was discernible from the facts presented in the information. The Commission was of the view that, FSA was computed and levied as per the Regulations framed by HERC and any issue regarding violation of the Regulations was, therefore, to be dealt with by HERC and anyone aggrieved by the decision of HERC could go in appeal to the Appellate Authority under the Electricity Act. The Commission accordingly closed the matter in terms of Section 26(2) of the Act, vide the impugned Order dated 10/2/2016.

14.....



WEB COPY

(v) That even if it were assumed that, both the Electricity Act and the Competition Act were special laws, then the principle of *leges posteriores priores contrarias abrogant* will be applicable as both the Acts, i.e. Electricity Act and Competition Act, were passed by the Union Parliament under Article 246 List III of the Schedule 7 of the Constitution. As the Electricity Act was later in date, therefore, it would prevail over the Competition Act.

15. We have considered the submissions made by the learned counsels appearing for the parties and perused the Electricity Act, the Competition Act, the Regulations made in exercise of powers vested under the aforesaid Acts, and the relevant judicial pronouncements. It is an admitted position that DHBVN enjoyed dominant position in the market for distribution of electricity in its licensed area. The following issues arise for determination:

1. Whether the impugned order suffers from the fatal flaw of contravention of principles of natural justice as the Commission did not give an opportunity of hearing to the Appellant while passing the impugned order, which was prejudicial to the appellant, under Section 26(2) of the Act.

2. Whether the Commission had the jurisdiction in the matter of alleged abuse of dominance arising from computation and levy of FSA which, as admitted by the Appellant in information filed with the Commission, was approved by the HERC i.e. the State Electricity Regulatory Commission.

3. Whether any competition law issue of unfair and discriminatory price in contravention of Section 4 of the Act, while computing or charging FSA, has been made out."

15. Relying on the above judgments, the learned Additional Advocate General appearing on behalf of the petitioner is of an opinion that the ratio laid down by the Hon'ble Supreme Court in *Bharti Airtel* case (cited supra) is to be applied in respect of the jurisdiction of the Competition Commission of India for entertaining a complaint from the third respondent and issued the impugned notice. When the Special Act provides a redressal mechanism, which is effective and efficient, parallel proceedings under the general law is barred and thus, the impugned notice is untenable.



16. The learned Additional Advocate General, referred the category of cases, which can be entertained by the Competition Commission of India with reference to the provisions of the Competition Act, which was elaborately considered by the Hon'ble Supreme Court of India. The three kind of practices, which are treated as anti-competitive are prohibited, are enumerated in Paragraph 83 of the judgment in Bharti Airtel case (cited supra) and the case of the petitioner / TANGEDCO is not falling under any one of the three categories mentioned in the said judgment with reference to the provisions of the Competition Act and therefore, the complaint filed by the third respondent is untenable. The TANGEDCO is owned by the Government of Tamil Nadu and Electricity Supply has been provided without any discrimination to the consumers. If at all any discrepancy arises in this regard, the Tamil Nadu Electricity Regulatory Commission is competent to adjudicate the issues under the Electricity Act, which is a Special enactment and the Competition Act, which is a general law would be inapplicable.

17. The learned Additional Solicitor General of India appearing on behalf of the respondents 1 and 2 objected the contentions raised on behalf of the petitioner in entirety. The jurisdiction and applicability of the Act has been well enumerated by the Hon'ble Supreme Court of India in Bharti Airtel case (cited supra) itself. The Hon'ble Supreme Court of India has elaborately discussed the circumstances, under which, complaints are entertainable under the Competition Act and where it is not entertainable. While so, the prima facie case made out against the writ petitioner revealed that it is evident prima facie case was made out regarding abusul of its dominant position by imposing discriminatory conditions in the sale of electricity in the relevant market within the meaning of Section 4 (2) (a) (i) of the Competition Act, 2002. Thus, the Competition Commission of India formed an opinion that it is a fit case for Director General investigation in the proceedings itself. It is categorically stated that the notice as well as the contentions shall not tantamount to the final expression of opinion on the merits of the case and the Director General shall conduct the investigation without being swayed in any manner whatsoever by the observations made in the said order. This being the independent investigation to be conducted by the Director General based on the allegations raised by the third respondent and materials available on record, there is no reason to entertain the writ petition at the stage of notice, which is not only premature, but unsustainable.

18. The learned Additional Solicitor General of India with reference to Section 23 of the Electricity Act, contended that the Electricity Regulatory Commission is not an investigating body. The complaint filed by the third respondent is entertained



with reference to Section 4 of the Competition Act and entire reading of the Electricity Act would reveal that there is no power conferred on the Regulatory Commission to conduct any investigation of this nature, more specifically, with reference to abuse of dominant position by the writ petitioner TANGEDCO. Section 23 of the Electricity Act confers power to the Regulatory Commission to frame policies in the areas, where there is no policy exists. However, the power of investigation or penalty clauses with reference to the allegation of abuse of dominant position is not traceable under any of the provisions of the Electricity Act and therefore, there is no overlapping of provisions in respect of the Electricity Act and Competition Act and the Competition Act covers certain specialized area to deal with certain nature of complaint and to conduct investigation for initiation of further action. When power of investigation of initiation of action and imposition of penalty are not contemplated under the Electricity Act, the contention raised on behalf of the petitioner that the Electricity Act prevail over the Competition Act does not arise with reference to the context in the present case.

19. No doubt, the Electricity Act will prevail over the Competition Act in respect of the subjects dealt with under the provisions of the Electricity Act. However, the Competition Act provides Power of investigation by the Director General. In the event of certain circumstances as contemplated under Section 4 of the Competition Act, which is not comparable with reference to the powers conferred on the Tamil Nadu Electricity Regulatory Commission either under Section 23 or under any other provisions of the Electricity Act.

20. The learned Additional Solicitor General of India drew the attention of this Court with reference to Section 4 of the Competition Act, which contemplates abuse of dominant position. In the present case, the third respondent submitted a complaint for abuse of dominant position by the TANGEDCO / writ petitioner and the Competition Commission of India found that there is a prima facie case for the purpose of conduct of investigation and accordingly, entertained the complaint and issued notice. Instead of defending the case, the writ petitioner has chosen to file the writ petition, challenging the very notice issued and therefore, the writ petition itself is not maintainable and liable to be rejected.

21. It is further contended that with reference to the abuse of dominant position, as referred by the third respondent by way of a complaint, there is no monitoring provision or investigating mechanism under the Electricity Act. Thus, Section 4 of the Competition Act is a stand alone provision, which is specific and in the event of any such complaint of abuse of



dominant position, Competition Commission of India is empowered to entertain the complaint and investigate the matter through its Director General for the purpose of proceedings under the provisions of the Competition Act. Section 41 of the Act provides "Director General to investigate contravention". In the present case, the Competition Commission of India ordered for an investigation by the Director General and thus, the petitioner is expected to co-operate for such investigation and to defend their case in the manner prescribed under the provisions of the Act. Thus, the writ petition is to be rejected.

22. The learned Additional Solicitor General of India also relied on the judgment of the Hon'ble Supreme Court of India in the case of Competition Commission of India Vs. Bharti Airtel Limited and others, reported in (2019) 2 SCC 521. Paragraph 83 would provide three kind of practices, which are treated as anti-competitive and the said paragraph is relied upon.

23. The learned Additional Solicitor General of India drew the attention of this Court from Paragraphs 83 to 102, which deals with various circumstances and the findings with reference to the kinds of practices, which are treated as anti-competitive and are prohibited under the provisions of the Act. The provisions of the Act are also elaborately considered by the Hon'ble Supreme Court of India.

24. The learned Additional Solicitor General of India referred Paragraph 103 of the judgment, wherein the Hon'ble Supreme Court made an observation that "TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that interconnectivity is not provided by the IDOs in terms of the licences granted to them. The TRAI Act and Regulations framed thereunder make detailed provisions dealing with intense obligations of the service providers for providing POIs. These provisions also deal as to when, how and in what manner POIs are to be provisioned. They also stipulate the charges to be realised for POIs that are to be provided to another service provider. Even the consequences for breach of such obligations are mentioned. We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by TRAI which would bring on record findings on the aforesaid aspects, CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal



WEB COPY

obligations of service providers" or "breaches of any contract and/or practice", arising out of the TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 72 and 102 above are determined by TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage CCI can go into the question as to whether violation of the provisions of the TRAI Act amounts to "abuse of dominance" or "anti-competitive agreements". That also follows from the reading of Sections 21 and 21-A of the Competition Act, as argued by the respondents."

25. The learned Additional Advocate General relied on the judgment of the High Court of Delhi, wherein the ratio laid down in Bharti Airtel case (cited supra) has been relied upon.

26. In the case of Monsanto Holdings Pvt. Ltd., and others, Vs. Competition Commission of India and others, reported in (2020) SCC OnLine Del 598 and in the case of Whatsapp LLC Vs. Competition Commission of India, the Delhi High Court delivered a judgment on 22.04.2021 in W.P.(C) 4378/2021 & CM 13336/2021, in which, paragraphs 24, 27 and 28 are relied upon and the relevant paragraphs are extracted hereunder:

"24. The reliance of the petitioner on the judgment of Bharti Airtel Ltd. (supra) in this regard is ill-founded. In the said case, the Supreme Court was considering the scope and ambit of two specialized regulators, that is the respondent no.1 herein and the Telecom Regulatory Authority of India (TRAI), to deal with a complaint regarding denial of Points of Interconnection to one of the telecom operators. The Supreme Court explained the jurisdiction to the two Regulators as under:-

"85. It is for the aforesaid reason that CCI is entrusted with duties, powers and functions to deal with three kinds of anticompetitive practices mentioned above. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by the other participants, in India. For the purpose of conducting such an inquiry, CCI is empowered to call any person



WEB COPY

guaranteed under Article 21 of the Constitution of India is pending adjudication before the Supreme Court and this Court. The question regarding the 2016 Update/2021 Update not giving an option to opt-out is also an issue before the Supreme Court and this Court. However, the same cannot necessarily mean that during the pendency of those petitions, the respondent no.1 is completely denuded of the jurisdiction vested in it under the Competition Act, 2002 or that it must necessarily await the outcome of such proceedings. Therefore, it is not a question of lack of jurisdiction of the respondent no. 1, but rather one of prudence and discretion."

27. Relying on the above judgments, the learned Additional Solicitor General of India contended that there is ample power to entertain complaint of this nature and issue notice by following the provisions of the Competition Act and there is no infirmity and the petitioner has to defend their case by filing their objections or otherwise. Thus, the writ petition is to be rejected.

28. The learned counsel for the third respondent also opposed the contentions of the petitioner by stating that there is absolutely no ouster of jurisdiction as far as the Competition Act is concerned. Section 21-A of the Competition Act provides "Reference by Commission". Sub-Section (1) reads as under:

"(1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act, whose implementation is entrusted to a statutory authority, then the commission may make a reference in respect of such issue to the Statutory authority."

29. It is contended that the third respondent has not preferred any complaint before the Tamil Nadu Regulatory Commission. Section 21-A empowers the Commission to make a reference where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act, whose implementation is entrusted to a statutory authority, then the commission may make a reference in respect of such issue to the Statutory authority.

30. Relying on the said provision, the learned counsel for the third respondent reiterated that after investigation by the Director General and during the course of hearing by the Competition Commission of India, if the writ petitioner is able



to establish that the subject must be adjudicated before the Tamil Nadu Electricity Regulatory Commission, then the Commission itself has got powers to refer the issues to the statutory authority namely Tamil Nadu Electricity Regulatory Commission (TNERC) for adjudication under the provisions of the Electricity Act. Therefore, mere initiation cannot be questioned on the ground that the Competition Commission of India has no jurisdiction. When the third respondent has raised a specific allegation of abuse of dominant position, then as per Section 4, the Competition Commission is empowered to initiate action and thus, the writ petition is devoid of merits.

31. Considering the arguments as advanced by the learned Additional Advocate General for the writ petitioner and the Additional Solicitor General of India and the learned counsel for the respondents, this Court has to consider the nature of complaint and the scope of the entertainability of such complaint under the provisions of the Competition Act by the Competition Commission of India.

32. Let us now consider Section 4 of the Competition Act, which contemplates 'Abuse of dominant position'. It prohibits of abuse of dominant position. Sub-Section (1) enumerates that "No enterprise or group shall abuse its dominant position". Sub-Section (2) states that "There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group],
" (a) directly or indirectly, impose unfair or discriminatory.

(i) Condition in purchase or sale of goods or services; or
(ii) price in purchase or sale (including predatory price) of goods or service.

33. An enterprise stipulated in Section 4 is defined in Section 2(h) as follows:

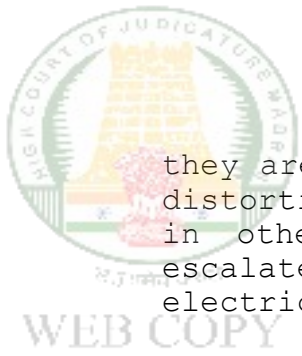
"2(h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy,



Thus, the TANGEDCO / writ petitioner is an enterprise within the meaning of Competition Act.

35. Chapter V Section 41 provides 'Director General to investigate contraventions'. Chapter VI deals with 'Penalties'. This being the provisions of the Competition Act, let us now consider the nature of the complaint given by the 3rd respondent to the Competition Commission of India, which has been elaborately stated in Case No.38 of 2013, wherein, the 3rd respondent has stated that the load shedding power in entire Tamil Nadu, barring Chennai, extended to about 14 to 18 hours a day. The informant highlighted an order dated 10.01.2011 of the Appellate Tribunal for Electricity directing the State Electricity Commission to initiate proceedings regarding short term, medium term and long term for meeting the requirement of power and the Opposite Party was directed to submit a comprehensive proposal in this regard before the State Commission. The High Court of Madras also, vide order dated 30.06.2011, taking note of the submissions regarding inequitable load shedding and enforcement of Restriction and Control Measures, directed the Regulatory Commission to take up the matter and pass appropriate orders.

36. The informant contended that the discriminatory treatment by the opposite party had resulted in unfavorable competitive conditions in the market. The Industries situated in rest of Tamil Nadu including foundry, automobile component manufacturers, textile, Information Technology (IT), commercial establishments etc., compete with similar industries functioning in Chennai. While the industries in Chennai region get power supply for 22 hours a day at Rs. 5.50 per unit rate charged by the Respondent, the Industries outside Chennai do not have such advantage and spend Rs. 15/- on per unit of electricity because



they are compelled to using diesel gensets. This has resulted in distortion in level playing field for industrial units situated in others parts of Tamil Nadu (except Chennai) because of escalated operating cost as a result of high per unit of electricity consumed by these industrial units.

37. As per Informant, there was no difference in respect of levy of tariff and charges in the electricity consumed in Chennai from other Regions of Competition Commission of India Tamil Nadu. Thus entire Tamil Nadu has to be taken as single geographic market. The discrimination met out to areas other than Chennai amounted to abuse. On the basis of the above stated facts, the informant argued abuse of dominant position by OP under section 4 of the Act by imposition of discriminatory conditions in the sale of electricity (Section 4(2) (a) (i)).

38. The relevant market in this case has to be 'generation and supply/sale/distribution of electricity in the State of Tamil Nadu'. As per the information available in public domain, Tamil Nadu Electricity Board came into existence in the year 1957 and remained the sole energy provider and distributor in the state till 2008. Post 2008, as per the mandatory requirements of the Electricity Act 2003, Government of Tamil Nadu re-organised TNEB by the establishment of a holding company by the name of TNEB Ltd and two subsidiary companies, namely Tamil Nadu Transmission Corporation Ltd (TANTRANSCO) and Tamil Nadu Generation and Distribution Corporation Ltd (TANGEDCO). TANTRANSCO is engaged in electricity transmission, TANGEDCO (opposite party in this case) is engaged in both electricity generation and distribution and is the successor to the erstwhile Tamil Nadu Electricity Board. TANGEDCO operates four large thermal power stations - Ennore Thermal Power Station (ETPS), Mettur Thermal Power Station (MTPS), North Chennai Thermal Power Station (NCTPS), Tuticorin Thermal Power Station (TTPS). Since both these activities, generation and distribution, are solely governed by the opposite party in Tamil Nadu, the opposite party seems to be dominant in this relevant market. Further, the existence of holding-subsidiary relation between TNEB Ltd, TANTRANSCO and Opposite Party makes the electricity sector vertically integrated in the state of Tamil Nadu. Opposite Party is the only distribution licensee, having considerable market share in the electricity distribution in the state.

39. Dealing with the question of abuse, it is important to note that electricity is the backbone of industrial units. For a free flow of manufacturing processes, it is important to have a non-discriminatory and an equitable availability of electricity. The difference in the load shedding in Chennai and other parts of Tamil Nadu was enormous, as shown in the information.



Whereas, Chennai was facing 2-3 hours of load shedding, other parts of Tamil Nadu were facing 14-16 hours of load shedding, which undoubtedly would adversely affect the functioning of industries in those areas. The reliance on the gensets (diesel run generators) by industrial units located in other parts of Tamil Nadu escalates their cost of production, making their products, uncompetitive with similar products manufactured in Chennai. It was also stated in the information that many industries outside of Chennai were likely to go out of production or suffer loss of orders, owing to inability to run their operations continuously or owing to increased cost of production. There seems to be no justification to extend uninterrupted power supply for the whole of Chennai and to all consumers merely on the ground of maintenance of certain specific essential services and ignoring other parts of Tamil Nadu. As stated in the information, the impact of such discrimination is not restricted to revenue, efficiency and productivity but manpower costs, power and electricity charges, maintenance charges, back up costs have also increased manifold in these areas. Further, performance and delivery has become a stress point for many industries. Many industries are losing valued customers and also orders. The most critical issue, as alleged in the information, is that repayment of debt and working capital loans is becoming a challenge due to inefficient functioning of Small and Medium Industries.

40. In view of the forgoing discussion, it is evident prima facie OP was abusing its dominant position by imposing discriminatory conditions in the sale of electricity in the relevant market within the meaning of section 4(2)(a)(i) of the Act. This is a fit case for DG investigation. The opinion expressed herein above is based on facts available to the Commission at this stage. The Director General has to investigate the matter for violation of any/all provisions of the Competition Act, and not only in respect of the provisions above stated.

41. The Secretary is, therefore, directed to send a copy of this direction to the office of the DG. The DG shall investigate the above matter as stated above. In case the DG finds any company in violation of the provision of the Act, it shall also investigate the role of the persons who at the time of such contravention were incharge of and responsible for the conduct of the business of the company involved so as to fix responsibility of such persons under section 48 of the Act. DG shall give opportunity of hearing to such persons in terms of section 48 of the Act. The report of DG be submitted within 60 days from receipt of the order. Nothing stated in this order shall tantamount to a final expression of opinion on merit of



the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

42. The above allegations set out in the complaint submitted by the 3rd respondent would reveal that there are certain allegations, which require an investigation. The question to be considered is whether the Tamil Nadu Electricity Regulatory Commission is vested with any power to conduct investigation regarding the abuse of dominant position with reference to the allegations raised by the 3rd respondent before the Competition Commission of India.

43. No doubt, Section 23 of the Electricity Act provides power to the Regulatory Commission to pass order for regulating supply, distribution, consumption or use thereof. Section 23 of the Electricity Act is unambiguous that for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

44. Therefore, the Tamil Nadu Electricity Regulatory Commission is vested with the power to pass necessary orders, framing policy or issue guidelines for maintenance of efficient supply, securing the equitable distribution of electricity and promoting competition. Thus, a policy shall be framed by the Electricity Regulatory Commission, necessary orders may be passed for regulating supply, distribution consumption or use thereof by the Electricity Regulatory Commission. However, there is no express provision or intent with reference to the ingredients of Section 23 of the Electricity Act that the Regulatory Commission is empowered to conduct investigation relating to the abuse of dominant position or to impose penalty or otherwise under the Electricity Act.

45. It is not in dispute that Electricity Act will prevail over the Competition Act as far as the writ petitioner / TANGEDCO is concerned. However, if there is no overlapping of provisions and if there is no mechanism for adjudication of certain disputes, then, the general law would be applicable to the aggrieved persons, who are entitled to approach the authority or Forum under the general law.

46. It is needless to state that in the absence of any investigating power or to impose penalty with reference to the allegations of abuse of dominant position by the Electricity Board in the present case, then the Competition Commission of India is empowered to take up the issues to conduct an investigation and adjudicate the issues. While doing so, if the Competition Commission of India forms an opinion that the



particular issue is falling under the ambit of the Electricity Act or within the provisions of Section 23 of the Electricity Act, even at that point of time, the Commission is empowered to make a reference to the statutory authority i.e., Tamil Nadu Electricity Regulatory Commission for the purpose of conducting further adjudication or otherwise.

47. Under these circumstances, whether a prima facie case is made out by the 3rd respondent for initiation of proceedings under the Competition Act or not is the question is to be considered. Secondly, whether there is any scope for the Tamil Nadu Electricity Regulatory Commission to conduct an investigation or impose penalty on the TANGEDCO under the provisions of the Electricity Act or not.

48. In this regard Section 4 of the Competition Act is very clear and it prohibits abuse of dominant position. The abuse of dominant position has been enumerated in clear terms by stating that if an enterprise or a group directly or indirectly imposes unfair or discriminatory, condition in purchase or sale of goods or services or price in purchase or sale of goods or service.

49. As far as the Electricity Act is concerned, there is no provision akin to that of Section 4 specifically deals with prohibition of abuse of dominant position. There is a specialized investigating agency, which is constituted and Section 40 (1) of the Competition Act provides Director General to investigate contraventions.

50. In the present case, the Competition Commission of India, considering the allegations raised by the 3rd respondent against the writ petitioner, formed an opinion that it is evident prima facie for the purpose of entertaining a complaint under Section 4 of the Competition Act and ordered for an investigation by the Director General and issued a notice to the TANGEDCO to submit their objections.

51. The impugned notice categorically states that the Commission after considering the available information, is of the opinion that a prima facie case exists and has directed in its order dated 08.10.2013 that investigation be made in the matter by the Competition Commission of India. Thus, in order to enable the Directorate to investigate the matter, in exercise of powers conferred under Section 41(2) read with Section 36(2) of the Competition Act, the informations along with supporting documents were sought for from the writ petitioner/TANGEDCO.

52. The TANGEDCO is bound to respond to the Competition Commission of India by producing all required documents along



with explanations/objections, if any, for the purpose of considering the same and take a final decision to proceed with the case or to drop the case.

53. With reference to the judgment of the Hon'ble Supreme Court, in the case of Bharti Airtel (cited supra), it was found that the issue raised is falling within the adjudicatory power of the TRAI. Under those circumstances, the Hon'ble Supreme Court held that the Competition Commission of India lacks jurisdiction. However, in paragraph 83, the Hon'ble Supreme Court has considered three kind of practices, which all are treated as anti-competitive and are prohibited and if any of the complaint is falling under any one of the three kind of practices narrated in paragraph 83 of the judgment, then the Competition Commission of India is empowered to conduct an investigation and proceed in accordance with the provisions of the Competition Act.

54. In the present case, perusal of the allegations raised by the 3rd respondent would reveal that there is a prima facie case that the TANGEDCO / writ petitioner enjoys dominant position in respect of electricity in the State of Tamil Nadu. This factum is not disputed. When the writ petitioner / TANGEDCO is in dominant position, the allegations set out in the complaint indicates certain abuses and therefore, the said abuse of dominant position warrants any further action or not, is to be investigated and all appropriate proceedings are to be allowed for the purpose of forming a final opinion.

55. This Court is not inclined to step-in to the nature of the allegations or its veracity or otherwise, which is yet to be investigated by the Director General under the provisions of the Competition Act. The allegations, which all are not yet investigated by the competent authority, it would be unnecessary for the Court to appreciate such allegations or made a finding, which would cause prejudice to either of the parties, either to proceed with the investigation or to form an opinion for initiation of further actions under the provisions of the Competition Act or to refer the matter to the Electricity Regulatory Commission under the Electricity Act by invoking Section 21-A of the Competition Act. This exercise is to be done by the respondents 1 and 2 and this Court is not inclined to provide any findings on the allegations or with reference to the investigations to be conducted by the competent authority.

56. Therefore, once an anti-competitive practices are brought to the notice of the Competition Commission of India by way of complaint and such allegations are falling under Section 4 of the Competition Act, then the Competition Commission of India is empowered to conduct investigation and form a final



opinion for the purpose of initiation of actions. In the present case, the Electricity Act does not provide any power to the Tamil Nadu Electricity Regulatory Commission to conduct investigation, more specifically, with reference to the allegations of abuse of dominant position, which is a specific provision under Section 4 of the Competition Act. When the Electricity Regulatory Commission is not vested with the power of investigation under the Electricity Act, but it confers with the powers to frame policy or to pass orders for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, then the Competition Commission of India is empowered to deal with the complaint with reference to Section 4 and initiate further proceedings by following the procedures as contemplated under the Competition Act.

57. In the present case, the notice issued to the writ petitioners, calling upon to furnish the informations and documents to conduct investigation is under challenge. Undoubtedly, it is in premature stage, wherein, the authority competent yet to form final opinion with reference to the allegations of abuse of dominant position as contemplated under Section 4 of the Competition Act. When the Competition Act provides jurisdiction to the authorities to entertain complaint, more specifically, when there is no such investigating power contemplated under the Special Act, then there is no impediment for the Competition Commission of India for entertaining a complaint in the present case submitted by the 3rd respondent and thus, there is no infirmity or perversity. Thus, the case on hand is not a fit case for the purpose of quashing the notice. Contrarily, the writ petitioner is at liberty to avail the opportunities provided under the provisions of the Act by the respondents 1 and 2 and defend their case.

58. This being the factum established, the writ petition is not only premature, but not entertainable as the challenge made is a notice issued, providing an opportunity to the writ petitioner to defend their case under the provisions of the Competition Act, 2002. The writ petitioner is at liberty to submit their explanations or objections along with the informations and documents to the respondents 1 and 2 within a period of four weeks from the date of receipt of a copy of this order. On receipt of such materials, informations, explanations from the writ petitioner, the respondents 1 and 2 are directed to proceed with the investigations, by affording opportunity to the writ petitioner / TANGEDCO and conclude the investigation and all further proceedings within a period of four months from the date of receipt of a copy of this order. The writ petitioner is directed to co-operate for the investigation for early disposal of the case. In the event of any non-cooperation on the



part of the writ petitioner, the said non-cooperation is directed to be recorded in the proceedings itself and in such an event, the outer time limit fixed by this Court cannot be taken as an advantage by the writ petitioner for seeking any relief on the said ground.

59. With the above directions, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kak/jeni

To

1. Competition Commission of India,
Hindustan Times House,
(3rd, 4th & 7th Floor)
18-20, Kasturba Gandhi Marg,
New Delhi - 110 001.
2. Additional Director General,
Competition Commission of India,
'B' Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.
3. The President,
Mr.T.C.Thiagarajan,
Southern India Engineering Manufacturers'
Association,
8/4, Race Course, Coimbatore - 18.

+1cc to Mr.H.Karthik Seshadri, Advocate, S.R.No.68922
+1cc to Mr.L.Jai Venkatesh, Advocate, S.R.No.69154
+1cc to Mr.P.Mahaadevan, Advocate, S.R.No.68995

W.P.No.35047 of 2013

EV(CO)
CT 12/01/2022