

Boost to Dawn Raids in India - Supreme Court Rules Power to Search Includes Seizure as well

Kluwer Competition Law Blog
February 27, 2019

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Please refer to this post as: *Suyash Bhamore, Kushagra Srivastava, 'Boost to Dawn Raids in India - Supreme Court Rules Power to Search Includes Seizure as well', Kluwer Competition Law Blog, February 27 2019, <http://competitionlawblog.kluwercompetitionlaw.com/2019/02/27/boost-to-dawn-raids-in-india-supreme-court-rules-power-to-search-includes-seizure-as-well/>*

Introduction

The Supreme Court of India in its order dated 15 January, 2019 ratified the power of the Office of Director General (DG), i.e., the investigating arm of the Competition Commission of India (CCI) to conduct 'search and seizure' operations. This order comes in light of a protracted dispute with JCB India Private Limited (JCB). The CCI in 2014 had directed the DG to carry out investigation into the alleged abuse of dominance by JCB pursuant to an order passed under Section 26(1) of the Competition Act, 2002 (the Act). In line with this, the DG obtained a search warrant from the Chief Metropolitan Magistrate and conducted a dawn raid at JCB's premises. JCB challenging the investigation, sought to set aside the search and seizure operation by moving the Delhi High Court. The High Court perfunctorily accepted JCB's contention and restrained the CCI from using the seized material on the ground that the search warrant merely authorized the DG to search the premises and that the same could not be used for purposes other than search (impugned order). CCI against this backdrop preferred an appeal before the Supreme Court of India assailing the impugned order. Providing great impetus to the investigative powers of the DG, the apex court vacated the impugned order and affirmed the validity of the seizure proceedings. In the following section, the authors present the rationale of the Supreme Court in reaching this conclusion and concurrently analyze the same.

The Ruling - An analysis

Section 41(3) of the Act states that the DG has powers equivalent to that of an Inspector as given under Section 240A of the Companies Act, 1956 (CA1956). Under Section 240A (2) of CA1956, a sanction by the Magistrate of First Class empowers the Inspector:

"(a) to enter, with such assistance, as may be required, the place or places where such books and papers are kept;

(b) to search that place or those places in the manner specified in the order; and

(c) to seize books and papers he considers necessary for the purposes of his investigation."

JCB in its contentions, firstly, endorsed a disjunctive reading of the above produced section and argued that the warrant obtained, being a 'search warrant' authorized the DG to merely search the premises and not seize any material. In other words, JCB pointed that the power to enter, search and seize materials were separate from one another and thus, each act required a distinct warrant for its execution. Secondly, JCB placed reliance on Section 240A (4) which reads, "every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898." The use of word 'or' between search and seizure is indicative of the dissimilar meaning and the corresponding mutual exclusivity between the two terms. However, the Supreme Court took a contrasting view and remarked that the provisions of Section 240A relating to search extend to authorization of seizure as well, because a search by itself will not be sufficient for the purposes of investigation. This line of thought stems from the underlying purpose of Section 41(3) of the Act which requires both search and seizure to allow the DG to reach a conclusive finding (page 12 of CCI Advocacy Series 4).

In the case of *H.N. Rishbud and Under Singh v. The State of Delhi*, the Supreme Court concluded that an investigation under the Code of Criminal Procedure generally includes the search of places as well as the seizure of things considered necessary for the investigation. The authors opine, the fact that the verdict in JCB is in line with its judicial practice gives more validity to the ruling. Furthermore, a perusal of the prayer before magistrate for grant of search warrant reveals that the basic agenda behind solicitation of the search warrant was for recovering incriminating documents and papers related with the case. Therefore, the Supreme Court ruling finds its credence in sound logical argumentation and any criticism of the same would be both unwarranted and unfounded.

Suggested amendments

Section 41(3) of the Act still places reliance on the CA1956 which has been substituted by the Companies Act, 2013 (CA2013). Further the CA1956 stands repealed from 30th January, 2019. Thus, there is not only a need for amendment in the Act for this reason but also due to the fact that the CA2013 simplifies the process of obtaining a warrant of seizure. This is because the CA1956 under Section 240A requires the authorization of Magistrate of First Class for a warrant of seizure but the CA2013 under Section 220 does away with this requirement and merely requires compliance with the provisions of Code of Criminal Procedure, an investigation under which has been interpreted to include search as well as seizure. This is suggestive of an intent to facilitate easier conduct of dawn raids on part of the legislators.

The move of the Supreme Court in JCB as well as the foregoing suggested amendment will ensure that position of law in India is in consonance with the internationally recognized and mature competition jurisdictions like UK and USA. Section 194 of the Enterprise Act, 2002 of UK clearly provides that a warrant authorizes an officer of the Office of Fair Trading to not only search premises but also to take possession of any relevant document. In a similar vein, a warrant under Rule 41 of U.S. Federal Rules of Criminal Procedure issued by magistrate empowers search and seizure of person or property located within the district. This establishes that a mere search by itself is not considered sufficient for the purposes of an investigation in foreign jurisdictions as well.

Conclusion

The Indian competition regime is a continually growing one and progressive rulings like that of JCB play an important role in furthering the scope and ambit of the Indian competition watchdog. Dawn raids play a crucial role in snaring clandestine anti-competitive activities, which if, not for dawn raids, would continue unperturbed. There already have been three instances of dawn raids in India - JCB, dry cell battery markets case and beer cartel case; and this number is bound to escalate in light of the Supreme Court ruling.

Interestingly, in the dry cell batteries market case, the regulator saw the opposite party come forward and file a leniency petition three days subsequent to its premises being subject to a dawn raid. The fact that a 100 percent penalty waiver was allowed to the opposite party in the said case evinces the character of dawn raids as effective tools of detecting cartels. The authors believe that the Supreme Court has done great service to the Indian competition regime by giving a legal character to antitrust search and seizure operations. Expansion of search to include seizure has ensured that the power preserved under Section 41(3) of the Act does not remain a mere lip service.