

# Kluwer Competition Law Blog

## Out of Court Settlement between Parties – Trouble for Settlement Regulations in India?

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The Honourable High Court of Delhi (**Delhi HC**) through its recent judgment in the case of **JCB v. CCI**, has quashed the preliminary investigation of the Competition Commission of India (**CCI**) initiated under section 26(1) of the Competition Act, 2002. This move of Delhi HC has the potential to adversely alter the course of competition law enforcement in the country.

In 2014, Bull Machines Pvt. Ltd. had filed an information before CCI alleging that JCB India Limited (**JCB**) had engaged in bad faith (sham) litigation over an intellectual property dispute before the Delhi HC, wherein an *ex-parte ad interim* injunction order was passed against Bull Machines based on misrepresentation of images and facts by JCB, which was later suspiciously withdrawn as well. The CCI passed an investigation order observing that predation through abuse of judicial process presents a threat to competition and that JCB had abused its dominant position in the relevant market, by denying market access and foreclosing entry of its rival's competing products.

On direction from Supreme Court of India (**SC**), the parties resolved their disputes via mediation and arrived at a private settlement, which sought to dispose of all the pending litigation cases including the one before CCI initiated by Bull Machines. The Delhi HC concluded that since the dispute related to the violation of intellectual property rights which has been settled and the substratum of competition law proceedings no longer exists, the CCI's investigation cannot continue and should be disposed of.

### **In-rem v. In-personam**

The SC in its judgment in the case of **Samir Agrawal v. CCI** has clearly stated that CCI is vested with powers enabling it to act *in-rem*, i.e., in public interest. The SC while determining the *locus standi* of the person who can initiate proceedings before CCI, held that that person does not have to be personally aggrieved to do so. The SC contrasted this with section 53N of the Competition Act which deals with 'awarding compensation' wherein an applicant before the Appellate Tribunal will have to show its loss or damage caused.

Section 53N essentially deals with private enforcement in claiming compensation alone that

follow-on from a competition law case that has attained finality in appeal as to a violation of the provisions of the Competition Act or an order for settlement under section 48A of the Act. Such private enforcement can be termed to be a case *in-personam*, whereas all other enforcement action under the Competition Act taken by CCI will be categorised as *in-rem*.

The Delhi HC in the JCB case, has speciously stated that competition authorities as per their jurisdictional boundaries ought to play a role that complements rather than conflicts with the resolution of disputes. Such an interpretation would hamper the *in-rem* jurisdiction of CCI, even though it emanates from an *in-personam* dispute between two parties. The aforesaid interpretation of the CCI's jurisdiction by the court contrasts with the broader mandate of the CCI envisioned by the legislators, which requires the CCI to implement corrective action through remedies/cease and desist direction for ensuring a level playing field in the relevant market, as against merely penalizing the party against which the information has been filed, i.e., the opposite party.

### **Mediation and settlement of dispute between the parties**

The Delhi HC in the JCB case has laid heavy emphasis on the importance of mediation and the need for CCI to honour the same. The Court states that the continuation of CCI's proceedings even after the settlement between the parties would endanger the benefits of alternate dispute resolution such as mediation. Further, the Court opined that the CCI proceedings cannot be permitted to hang like a 'Sword of Damocles' on both the parties, causing prejudice to the business and commercial interest of the parties who have brought an end to the commercial dispute. The Delhi HC has extended the purpose of settlement of private *in-personam* disputes to end all commercial litigation between parties before various courts, to also close the *in-rem* competition law dispute before CCI.

As per the Mediation Act, 2023, any investigation, inquiry or proceeding, under the Act, including proceedings before the Director General, under the Act, are not fit for mediation. The Delhi HC has not appraised the rationale behind such exemptions to regulatory matters provided in the Mediation Act, 2023 while stating that regulatory bodies such as CCI needs to honour the outcome of mediation and respect the settlement reached between parties.

In 2015, the Honourable Madras High Court (**Madras HC**) had dealt with a similar case of private settlement of dispute between the parties ([Tamil Nadu Film Exhibitors Association v. CCI](#)), who were then seeking to withdraw the information filed before the CCI. The Madras HC had clearly understood the mandate of CCI noting that an inquiry undertaken by CCI is not in the nature of an adjudication of a private dispute between two private parties, and that "despite the fact that an investigation may be triggered initially by a complaint given by an individual, the inquiry assumes larger proportions, leaving the individual complainant, as a speck in the galaxy." Neither the provisions of Act, nor any of its connected rules/regulations permit the information filed with the CCI to be withdrawn under any circumstances. Again, this reaffirms the *in-rem* nature of competition law proceedings before CCI.

With respect to the settlement, the Madras HC sought to answer the question of whether the scheme of the Competition Act allows for a compromise to be reached between the two parties. The Court while considering the residuary powers of the CCI under Section 27 of the Act, concluded that it is possible for the parties to enter a compromise or settlement which can be recorded by the CCI. The Madras HC added that such settlement shall be subject to scrutiny by the

CCI to review whether it is simply a cover-up or the competition concerns are addressed, so that the CCI can move forward with the aspect of imposition of penalty alone in case of violation of the Act.

### **Impact on the settlement scheme of the CCI**

The Madras HC back in 2015, while examining the above-mentioned question had noted that if a party agrees to abide by the mandate of Sections 3 and 4 (*via* a private settlement), the Commission will be saved of the botheration to proceed with the full-fledged inquiry. This possibility has now been formally introduced in section 48A of the Competition Act *vide* the Competition (Amendment) Act, 2023, and subsequently the [Competition Commission of India \(Settlement\) Regulations, 2024 \(Settlement Regulations\)](#).

The Settlement Regulations brought into force by the CCI in March 2024 provides for the enterprises against whom preliminary investigation has been initiated under Section 26(1) of the Competition Act for alleged contravention of non – cartel cases or abuse of dominance, to settle the aforesaid proceedings with the CCI in lieu of a discount of 15% on the penalty to be imposed upon the concerned enterprise/opposite party.

The Delhi HC's ruling on the finality of the mediation and the ensuing settlement reached between the parties themselves being sacrosanct, could potentially undermine the CCI's endeavour to bring corrective action and eliminate anti-competitive practices in the relevant markets, through its settlement with the opposite party. While the Madras HC had rightfully so held that the settlement between the informant and the opposite party shall be subject to scrutiny by the CCI for protecting the public interest, the Delhi HC's ruling suggests that the CCI's investigation ought to be wrapped up, whenever the informant and opposite party have reached a settlement, irrespective of whether the CCI has been afforded an opportunity to scrutinize the settlement. In such an instance, the opposite party would be let off scot-free and will be able to conveniently continue with its behaviour which was allegedly resulting in anti-competitive conduct or abuse of dominance, leaving no room for the CCI to bring any kind of corrective action in the market as no settlement proposal will be filed before it by the opposite party. Albeit, the Delhi HC has emphasized that the CCI's power to act upon the anti-competitive conduct through *suo – moto* investigation or any information is fully preserved, initiating a fresh investigation by the CCI regarding the out-of-court settlement or otherwise, would become even more cumbersome, leading up to further delay in bringing the corrective action required for eliminating appreciable adverse effect on competition as per the Act.

More importantly, the Delhi HC has not clarified whether settlement between the informant and opposite parties will be applicable only in the cases of alleged bad faith litigation related to IPR disputes, such as in the present case or for any kind of anti-competitive behaviour. This can lead to a worrisome precedent of opposite parties seeking to reach a settlement with the informant, pursuant to the receipt of the Director General's investigation report, instead of filing a settlement application with the CCI as per the Settlement Regulations. Circumventing a settlement order by CCI under section 48A of the Competition Act would also compromise private enforcement for compensation as per section 53N of the Act.

This precedent could also lead to an increase in the likelihood of competitors filing information

before the CCI, with the objective of coercing the opposite party to give into their demands for reaching a settlement of other commercial disputes, in exchange for out-of-court settlement of the proceedings pending before the CCI. In such a scenario, the CCI could experience an uptick in unethical practices such as forum shopping, resulting in burdening of the CCI's precarious time and resources.

## Conclusion

The SC has repeatedly held that the administration of criminal justice is bestowed upon the State on behalf of the victims of crime and on the premise that a crime against a citizen is a crime against the State. Similarly, in the opinion of the authors, as the CCI is entrusted with the duty to prevent anti-competitive behaviour in the Indian market, it is imperative that the CCI shall also be involved in all matters pertaining to adjudication or investigation of anti-competitive conduct. Ergo, the Delhi HC ought to reconsider the enforcement of the mandate of the CCI and the efficacy of the Settlement Regulations before altogether ousting the CCI's jurisdiction in cases wherein the parties reach an out-of-court settlement for their commercial disputes. The CCI's endeavour to bring finality and timely corrective action in the relevant markets by settling with the opposite party in line with the Settlement Regulations would be put into peril if the courts open the gates for the opposite party to implement creative arrangements for circumventing the Settlement Regulations.

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