

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.05.2020

+ W.P.(C) 1776/2016 and CM Nos. 7606/2016, 12396/2016 & 16685/2016

**MONSANTO HOLDINGS PVT. LTD.
AND ORS.**

..... Petitioners

Versus

**COMPETITION COMMISSION OF INDIA
AND ORS.**

..... Respondents

Advocates who appeared in this case:

For the Petitioners :Mr Chander M. Lal, Senior Advocate with Mr Rajshekhar Rao, Ms Anusuya Nigam, Mr Lakshay Kaushik, Mr Anandh Venkatramani and Ms Nancy Roy, Advocates.

For the Respondents :Mr Pallav Saxena and Mr Mohammad Nausheen Samar, Advocates for R-1. Mr Ruchir Mishra and Mr Mukesh Kumar Tiwari, Advocates for UOI. Mr Jayant Bhushan, Senior Advocate with Mr Vaibhav Choukse, Ms Ela Bali and Ms Akansha Mehta, Advocates for R-2 to 4. Mr Sunil Mathews, Advocate for UOI.

AND

+ W.P.(C) 3556/2017 and CM Nos. 15578/2017, 15579/2017 & 35943/2017

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CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Monsanto Holdings Pvt. Ltd. (hereafter 'MHPL'), Monsanto Company (hereafter 'Monsanto'), Mahyco Monsanto Biotech (India) Pvt. Ltd. (hereafter 'MMBL') have filed the petition, W.P.(C) 1776/2016, *inter alia*, impugning a common order dated 10.02.2016 (hereafter 'the impugned order') passed by the Competition Commission of India (hereafter 'CCI') under section 26(1) of the Competition Act, 2002 (hereafter the Competition Act) in Reference Case 02/2015 and Information Case 107/2015, whereby the CCI has directed the Director General (hereafter 'DG') to investigate the activities of the petitioners and Maharashtra Hybrid Seeds Company (Mahyco). The petitioners also impugn an order dated 18.02.2016, whereby CCI had issued notice to the petitioners in an application filed by the informants under Section 33 of the Competition Act.

2. In W.P(C) 3556/2017, the petitioners impugn four separate orders – common order dated 18.02.2016 passed in Case No.10/2016, Case No. 3/2016 and Ref Case no.1/2016; common order dated 09.06.2016 passed in Case no. 37/2016, Case no.38/206 and Case no.39/2016; Order dated 21.09.2016 in Case no. 36/2016; and Order dated 14.03.2017 in Case no. 88/2016 – passed by the CCI under Section 26(1) of the Competition Act read with Regulation 27 of the Competition Commission of India (General) Regulations, 2009. By the said orders the CCI had held that the substance of the allegations made in the said cases were similar to the allegations made in Case no. 107/2015 and Reference Case no.2/2015 and directed that the matters be clubbed with the investigation being conducted in those cases pursuant to the impugned order.

3. CCI had passed the impugned order under Section 26 (1) of the Competition Act in Information Case No. 107/2015 and Reference Case No. 02/2015. Reference Case No. 02/2015 was instituted pursuant to a reference made by the Department of Agriculture, Cooperation and Farmers Welfare, Ministry of Agriculture and Farmers Welfare, Government of India ('MOA&FW') under section 19(1)(b) of the Competition Act against the petitioners, *inter alia*, alleging contravention of provisions of Sections 3 and 4 of the Competition Act. Information Case No. 107/2015 was instituted pursuant to information filed under Section 19(1)(a) of the Competition Act by Nuziveedu Seeds Ltd. ('NSL'), Prabhat Agri Biotech Ltd. ('PABL') and Pravardhan Seeds Pvt. Ltd. ('PSPL'). The

said companies are hereafter collectively referred to as ‘the Informants’.

4. The controversy, essentially, relates to the trait fee charged by MMBL and the other terms and conditions imposed by it for using the technology for manufacturing Bt. Cotton Seeds.

5. Monsanto is a company engaged in developing and commercializing technology for producing genetically modified seeds. It is claimed that Monsanto is a fortune 500 company and is engaged in providing agricultural products. It holds a portfolio of patents, trademarks and licenses. It is stated that Monsanto was the first company to develop and commercialize Bt. Cotton Technology (Bollgard-I). The technology is aimed at genetically modifying hybrid seeds to instill a particular trait – resistance to bollworms. Initially, Monsanto had developed a single-gene technology for producing seeds that were resistant to bollworms (Bollgard-I). Subsequently, Monsanto developed the second generation cotton technology, which consists of two genes that makes it resistant to bollworms (Bollgard-II). It is stated that the second generation cotton technology was developed as Pink Bollworms had become resistant to Bollgard-I. Bollgard -II technology is patented under the Patents Act, 1970 (hereafter ‘the Patents Act’). Monsanto has licensed the said Bt. Cotton Technology to MMBL.

6. MMBL is a company incorporated in India and is part of the Monsanto group inasmuch as it is a joint venture company between

MHPL (which is a 100 subsidiary of Monsanto) and Mahyco. Further, MHPL also holds 26% equity in Mahyco.

7. MMBL, in turn sub-licenses the technology licensed by Monsanto to various seed manufacturers in India including the Informants. It is stated that consideration for sub-licensing the said technology is in two parts. The first is a non-refundable fee, which is a required to be paid upfront. The second part is a recurring fee, which is referred to as 'trait value' and is determined on the basis of the Maximum Retail Price (MRP) fixed for Bt. Cotton Seeds. The fees/royalty charged by MMBL from the Informants has been a subject matter of disputes between them.

8. MMBL had licensed Bollgard-I and Bollgard-II technologies to NSL in terms of an agreement dated 21.02.2004 (2004 Agreement). This agreement was extended from time to time till 31.03.2013. It is stated that on 10.03.2015, MMBL entered into a fresh sub-license agreement (2015 Agreement) with NSL, whereby it sub-licensed Bollgard-II technologies to it. In terms of the 2004 Agreement, NSL was required to pay a one-time fee of Rupees Fifty Lacs (₹50,00,000/-) and in addition a running fee/trait fee, which was determined based on the annual sales volume of NSL. It is stated that under the 2015 Agreement running fee/trait value is payable, based on the MRP of Bt. Cotton Hybrid Seeds sold by NSL.

9. As stated above, payment of royalty/fees for use of Bt. Technology has been a subject matter of disputes between the

concerned parties. On 30.08.2005, Andhra Pradesh, Ryotu Sangham filed a complaint before the Monopolies and Restrictive Trade Practices Commission (MRTPC) seeking investigation into alleged unfair trade practice of charging excessive royalty by MMBL. The Government of Andhra Pradesh and the Commissioner and Director of Agriculture had also filed a Reference before MRTPC making similar allegations. It is stated that the Director General of Investigation and Regulation had also submitted a preliminary report recommending institution of an inquiry by MRTPC. It is stated that on 11.05.2006, MRTPC passed an interim injunction restraining MMBL from charging a trait value of `900 per 450 grams packet of Bt. Cotton Hybrid Seeds and to fix a reasonable trait value within a month.

10. It is stated that on 27.11.2008, MMBL issued a communication to NSL seeking on account payment towards trait value. NSL responded to the said communication by requesting MMBL to charge a reasonable trait value considering the increase in the cost of production and fixation of lower MRP of cotton seeds by the State Governments.

11. On 03.07.2009, MMBL issued a termination notice to NSL on account of non-payment of trait value for the Kharif 2008 season. In the information filed by NSL, it referred to various communications with MMBL with regard to payment of trait value. It is apparent from the above that the issue regarding payment of trait value continued to be a subject matter of dispute between the said parties.

12. MMBL had also instituted proceedings under the Arbitration and Conciliation Act, 1996 which were settled by the said parties by entering into a Settlement Agreement and a Settlement Amendment Agreement dated 20.01.2011.

13. On 19.07.2015, NSL, PABL and seven other seed manufacturers (sub-licensees) issued a letter to MMBL requesting that it consider charging a trait value at a rate determined by the State Governments. Immediately thereafter on 01.08.2015, MMBL filed petitions under Section 9 of the Arbitration and Conciliation Act, 1996 before the Bombay High Court against NSL and PABL seeking to secure amount of `1,72,83,81,567/- and `26,21,36,431/- respectively. These being the amounts claimed by MMBL from them. It is stated that in November 2015, MMBL filed a similar petition against PSPL for securing an amount of `20,34,48,646. Thereafter, on 22.08.2015, MMBL issued a notice calling upon NSL to pay the amount within a period of twenty one days failing which MMBL would take legal action against NSL. Similar notices were also issued to other sub-licensees. On 18.10.2015, MMBL filed another petition under Section 9 of the Arbitration and Conciliation Act, 1996 before a coordinate bench of this Court seeking certain interim relief in relation to the trait value claimed by it. On 19.10.2015, the Court passed an *ad interim* order directing NSL to secure MMBL for a sum of `21,37,76,123/- by depositing the amount in a no lien account with its bank.

14. Subsequently, MMBL issued termination notices to NSL, PABL and PSPL terminating the sub-licenses on the ground that they

had failed to pay the trait value for the technologies sub-licensed to them.

15. It is not necessary, for the purposes of this petition, to set out the disputes between the parties – MMBL and Monsanto Group on one part and NSL and its affiliates on the other. Suffice it to state that the disputes relating to the terms of the sub-license agreement(s) exist between the said parties.

16. In the aforesaid context, the informants (NSL, PABL and PSPL) filed Information under section 19(1)(a) of the Competition Act before CCI alleging contravention of the Competition Act.

17. The informants claim that there is no substitute for Bt. Technology and given the Bollworm resistant characteristics of Bt. Cotton Seeds, there is a surge in demand for such seeds. They claim that more than 99% of the total cotton cultivation in India is done using Bt. Cotton Hybrid Seeds. They state that forty-nine major cotton seed manufacturers use Bt. Technology sub-licensed by MMBL. According to the informants, MMBL and Monsanto Group are dominant undertakings in the upstream market of licensing of Bt. Cotton Technology to seed manufacturers.

18. The informants allege that MMBL and its other group companies have violated Section 4(2) of the Competition Act inasmuch as they have abused their dominant position by charging excessive and unfair prices for Bt. Technology. The informants allege that MMBL and Monsanto Group have exploited their dominant

position and set prices for the technology, which are significantly higher than those that would result if there was effective competition in the relevant market. They further allege that linking of the trait value to MRP of cotton seeds is unreasonable and not reflective of the economic value of the said technology.

19. Next, the informants allege that MMBL had imposed unfair conditions in the sub-license agreement(s) and the same violated Section 4(2)(a)(i) of the Competition Act. The Informants aver that in terms of clause 2.05(c) of the sub-license agreements entered into by MMBL with them, they are required to notify MMBL in case their affiliates enter into negotiations with any competitor of MMBL within thirty days of commencement of such negotiations. In terms of the said clause, the Informants are also required to inform MMBL in case they or their affiliates intend to deal with any competitor of MMBL and failure to give such prior notice entitles MMBL to terminate the sub-license agreement. The Informants allege that this clause is unfair as commercial negotiations are confidential and any disclosure of such negotiations would have an adverse effect on the Informants. They further alleged that there is a reasonable apprehension that dealing with any competitor or any competing technology provider, would invite an adverse action against the Informants. It is alleged that the said apprehension is not unfounded as MMBL has followed a policy of selective licensing and had refused to sub-license Bt. Technology to certain seed manufacturers.

20. The Informants further claim that Article 9.4 of the sub-license agreements also imposes an unfair condition as in terms of the said clause, the Informants are required to destroy all parent lines or cotton germplasm, which has been modified to contain Monsanto Technology after the sub-license is terminated. They state that destroying germplasm (parent line) would effectively amount to destroying their intellectual property, which normally takes about five to ten years to develop.

21. Informants allege that MMBL has virtually eliminated all potential competition for its technology by incorporating restrictive and unfair conditions in the sub-license agreements.

22. In addition, the informants allege that MMBL and Monsanto Group has violated Section 4(2)(a)(i) of the Competition Act as they have discriminated against the Informants. It is alleged that whereas Bt. Technology has been provided to other group companies of the Monsanto Group without entering into any sublicense agreements containing unfair conditions; MMBL insists on entering into unfair sublicense agreements with other seed manufacturers. Thus, seed manufacturing companies that belong to Monsanto Group are provided the said technology without any such agreement as is required to be entered into by the Informants and other seed companies. According to the Informants, this has had an appreciable adverse effect on the competition in the downstream market of cotton hybrid seeds.

23. The Informants also allege that MMBL and Monsanto Group have restricted technical and scientific development relating to goods and services and has thus, violated Section 4(2)(b) of the Competition Act. They allege that the conduct of MMBL and Monsanto Group has resulted in denial of market access to the seed companies.

24. The informants further allege that MMBL has been following a policy of selective licensing and has sub-licensed its Bt. Technology to major players in the cotton seeds market. Bt. Cotton Hybrid Seeds have gained a significant market share and account for 99% of the cotton seeds market in India. This has placed MMBL in a position of dominance where it can leverage the same by licensing Bt. Technology to monopolize the downstream market relating to sale of Bt. Cotton Hybrid Seeds through its affiliates. It is stated that MMBL's affiliates have a combined market share of 14% in the downstream market for manufacturing Bt. Cotton Seeds. The Informants contend that in the circumstances unfairly terminating sublicense agreements with major seeds manufacturers, would effectively result in various affiliates of MMBL gaining a larger market share of the Bt. Cotton Seeds.

25. Next, the Informants claim that the sub-license arrangements between them and MMBL also contravene Section 3(1) and Section 3(4) of the Competition Act.

26. MOA&FW' also filed a Reference under Section 19(1)(b) of the Competition Act, which was registered as Reference Case No.

02/2015. In its reference MOA&FW set out the main allegations made by the farmers' organizations against MMBL and Monsanto Group. The same are reproduced as under:-

- “(i) MMBL is in a dominant position in the market for “Bt. Cotton seeds” in India;
- (ii) MMBL's practice of charging unreasonably high trait fees for 'Bt. cotton seeds' may be 'abuse of dominant' position within the meaning of Section 4(2)(a) of the Competition Act;
- (iii) MMBL's sub-licence agreements with Indian seed manufacturing companies appear to be anti-competitive within the meaning of Section 3(4) of the Competition Act, 2002;
- (iv) MMBL is exploiting the permissions given by the Government to market Bt. cotton technology by creating monopoly through restrictive agreement for unjust enrichment by charging high trait value from its licensees and ultimately from farmers.”

27. The CCI held that MMBL held a dominant position in the relevant market of “provision of Bt. Cotton Technology in India” as well as the downstream market of “manufacture and sale of Bt. Cotton seeds in India”. The CCI further found the allegations made by the informants to be *prima facie* merited. It held that the stringent conditions imposed in the Sub-licence agreement(s) discouraged the Seed companies from dealing with competitors and also amounted to restricting development of alternate technologies. The CCI held that *prima facie* MMBL's conduct violated section 4 of the Competition

Act. The CCI also held that prima facie, the conditions imposed in the Sub-licence agreements were harsh and not reasonable for protecting the IPR rights. Accordingly, the CCI passed the impugned order under section 26(1) of the Competition Act directing the DG to conduct an investigation in the matter.

Submissions

28. The petitioners have challenged the impugned order, essentially, on the ground that CCI does not have any jurisdiction to examine the issues raised before it as they relate to the exercise of rights granted under the Patents Act. The petitioners contend that Patents Act is a comprehensive enactment, which exclusively governs and regulates all practices and contracts that relate to or arise out of exercise of patent rights. According to the petitioners, the remedies against alleged abuse of any rights by the patentee would fall exclusively within the remedies as provided under the Patents Act and, therefore, the jurisdiction of the CCI to entertain such disputes is impliedly excluded. The petitioners contend that in order for the CCI to determine whether the conduct of the petitioners is anti-competitive, it would be necessary for the CCI to return findings that the royalty fee/trait value charged is unreasonable and excessive and the terms of the sub-license agreement are unreasonable. It is submitted that such issues are required to be determined by authorities under the Patents Act, namely, the Controller of Patents (hereafter the Controller). And, without effective findings returned by the Controller, the CCI would have no jurisdiction to proceed in the matter.

29. Mr Lal, learned senior counsel appearing for the petitioners earnestly contended that the decision of this Court in *Telefonaktiebolaget L.M. Ericsson v Competition Commission of India & Another: W.P.(C) 464/2014 decided on 30.03.2016* is no longer good law in view of the subsequent decision of the Supreme Court in *Competition Commission of India v. Bharti Airtel Ltd. And Ors.: Civil Appeal No. 11843/2018, decided on 05.12.2018*. He contended that the CCI can examine the question whether there has been abuse of dominance or an unfair trade practice only once a finding as to the jurisdictional facts has been returned by the Controller. He submitted that the position of the Controller is similar to the Telecom Regulatory Authority of India (TRAI) as the Controller also exercises powers to regulate the grant of patents and exercise of rights under the Patents Act. He submitted that these powers are akin to the powers of TRAI in the field of the telecom industry.

30. Next, it was contended that the field regarding the exercise of rights under the Patents Act is occupied by the Patents Act and thus, by implication excludes the jurisdiction of the CCI. It was submitted that the only remedy in case where a patentee has unjustifiably withheld the grant of a license, is to seek a compulsory license under Section 84 of the Patents Act and the jurisdiction to entertain such issues would rest with the Controller. Mr Lal contended that the Controller is bound to take into account whether there is any appreciable adverse effect on the competition / market while determining the question whether to grant a compulsory license. The

petitioners contend that such exercise is similar to the issues that would be considered by the CCI while examining whether Sections 3 and 4 of the Competition Act have been violated.

31. Mr Lal contended that Section 140 of the Patents Act lists out cases where exercise of patents rights constitutes anti-competitive conduct. He submitted that a bare perusal of Section 140 of the Patents Act indicates that it mirrors the principles that are embodied in Sections 3 and 4 of the Competition Act. He submitted that in terms of Section 66 and 85 of the Patents Act, a patent could be revoked in public interest. And, public interest encapsulates promotion of healthy competition, which is also the objective of the Competition Act. He submitted that, therefore, in cases where a patentee is found to be abusing his position of dominance, it would be open for the Controller to revoke the patent in exercise of powers under Section 85 of the Patents Act.

32. Next, he stated that Section 140 of the Patents Act was retained on the statute despite enactment of the Competition Act in 2002. He submitted that if the legislature intended that the determination whether a patentee had abused his position of dominance was required to be examined by the CCI, the legislature would have suitably amended Section 140 of the Patents Act. He submitted that the fact that Section 140 of the Patents Act was not amended is indicative of the legislative intent that it did not contemplate the CCI examining such issues and the same were required to be examined by the Controller.

33. Mr Lal contended that interpreting the provisions of the Competition Act to confer upon the CCI concurrent jurisdiction to investigate allegations and issues, which are within the domain of Controller would result in two different bodies simultaneously evaluating the same matters resulting in potentially conflicting decisions. He submitted that keeping the aforesaid principle in mind, the Supreme Court in *Bharti Airtel Limited* case (*supra*) had harmoniously reconciled the provisions of two enactments – the Competition Act and the Telecom Regulatory Authority Act, 1997 – and held that the CCI could exercise its jurisdiction only after the Regulator (TRAI) had returned the findings on the basis of which any order could be passed by the CCI.

34. Next, it was contended that the Court must also look into economic and realistic consequences on the issues of interpretation. Mr Lal placed reliance on the decision of the Supreme Court in *Shiva Shakti Sugars v. Shri Renuka Sugar Limited: (2017) 7 SCC 729*. He submitted that if it is held that the CCI had jurisdiction to examine matters that were within the domain of the Patents Act, it would result in various parties abusing the same and proceeding directly to CCI instead of resorting to remedies under the Patents Act. This according to him would result in loss of significant resources and cause market disruptions.

35. The petitioners further contended that the respondents had also failed to establish that the jurisdiction of the civil courts or Controller with regard to the issues raised by the Informants was excluded. Mr

Lal relied on the decision of the Supreme Court in *Abdul v. Bhawani: AIR 1966 SCC 1718* and contended that a civil court has jurisdiction to decide all questions of civil nature and any provision which seeks to exclude the jurisdiction of a civil court is required to be strictly construed.

36. Mr Lal further contended that in terms of Section 3(5) of the Competition Act, the petitioners were well within their right to enter into agreement to restrain any infringement and this aspect was expressly excluded by virtue of Section 3(5) of the Competition Act. He submitted that clauses of the agreement, which are designed to restrain infringement of IPR including patents are excluded from the purview of the Competition Act and the CCI would have no jurisdiction to examine such agreements. Mr Lal submitted that it was also not necessary to examine whether the clauses included in any agreement to restrain infringements of patents, are reasonable or not as there was a blanket exclusion of such clauses by virtue of Section 3(5) of the Competition Act. The question whether any of the conditions included in the agreements were reasonable or not related to other conditions included to protect Intellectual Property Rights and not to clauses relating to restraining infringement of such rights including those relating to patents. He argued that Section 3(5) of the Competition Act has two limbs. The first, which provides a blanket exclusion in respect of rights to restrain infringement of Intellectual Property Rights (IPR); and the second, which relates to other reasonable conditions that may be necessary for protecting the IPR.

He submitted that the Parliament in its wisdom had used the word 'reasonable' only in respect of other conditions and not in respect of agreements to restrain infringement of IPR.

37. Next, he submitted that the Informants (the respondents) had disguised their complaint as one regarding violation of Section 4 of the Competition Act. However, their grievances, essentially, related to agreements that were covered under Section 3 of the Competition Act.

Reasons and conclusion

38. In *Telefonaktiebolaget L.M. Ericsson (supra)*, this Court had elaborately dealt with the question whether the jurisdiction of the CCI to examine matters, which involve one of the parties exercising rights as a Patentee, is excluded. In the present case, the principal contention advanced on behalf of the petitioners is that there is an implicit repugnancy between provisions of the Competition Act and the Patents Act and, therefore, the applicability of the Competition Act is excluded. It is contended that the Patents Act occupies the entire field in respect of not only the grant of patents but also exercise of rights granted to a patentee. And, this includes provisions regarding abuse of Patent rights. Therefore, it is implicit that the Competition Act would have no applicability to agreements that are related to exercise of rights by a Patentee.

39. The above contention was also elaborately dealt with by this Court in *Telefonaktiebolaget L.M. Ericsson (supra)*. This Court had also noted that in conformity with the TRIPS Agreement, the Patents

Act was amended and now contains provisions for grant of compulsory licenses in certain cases. Further, Section 140 of the Patents Act also proscribes inclusion of certain restrictive conditions in certain contracts – contracts relating to sale or lease of a patented article, license to manufacture a patented article or to work any patented process. The specified restrictive conditions are statutorily declared to be void by virtue of Section 140 of the Patents Act. However, this Court did not accept that the jurisdiction of the CCI to examine matters relating to certain rights granted under the Patents Act or to examine any alleged anticompetitive conduct of any enterprise including abuse of its dominant position, is excluded.

40. The Court also referred to Section 62 and Section 60 of the Competition Act. Section 60 of the Competition Act contains a *non obstante* provision and expressly provides that the provisions of the Competition Act would have effect notwithstanding anything inconsistent contained in any other law for the time being in force. This Court held that although Section 60 of the Competition Act expressly provided that the Competition Act would be given an overriding effect, the same would not whittle down the provisions of the Patents Act. This Court is of the view that Section 62 of the Competition Act which expressly provides that the Competition Act would be in addition to and not in derogation of the provisions of any other law for the time being in force, clearly expresses the legislative intent that the Competition Act is in addition to other laws and not in substitution thereof.

41. This Court next examined the issue whether there was any irreconcilable conflict between the Competition Act and the Patents Act and whether both the enactments could be construed harmoniously. This Court had noticed that Chapter XVI and Section 140 of the Patents Act contained provisions the subject matter of which may be common with the Competition Act. Section 84 of the Patents Act provides for grant of compulsory licenses in certain cases where reasonable requirement of public in respect of patented inventions has not been satisfied. Section 85 of the Patents Act provides for revocation of patents if after expiry of two years from the date of grant of compulsory license, the patented invention has not been worked in the territory of India and the reasonable requirements of public with respect to the patent have not been satisfied. The instances listed out in Section 84(7) of the Patents Act can in certain circumstances be considered as an abuse of dominance if the patentee is dominant in the relevant market. Section 4 of the Competition Act contains provisions, which indicate abuse of a dominant position by an enterprise. And, Section 27 of the Competition Act provides for orders that can be passed by the CCI in cases where it finds that any enterprise has violated provisions of Section 3 and Section 4 of the Competition Act. This Court had after examining the various provisions of the two enactments, concluded that the orders that can be passed by the CCI under Section 27 of the Competition Act in respect of abuse of dominant position by any enterprise are materially different from the remedies that are available under Section 84 of the Patents Act. This court also observed that in certain case it may be

open for a prospective licensee to approach the Controller for grant of a compulsory license. However, the same would not be inconsistent with the CCI passing an appropriate order under Section 27 of the Competition Act.

42. This Court had also examined the provisions of Section 21A and Section 21 of the Competition Act. In terms of section 21A of the Competition Act, CCI can make a reference to any regulator where in course of proceedings the CCI proposes to take any decision which may be contrary to provisions of any statute, the implementation of which has been entrusted to any statutory authority. Similarly, Section 21 of the Competition Act enables any statutory authority, which is charged with administration of any statute to make a reference to CCI if it proposes to take any decision, which may be contrary to the provisions of the Competition Act.

43. This Court concluded that these provisions of the Competition Act clearly indicate that the intention of the Parliament was not to repeal any other statute by enacting the Competition Act but on the contrary the legislative intent was to ensure that the provisions of the Competition Act are implemented in addition to the provisions of other statutes. After elaborately discussing the various provisions of both the enactments (Patents Act and the Competition Act), this Court concluded that there was no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act and, therefore, the jurisdiction of the CCI to entertain complaints regarding abuse of dominance in respect to patent rights could not be excluded. The

decision of this Court in *Telefonaktiebolaget L.M. Ericsson (supra)* squarely covers the principal contention advanced on behalf of the petitioners that the CCI has no jurisdiction to entertain any complaint against an enterprise in respect of matters which relate to exercise of its patent rights.

44. It is also material to note that in *Bharti Airtel Ltd. (supra)* – which is relied upon by the petitioner – the Supreme Court did not accept the contention that the jurisdiction of the CCI was ousted by virtue of the telecom industry being regulated by a statutory body (TRAI). Although the functions of TRAI include regulation of the telecom industry and would encompass all aspects of the telecom industry, the Supreme Court, nonetheless, held that the focus of the Competition Act was different and was restricted to regulating and promoting a free market. The Supreme Court noticed that the Competition Act dealt with three kinds of practices, which are treated as anti-competitive and are prohibited: (a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition; (b) where an enterprise or group of enterprises, which enjoys dominant position abuses the said dominant position; and (c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations are not anti-competitive or result in an abuse of the dominant position, which may be resultantly attained. The Court noticed that the CCI has been entrusted with a function to deal with the aforesaid kind of anti-competitive conduct and to the aforesaid

extent, the functions assigned to the CCI were distinct from the function of TRAI under the TRAI Act. In this view, the Supreme Court did not accept the contention that the jurisdiction of the CCI in respect of matters, which are regulated by a specialised statutory body, were excluded from the applicability of the Competition Act. Thus, this decision does not support the petitioner's contention that the Patents Act being a special act in respect of patents excludes the applicability of the Competition Act in respect of the matters that relate to patents on account of any implicit repugnancy. As noticed by this Court in *Telefonaktiebolaget L.M. Ericsson (supra)*, the focus of the Patents Act and the Competition Act are different and there is no irreconcilable repugnancy between the two enactments.

45. It was also contended by the petitioners that Section 3(5) of the Competition Act excludes the applicability of the Competition Act in respect of any agreement, which relates to restraining infringement of any patent rights.

46. The aforementioned contention was also examined by this Court in *Telefonaktiebolaget L.M. Ericsson (supra)* and it was held that while an agreement, which imposes reasonable condition for protecting patent rights is permissible any anticompetitive agreement which imposes unreasonable conditions would not enjoy the safe harbor of Section 3(5) of the Competition Act. Mr Lal contended that a Patentee could include any condition/obligation in an agreement for restraining infringement of a patent and examination of such clause including the question whether such clause is reasonable or not, is

expressly excluded by virtue of sub-section (5) of Section 3 of the Competition Act. He contended that the clause (i) of sub-section (5) of Section 3 of the Competition Act has two limbs. The first limb expressly recognizes the right of a Patentee to restrain any infringement of any right granted under the Patents Act and excludes the same from the application of the Competition Act. Resultantly, any agreement for achieving the same is also excluded from the purview of any examination by the CCI. He submitted that the question whether any agreement or any clause in the agreement is reasonable or unreasonable, would also stand excluded from the purview of any examination by the CCI. He submitted that the second limb of the clause(i) of subsection (5) of section 3 of the Competition Act permitted imposition of reasonable conditions for protecting rights granted under the Patents Act and the word 'reasonable' qualified only such other conditions. Therefore, the issue whether any the condition imposed by a patentee is reasonable or not could only be examined in respect of conditions other than those that relate to restraining infringement of any rights granted under the Patents Act.

47. This Court finds the aforesaid contention bereft of any merit. Clause (i) of sub-section (5) of Section 3 of the Competition Act cannot be dissected in the manner as suggested on behalf of the petitioners. Clause (i) of Subsection (5) of section 3 must be read in a meaningful manner. Sub section (5) of section 3 is set out below:

“(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. “

48. As is apparent from the plain language of sub-section (5) of Section 3 that nothing contained in Section 3 of the Competition Act would restrict the right of a person to restrain any infringement of his IPR or to impose reasonable conditions for protecting them. It recognizes that a person has a right to restrain infringement of IPR granted under the specified statutes and any agreement entered for the aforesaid purpose would fall outside rigors of Section 3 of the Competition Act. However, such rights are not unqualified. Only such

agreements that are “*necessary for protecting any of his rights which have been or may be conferred upon him under*” the specified statutes are provided the safe harbor under Sub-section (5) of Section 3 of the Competition Act and only to such extent. This also entails right to impose reasonable conditions. The words “*or to impose reasonable conditions*” are placed between two commas and thus must be interpreted as being placed in parenthesis that explains and qualifies the safe harbor of Sub-section (5) of Section 3 of the Competition Act. Plainly, the exclusionary provision to restrain infringement cannot be read to mean a right to include unreasonable conditions that far exceed those that are necessary, for the aforesaid purpose.

49. The question whether an agreement is limited to restraining infringement of patents and includes reasonable conditions that may be necessary to protect such rights granted to a patentee, is required to be determined by the CCI. Subsection (5) of section 3 of the Competition Act does not mean that a patentee would be free to include onerous conditions under the guise of protecting its rights.

50. The next question to be addressed is whether the decision of the Supreme Court in *Bharti Airtel Ltd.* (*supra*) effectively overrules the decision of this Court in *Telefonaktiebolaget L.M. Ericsson* (*supra*). It was contended on behalf of the petitioners that in view of the decision of the Supreme Court in *Bharti Airtel Ltd.* (*supra*) it would be essential for the specialised regulator – in this case, the Controller – to first determine whether the agreements (sub-licenses) entered into by MMBL are an abuse of its rights under the Patents Act before the

CCI could proceed further with the information or the reference filed with it. It was earnestly contented that since issues relate to patents, the same would be best debated before the Controller.

51. This Court is unable to accept the aforesaid contention. The decision of the Supreme Court in *Bharti Airtel Ltd. (supra)* was delivered in the context of the specific disputes that had arisen between Reliance Jio Infocom Ltd. (RJIL) and the specific role of the Telecom Regulatory Authority of India (TRAI) in regulating the said industry. TRAI is a statutory body constituted under the Telecom Regulatory Authority of India Act, 1997 (TRAI Act). Section 11 of the said Act sets out the functions that are to be performed by TRAI. In terms of Section 11 of TRAI Act, TRAI is charged to perform two kinds of functions: recommendatory functions and regulatory functions. Clause (a) of Section 11 of the said Act lists out the recommendatory functions of TRAI. In terms of clause (a) of Section 11, TRAI is required to make recommendations, either *suo moto* or on request of the licensor (Government of India), on the matters as listed therein. Clause (b) of Section 11 of the TRAI Act sets out the other functions that are required to be performed by TRAI. Section 11(1) of the TRAI Act is set out below:-

“(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(a) make recommendations, either *suo motu* or on a request from the licensor, on the following matters, namely:--

- (i) need and timing for introduction of new service provider;
 - (ii) terms and conditions of licence to a service provider;
 - (iii) revocation of license for non-compliance of terms and conditions of licence;
 - (iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
 - (v) technological improvements in the services provided by the service providers;
 - (vi) type of equipment to be used by the service providers after inspection of equipment used in the network;
 - (vii) measures for the development of telecommunication technology and any other matter relating to telecommunication industry in general;
 - (viii) efficient management of available spectrum;
- (b) discharge the following functions, namely:--
- (i) ensure compliance of terms and conditions of licence;
 - (ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000 (2 of 2000), fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of inter-connect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be

necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government, having considered that recommendation of the Authority, comes to a *prima facie* conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central

Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.”

52. It is apparent from a plain reading of clause (b) of Section 11 that TRAI is *inter alia* charged with the function to ensure technical compatibility and effective interconnection between different service providers.

53. In *Bharti Airtel Ltd. (supra)*, the disputes, which were sought to be placed before the CCI, related to non-provision of Points of Interconnection (POIs). RJIL alleged that other telecom service providers had delayed/denied provisioning of POIs during the testing phase as well as after the commercial launch of its services. It alleged that without sufficient POI's, it was not possible for subscribers or one service provider to make calls to subscribers of another service provider. Second, it was alleged that the service providers were denying mobile number portability requests that were made by the customers who wanted to switch to RJIL. Third, it was alleged that Cellular Operators Association of India was acting at the behest of other service providers against the interest of a competing member (RJIL) and not for the common interest of the industry and consumers as a whole.

54. The Supreme Court noticed that in terms of the unified license granted to service providers, they were obliged to interconnect subject to compliances with the prevailing regulations and the determinations issued by TRAI. All service providers were required to establish POIs

in sufficient capacity and number to enable transmission and reception of messages between interconnected systems. Thus, the subject matter of the disputes fell squarely within the domain of the TRAI and the TRAI was charged with the function of ensuring that the quality of services to consumers is not affected.

55. It is also relevant to note that the role of TRAI as a regulator is materially different from that of a Controller. Telecom services are regulated and controlled and TRAI has a vital role in regulating the industry. As noticed above, the nature of functions of TRAI are two-fold. The first is recommendatory in nature. TRAI is required to make recommendations to the licensor on the matters as specified in Section 11(a) of the TRAI. Thus, matters that relate to licensing between the licensor and the service provider are squarely covered at the said level. In addition to the above, TRAI is required to perform other functions for regulating the telecom services. The TRAI's scope of regulation is all pervasive. In exercise of its powers, TRAI has made several Regulations, which are required to be complied with. TRAI also fixes the tariff for interconnection. Thus, the issue whether adequate number of POIs had been provided by service providers for connecting with the service rolled out by RJIL fell squarely within the scope of regulatory powers of TRAI and TRAI was required to determine it. A Controller does not regulate the exercise of patent rights in such pervasive manner. This is for an obvious reason that patents is not an industry. Grant of a Patent recognizes and confers an intellectual property right. The principal function of the Controller

under the Patents Act is to examine the application for grant of patents and grant patents if the applicant is entitled to such rights. Although, the Controller also exercises other powers and performs other functions, including issuance of compulsory licenses in given case. But the Controller does not regulate, in a pervasive manner, the exercise of patent rights or the agreements that are entered into by patentees with third parties. The nature of the role performed by a Controller, thus, cannot be equated to that as performed by the TRAI.

56. The expertise of TRAI in the field of telecommunications is materially different than the expertise that a Controller bears in regard to grant of patents and exercise of patent rights. There are certain technical aspects relating to the telecom industry where TRAI has domain expertise. In *Bharti Airtel's* case one of the principal questions to be addressed was whether the service provider had provided sufficient number of POIs for interconnecting with the services rolled out by RJIL. The question whether the number of POIs were sufficient was clearly required to be technically evaluated. In this context, the Supreme Court held that this would be best done by the TRAI, which had the domain expertise. And, the examination by the CCI ought to be deferred till the technical aspects (which formed the factual basis on which the complaints before the CCI were founded), were determined. The decision of the Supreme Court in *Bharti Airtel Ltd. (supra)* is certainly not an authority for the proposition that wherever there is a statutory regulator, the complaint must be first

brought before the Regulator and examination of a complaint by the CCI is contingent on the findings of the Regulator.

57. It is relevant to note that in *Bharti Airtel Ltd.*(*supra*) the Supreme Court had upheld the decision of the Bombay High Court to the effect that the consideration of the information by the CCI must be deferred. The Bombay High Court had, after examining the role of TRAI in much detail, expressed its the view that the role of TRAI was different than the role of a Controller of Patents and, therefore, the decision in *Telefonaktiebolaget L.M. Ericsson* (*supra*) was not applicable.

58. In view of the above, this Court finds no reason to interfere with the impugned order. It is also relevant to note that an order passed by the CCI under Section 26(1) of the Competition Act is an administrative order and, therefore, unless it is found that the same is arbitrary, unreasonable and fails the *wednesbury* test, no interference would be warranted. A review on merits is impermissible at this stage, and therefore, this court is refraining from examining the merits of the dispute.

59. The petitioners' challenge to the order dated 18.02.2016 is also not maintainable. By the aforesaid order, the CCI had merely issued notice and afforded the petitioners for an opportunity to be heard before considering the application filed by the informants under Section 33 of the Competition Act. This Court finds no reason whatsoever to interfere with the said order. The petition – W.P.(C)

1776/2916 is unmerited and, therefore, dismissed. All pending applications are also disposed of.

60. W.P.(C) 3556/2017 is also unmerited. The orders impugned therein are premised on the basis that the issues raised in the cases in which the said orders are passed are similar to the ones raised in Reference Case 2/2015 and Case no. 107/2015. This premise was not disputed by any of the counsels appearing for the petitioners and their contentions were confined to challenging the jurisdiction of the CCI in entertaining Reference Case 2/2015 and Case No.107/2015 and passing the impugned order.

61. Thus, in view of the above, W.P.(C) 3556/2017 is also dismissed. All pending applications are also disposed of.

62. Parties to bear their own costs.

MAY 20, 2020
RK/MK

VIBHU BAKHRU, J