

TRINITY CHAMBERS

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Strategic Insights Into Dawn Raids: A Crucial Tool In India's Anti-Trust Arsenal

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In recent times, several noteworthy judgments have been rendered by the Indian Courts in matters relating to the law of arbitration in India. Some decisions rendered from January to September 2023 that discuss the legal position concerning the interpretation and applicability of provisions of the Arbitration and Conciliation Act, 1996 have been summarised below:

1. *TATA Sons (P) Ltd. v. Siva Industries & Holdings Ltd.*

Supreme Court of India

Citation: (2023) 5 SCC 421

In terms of the amended provisions of Section 29A, arbitral tribunals in international commercial arbitrations are only expected to make an endeavour to complete the proceedings within twelve months from the date of competition of pleadings and are not bound to abide by the time limit prescribed for domestic arbitrations.

The removal of the mandatory time limit for making an arbitral award in the case of an international commercial arbitration does not confer any rights or liabilities on any party. Since Section 29A, as amended in 2019, is remedial in nature, it should be applicable to all pending arbitral proceedings as on the effective date i.e., 30 August 2019.

A. INTRODUCTION

In the Indian anti-trust law framework, the term "dawn raids" is a frequently used colloquial expression but not formally defined. It refers to sudden and unannounced search and seizure operations conducted when the Competition Commission of India (CCI), i.e., India's anti-trust regulatory authority, suspects that enterprises are indulging in anti-competitive activities. Dawn raids may be conducted at any time, including holidays, when businesses are least likely to expect search operations and would be least prepared. Generally, dawn raids are conducted in the early hours of the day to ensure that sufficient time is available for the Director General (DG) and their team to collect incriminatory evidence against the individual(s) or enterprise(s) suspected of being involved in anti-competitive activities.

B. COMMON ISSUES BEING INVESTIGATED BY CCI

CCI has been carefully investigating various anti-competitive practices in the Indian market. Among the most prevalent issues under scrutiny are collusive bidding or pricing of goods and services, exclusivity arrangements, price determination agreements, and refusal to supply. Additionally, CCI closely monitors cases involving bundling or tying-in arrangements and exploiting market dominance in one sector to gain entry into another. The evolving landscape of competition jurisprudence has led to the investigation of innovative anti-competitive structures, including those related to market-dominating structures and the misuse of bad faith litigation to stifle competitors.

C. POWERS OF THE DIRECTOR GENERAL

Section 41 of the Competition Act, 2002 (**Competition Act**) empowers the Director General (**DG**) with wide-ranging powers to assist CCI, when directed to do so, in investigating into any contravention of the provisions of the Competition Act or any rules and regulations made thereunder.¹ In terms of Section 41(2) of the Competition Act, the DG, while carrying out the investigation, shall have all such powers² of a "Civil Court" under the Code of Civil Procedure, 1908 as are conferred upon CCI under Section 36(2) of the Competition Act.

(I) The duty of party being investigated to render cooperation/ assistance, preserve, and produce requisite information

Section 41(3) of the Competition Act sets out a two-fold duty of all officers³, other employees⁴, and agents⁵ of a party⁶ that is under investigation. First, the duty to preserve and furnish to the DG, or any person authorised on this behalf, all information, books, papers, and other documents/ records of, or relating to, the party in their custody or power. Second, the duty to render all possible assistance in connection with the ongoing investigation to the DG.

Section 41(4) of the Competition Act clarifies that the DG may require any person other than a party referred to in Section 41(3) to furnish additional information before the DG or any other authorised person if deemed relevant or necessary for the purposes of the investigation.

(II) Retention of the documents

In terms of Section 41(5) of the Competition Act, the DG is empowered to retain in his custody any information, books, papers, other documents, or records produced under Section 41(3) or Section 41(4) for a period of 180 days. Beyond the 180-day timeline, the DG is mandated to return the documents to the person by whom or on whose behalf the documents were produced.

A proviso to Section 41(5) of the Competition Act adds that the DG, if needed, is empowered to call for and retain documents for a further period of 180 days in addition to the originally stipulated 180 days by way of an order in writing. Also, the party or on whose behalf the

¹ Section 41 of the Competition Act.

² Section 41(2) read with Section 36(2) of the Competition Act.

³ As per the explanation provided in Section 41 of the Competition Act, an "**officer**", in relation to any company or body corporate, includes any trustee for the debenture holders of such company or body corporate.

⁴ As per the explanation provided in Section 41 of the Competition Act, any reference to offices and other employees or agents shall be construed as a reference to past as well as present officers and other employees or agents, as the case may be.

⁵ As per the explanation provided in Section 41 of the Competition Act, an "**agent**" in relation to any person, means anyone acting or purporting to act for or on behalf of such person, and includes the bankers, and persons employed as auditors and legal advisors, by such person.

⁶ A "**party**" is defined under Section 2(ka) of the Competition Act to include a consumer or an enterprise or a person or an information provider, or a consumer association or a trade association, or the Central Government or any State Government or any statutory authority, as the case may be, and shall include an enterprise or a person against whom any inquiry or proceeding is instituted; and any enterprise or person impleaded by CCI to join the proceedings.

documents were produced has the option of procuring the certified copies of such documents at their own cost.⁷

(III) Examination on oath

In the course of investigation, the DG may, in terms of Section 41(6) of the Competition Act examine on oath: (i) any of the officers and other employees and agents of the party being investigated; and (ii) with the prior approval of CCI, any other person in relation to the affairs of the party being investigated. For the purpose of administering the oath, the DG may require any of the persons being investigated to appear personally.

Section 41(7) of the Competition Act mandates that the examination conducted under Section 41(6) by the DG would be recorded in writing and shall be read over to or by, and signed by, the person examined and may thereafter be used in evidence.

(IV) Search and seizure of Documents

In terms of Section 41(8) of the Competition Act, when the DG in course of investigation has "*reasonable grounds to believe*" that information, books, papers, other documents or records of, or relating to, any party or person, may be destroyed, mutilated, altered, falsified or secreted, the DG may make an application to the Chief Metropolitan Magistrate, Delhi for an order for seizure of such information, books, papers, other documents or records.

For the purpose of seizing the documents, the DG may make requisition of the services of any police officer or any officer of the Central Government to assist him. It shall be the duty of every such officer to comply with the requisition.⁸

After considering the application filed under Section 41(8) of the Competition Act and hearing from the DG, the Chief Metropolitan Magistrate Delhi may by order authorise the DG:

- (a) to enter, with such assistance, as may be required, the place or places where such information, books, papers, other documents are kept;
- (b) to search that place or places in the manner specified in the order; and
- (c) to seize information, books, papers, other documents or records as it considers necessary for the purpose of investigation.

The documents obtained from the search and seizure operation conducted by the DG shall be retained only until the conclusion of the investigation and thereafter, the same shall be returned to the party or person from whose custody they were seized.⁹ However, the DG is permitted to take copies of the documents before returning the same.

(V) Procedure for conducting search and seizure

⁷ Section 41(2) of the Competition Act.

⁸ Section 41(10) of the Competition Act.

⁹ Section 41(11) of the Competition Act.

Every search or seizure made under Section 41 of the Competition Act shall be conducted and carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 relating to search or seizure.

D. DAWN RAIDS IN INDIA

In September 2014, the DG in India initiated the country's first dawn raid at the offices of JCB India Limited. This action was taken in response to allegations of the company's potential abuse of its dominant position in the market. Following this groundbreaking development, CCI has subsequently carried out numerous similar raids on various entities that have come under scrutiny on allegations of engaging in anti-competitive activities such as cartelisation, anti-competitive agreements, and the potential abuse of dominance, among others. Some of the notable dawn raids are listed below:

- (i) In August 2016, a simultaneous raid was conducted at the premises of Eveready Industries Limited, Indo National Limited, and Panasonic Energy India Co. Limited. This operation was related to allegations of cartel activities.¹⁰
- (ii) In October 2018, raids were executed at the premises of Anheuser-Busch InBev, Carlsberg India Private Limited, and United Breweries Limited. Following these raids, Carlsberg India Private Limited and United Breweries Limited cooperated by submitting evidence under CCI's leniency program.¹¹
- (iii) In March 2019, Glencore India, Export Trading Group, and Edelweiss Financial Services Limited were subjected to dawn raids following allegations of collusion to artificially inflate prices of pulses during a drought.¹²
- (iv) In July 2019, the Indian subsidiary of Mersen SA and the Hyderabad and Kolkata offices of Assam Carbon Products Limited were raided amid allegations of price-fixing regarding equipment supplied to the Indian Railways.¹³
- (v) In September 2019, Climax Synthetics Private Limited, Shivalik Agro Poly Products Limited, Arun Manufacturing Services Private Limited, and Bag Poly International Limited underwent raids for allegedly colluding to manipulate bids for tarpaulin sales to the Food Corporation of India, with the raids spanning across five cities.¹⁴
- (vi) In December 2020, CCI conducted raids at the offices of cement manufacturers, including Ultratech Cement Limited, Ambuja Cements Limited, ACC Limited, and

10 See, CCI's order in *Suo Motu Case No. 02 of 2016* dated 19 April 2018. Subsequent press release on the matter available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1560364>.

11 See, CCI's order in *Suo Motu Case No. 06 of 2017* dated 24 April 2021. Subsequent press release on the matter available at: <https://www.cci.gov.in/images/pressrelease/en/pr40-2021-22pdf1652252223.pdf>

12 See, news reports available at: https://www.pymnts.com/cpi_posts/india-glencore-business-raided-by-regulator/ and <https://www.reuters.com/article/us-india-regulator-glencore-raid-idUSKCN1OX0HN>.

13 See, CCI's order in *Reference Case No. 02 of 2016* dated 1 November 2021.

14 See, CCI's order in *Reference Case No. 07 of 2018* dated 29 October 2021.

Shree Cements Limited, as part of an investigation into allegations of cartelisation in the cement industry.¹⁵

E. DAWN RAIDS OUTSIDE INDIA?

Section 32 of the Competition Act addresses anti-competitive practices occurring outside India but having repercussions on the competitive landscape within the country.¹⁶ To facilitate investigations beyond its borders, CCI is empowered by Section 18 of the Competition Act to sign Memorandums of Understanding (**MOU**) with international competition authorities, fostering cooperation in cross-border inquiries.¹⁷

CCI has taken proactive steps in this regard by entering into MOUs with several influential counterparts worldwide.¹⁸ Notable among these are the agreements with the US Department of Justice and the US Federal Trade Commission¹⁹, the European Commission²⁰, the Canadian Competition Bureau²¹, the Australian Competition and

15 See, news report available at: <https://indianexpress.com/article/business/price-cartelisation-charge-cci-raids-major-cement-cos-7100285/>.

16 Section 32 of the Competition Act reads as below:

"32. Acts taking place outside India but having an effect on competition in India.—The Commission shall, notwithstanding that,—

(a) an agreement referred to in Section 3 has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or

(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,

have power to inquire in accordance with the provisions contained in Sections 19, 20, 26, 29, 29-A, 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act."

17 The relevant part of Section 18 of the Competition Act reads as below:

"Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country:

Provided further that, the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with any statutory authority or department of Government."

18 See, a list of MOUs under the International Cooperation section of CCI website at <https://www.cci.gov.in/international-cooperation/mous>.

19 The MOU between CCI and United States Department of Justice (DOJ) and Federal Trade Commission (FTC) was signed on 27 September 2012 in Washington D.C, USA. Subsequent press release on the MOU available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=88032>.

20 The MOU was signed between CCI and the Directorate General for Competition of the European Commission (DG, Competition) on 21 November 2013. Subsequent press release on the MOU available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=100761>.

21 The MOU was signed between CCI and Commissioner of Competition, Competition Bureau Canada (CB) on 1 December 2014. For the text of the MOU, see: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/collaboration-and-partnerships/cooperation-instruments-international-partners/memorandum-understanding-between-commissioner-competition-competition-bureau-canada-and-competition>.

Consumer Commission²², and the Russian Federal Anti-Monopoly Service²³. Furthermore, an MOU was formalised between the competition authorities of the BRICS²⁴ nations - the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China, and the Republic of South Africa.

This strategic collaboration empowers competition authorities to conduct simultaneous global dawn raids, a powerful tool employed in the crackdown on cartels operating across multiple jurisdictions. Instances of such coordinated efforts have been observed with Asian, European Union, and United States competition authorities during investigations into potential price-fixing schemes among air cargo carriers, demonstrating the global reach and collective resolve in combating anti-competitive practices.

F. NAVIGATING A DAWN RAID: DO'S AND DON'TS

When the DG comes knocking, enterprises need to be prepared. A sudden, unannounced search and seizure operation can be a daunting experience. To ensure that the company's interests are safeguarded, it is essential to have a well-thought-out checklist of do's and don'ts in place for such occurrences.

(I) What to Do:

1. **Designating a representative:** The front desk or reception area of the business is often the DG's first point of contact. The reception staff must be informed of a standard procedure to be followed in the potential event of a dawn raid. There should be a predetermined point of contact/ representative ideally from the management or the internal legal staff of the company. It is this person's duty to quickly alert top management, external legal counsels, and to assemble teams of staff to support and observe the DG's representatives.
2. **Verification:** The staff of the entity being investigated should verify the identities of DG and other officials and carefully scrutinise (and if possible, photocopy) the warrant presented by the DG.
3. **Shadowing the officials conducting the raid:** The representative of the company should deploy employees to shadow the DG's officials throughout the dawn raid. These teams are crucial in assisting the officials, granting them access to the entire premises, making copies of every document seized, and recording the names of employees interviewed.
4. **Handling media attention:** A representative of the company should get training on how to deal with media queries given the possibility of media attention. The strategy should acknowledge the existence of a dawn raid but avoid providing any specifics on the information or papers that were taken.

22 The MOU was signed between CCI and Australian Competition and Consumer Commission (ACCC) at Canberra, Australia on 3 June 2013.

23 The MOU between CCI and Federal Antimonopoly Service (Russia) was signed on 16 December 2011 in Moscow, Russia.

24 The MOU was signed on 19 May 2016 during the International Legal Forum held in Saint Petersburg. In 2020, extension of the BRICS MOU for an open-end period was signed by the Chairperson, CCI.

(II) What Not to Do:

1. **Obstructing the process:** It is vital not to obstruct or impede the DG and other officials in any way during the raid. Cooperation is key to ensure the process goes as smoothly as possible.
2. **Document Destruction:** Under no circumstances should any physical or electronic documents be destroyed or hidden. This rule extends to emails as well. Destroying evidence can lead to serious legal consequences.

It is important to keep in mind that a dawn raid is only a method of investigation, not evidence of any crime. Protecting the business's interests depends on how well a dawn raid is handled. Given that all businesses are subject to the scrutiny of CCI and the DG under the Competition Act for potential anti-competitive activities, it is essential to provide each employee the necessary dawn raid related training. To make sure that staff members are adequately equipped to manage the search and seizure activities, external legal counsel might be hired to design guidelines and do simulations.

(III) STEPS TO BE TAKEN POST THE DAWN RAID

Following a dawn raid conducted by authorities, it is imperative for the enterprise to conduct an internal meeting or debriefing to address several critical aspects of the situation. Firstly, the scope of the investigation and its implications need to be thoroughly discussed, along with any follow-up actions that may be required. A detailed review of the seized documents, files, and information, including copies made, should be a priority.

Additionally, insights from interviews with DG officials and their questions and responses should be carefully documented. The summaries of the developments compiled from the appointed individuals who shadowed the entire process and assisted during the raid should be collected and organised. If any false or incorrect information was provided during the raid, immediate rectification is essential. Moreover, the enterprise should prepare to inform all key stakeholders and manage any potential leaks or news surrounding the dawn raid.

G. CONCLUSION

Dawn raids represent a potent and proactive approach by CCI to curb anti-competitive practices. With their extensive powers and global collaborations, dawn raids have become a pivotal tool in safeguarding fair competition within India and beyond. Enterprises must be prepared to navigate these investigations, emphasising cooperation, compliance, and effective post-raid measures. As CCI continues to evolve its strategies, staying vigilant and responsive remains crucial for businesses to protect their interests and uphold competition laws.



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