

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 5 of 2023

[Arising out of order dated 25.10.2022 passed by the Competition Commission of India in Case No. 05 of 2022]

IN THE MATTER OF:

Mr. Swapan Dey

...Appellant(s)

S/o Late Rukmini

R/o Ushumpur Shibir No: 2,

Battala Agarpara, North 24 Prghns,

West Bengal, Kolkata: 700109.

Versus

1. Competition Commission of India

...Respondent(s)

Through Secretary

Address: 9th Floor, Office Block-1

Kidwai Nagar (East)

New Delhi: 110023, India.

2. Vifor International (AG)

Rechenstrasse 37,

CH-9001 ST. Gallen, Switzerland.

Present:

For Appellant : Mr. Rohit Arora, Advocate

For Respondents : Ms. Deeksha Manchana, Adv. Aileen Aditi Sundardas
for R2.

Mr. N. Raja Singh, Advocate for CCI,

Ms. Sunaina Dutta, Joint Director for CCI, Mr. Dinesh
Chand, Dy. Director for CCI.

Mr. Pravin Anand, Advocate.

Mr. Vaibhav Gaggar, Sr. Advocate with Vaishali K.
Mittal, Mr. Siddhant Chamola, Ms. Gitanjali Sharma,
Ms. Ambika Singh, Mr. Abhishek Nair, Advocates for R-
2.

J U D G M E N T
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

The present appeal is filed under Section 53B of the Competition Act,
2022 (hereinafter referred to as the “**Act**”) against the impugned order passed

under Section 26(2) of the Act by the Competition Commission of India (hereinafter referred to as the “**CCI**”) on 25.10.2022 in Case No. 5 of 2022.

2. It is submitted that the appellant herein is a CEO of hospital providing free dialysis services to patients on behalf of the Government through a Private Public Partnership under Pradhan Mantri National Dialysis Programme (PMNDP). It is submitted that it is common for the patients under dialysis to develop Iron Deficiency Anaemia (hereinafter referred to as the “**IDA**”) and the deficiency of IDA in children is 67% and women is 59% as per National Family Health Survey-5 of 2019-21, and that injection referred as Ferric Carboxymaltose (“**FCM**”) injection is available for treatment of IDA.

3. It is the allegation of the appellant that due to anti-competitive and abusive conduct of Vifor International (AG), Switzerland who is the Respondent No. 2 herein, the FCM injections are neither accessible nor affordable by patients/consumers at large. The appellant had filed information with the Respondent No. 1, the Competition Commission of India on 12.01.2022 regarding anti-competitive conduct and abuse of its dominant position, in violation of Section 3 and 4 of the Competition Act, 2002, by the Respondent No. 2.

4. The CCI took cognizance of the information filed by the appellant. However, on 25.10.2022, through the impugned order, the CCI held that there is no violation of Section 3 and 4 of the Act. The relevant portion of CCI’s order dated 25.10.2022 is as under:

74. The Commission has examined the license agreement submitted by Vifor along with its reply, that it has entered into with the aforesaid Indian Companies which appear to have, in their own independent standing, good presence in the Indian

market, in respect of the pharma products dealt with by them, which is independent of Vifor. The Commission having given due consideration to the facts and issues involved and the respective assertion of the parties is of the *prima facie* view that there arises no requirement of defining a precise relevant market and accessing the dominance of Vifor, for the reasons adumbrated hereinunder.

75. In the view of the Commission, *prima facie* the clauses of the agreement do not appear to be one sided or to be couched in such terms which can be said to be not reasonable in relation' to protection of right of a patent holder qua its licensees, when seen from the perspective of Section 3(4) of the Act. There is nothing on record to *prima facie* indicate that Lupin and Emcure are said to be distribution channel partners with such pervasive presence in the market that allows them to exclude competition from other pharma companies operating in the Indian market dealing with diverse product, both generic and non-generic: Further, *prima facie* there is nothing to suggest that construct of the market is such that impedes the free entry of other manufacturer of soluble iron injectables, should they like to operate in the market either independently or through Indian pharma companies, save the interse restrictions between Vifor and its two licensees as discussed above.

76. Further, Vifor has submitted that it has no control over prices of soluble FCM Iron injectables sold in the market through these companies and has not restricted its licensees to inter se compete through any unilateral anti-competitive policies. According to the Commission what is also noteworthy is that, these license agreements entered into by Vifor are not of a long-term nature but entered into for a limited period of three years with provision for extension upon expiry. There is also no restriction that Vifor cannot enter into more licensing arrangements should it want. Also, the termination clause contained in such agreements do not appear to be *prima facie* erroneous on the two licensees so as to place them at any disadvantageous position in the bargain. Another significant aspect that has weighed with the Commission is that the patent granted to Vifor in respect of its soluble FCM iron Fair Competition For Grester Good injectables is said to expire in the year 2023 and it is expected that the patented FCM should then be available for free exploitation by interested parties.

77. As regards the price discrimination alleged by the Informant, the Commission observes that all price differentiations may not be discriminatory, more so when the same is based on reasonable

classification of consumers to which they are offered. Prices offered in government procurement may not be comparable with the products being sold in open market on quantity criteria (bulk vs. individual buying) as well as purpose (public purpose or distribution free of cost vs private consumption). As regards pricing of FCM injectable in another country i.e. Bangladesh, the Commission does not find this to be a correct parameter to adjudge the reasonability of pricing in India. Different countries may have different tax and import duty regimes besides other conditions not being homogenous.

78. Another aspect that has been highlighted is the freedom available to Vifor to choose its trading partner, as has been recognised by the Commission in Case No. 18 of 2021 (In re: Hiveloop and Britannia). The Commission in this regard would like to reiterate that this legal position as has been claimed by Vifor is not absolute in nature, but within the confines of the legal principle as has been enunciated in the decision of the Commission in such case. However, the Commission is mindful of the fact that not every company has a right to seek access to the patent of Vifor, unless it demonstrates that there is indeed a need for such access, basing on the existing supply conditions of an essential product/facility as against its demand by the consumers, so as to affect the market adversely by non-dealing on the part of the entity with significant market power. Vifor has submitted that it did not receive any satisfactory request for grant of license of its patent from any entity and that it has responded to two requests it has received recently. Any company requesting for grant of access should also demonstrate its ability to the patent holder, to satisfy the requirements specified for receipt of the grant of license.

79. In the backdrop of the discussion as above, the Commission does not prima facie find any contravention on the part of Vifor either under Section 4 or Section 3(4) of the Act and the Information merits to be closed under Section 26(2) of the Act.

- 5.** It is the submission of the appellant that CCI has failed to deal with the issue of 'relevant market' and has failed to assess the 'dominant position' of Respondent No. 2 and that CCI committed an error in conducting ex-ante analysis instead of ex-post analysis for examining violation of Section 3(4) of the Competition Act.

5.1 The Learned Counsel appearing for the Appellant submitted that the Respondent No. 2 has given licence to Emcure Pharmaceutical Ltd. for manufacturing FCM injections. The Respondent No. 2 also entered into a 2nd agreement with Lupin Ltd. for import and distribution of FCM manufactured by Respondent No. 2. It was submitted that FCM injection manufactured by Emcure Pharmaceutical Ltd. and the one imported and distributed by Lupin Ltd. has the same composition, though branding was different. It was submitted that limited production of FCM violated Section 4(2) of the Act.

6. In its notes of submissions dated 15.03.2024, the Respondent No. 2 has submitted that the appellant is a CEO of a hospital, namely, Eskag Sanjeevani Multispeciality Hospital which is one of the units of Eskag Sanjeevani Private Limited a group company of an entity known as West Bengal Chemical Industries Limited (“WBCIL”) based in Kolkata and Respondent No. 2 is a Swiss pharmaceutical company which has no office and place of business in India. The Respondent No. 2 has developed a molecule known as Ferric Carboxymaltose (FCM) which is the active pharmaceutical ingredient used for manufacturing injectables for treatment of iron deficiency anaemia. The Respondent No. 2 had been granted a patent on the said drug (FCM) on 25.06.2008. However, the said patent has expired on 21.10.2023 and FCM has passed into public domain and is available for free exploitation by interested parties and consumers pan-India.

6.1. The Learned Counsel for the Respondent No. 2 submitted that production of FCM is governed by the Patents Act, 1970, specifically Section 83 of the said Act. The relevant provisions of the Patent Act, 1970 are reproduced below:

83. *General principles applicable to working of patented inventions.*—Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely;—

(a) *that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;*

(b) *that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;*

(c) *that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;*

(d) *that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio-economic and technological development of India;*

(e) *that patents granted do not in any way prohibit Central Government in taking measures to protect public health;*

(f) *that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and*

(g) *that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.*

84. *Compulsory licences.*—(1) At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:—

(a) *that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or*

(b) that the patented invention is not available to the public at a reasonably affordable price, or

(c) that the patented invention is not worked in the territory of India.

(2) An application under this section may be made by any person notwithstanding that he is already the holder of a licence under the patent and no person shall be estopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price by reason of any admission made by him, whether in such a licence or otherwise or by reason of his having accepted such a licence.

(3) Every application under sub-section (1) shall contain a statement setting out the nature of the applicant's interest together with such particulars as may be prescribed and the facts upon which the application is based.

(4) The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price, may grant a licence upon such terms as he may deem fit.

(5) Where the Controller directs the patentee to grant a licence he may, as incidental thereto, exercise the powers set out in section 88.

(6) In considering the application filed under this section, the Controller shall take into account,—

- *the nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensee to make full use of the invention;*
- *the ability of the applicant to work the invention to the public advantage;*

90. Terms and conditions of compulsory licences.—(1) In settling the terms and conditions of a licence under section 84, the Controller shall endeavour to secure—

(ix) that in case the licence is granted to remedy a practice determined after judicial or administrative process to be anti-

competitive, the licensee shall be permitted to export the patented product, if need be.”

6.2 It was submitted by Learned Counsel for Respondent No. 2 that as per provisions of sub-Section 5 of Section 3 of the Competition Act nothing contained in Section 3 shall restrict 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 the Patents Act. The relevant provision of the Competition Act is reproduced below:

“3(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);

(g) any other law for the time being in force relating to the protection of other intellectual property rights;”

6.3 The Respondent No. 2 has challenged the jurisdiction of CCI and stated that since the molecule is governed by the Patent Act, CCI has no jurisdiction to consider the issue raised by the appellant. It was submitted that the appellant has approached the CCI with unclean hands and similar issues were raised before the Hon’ble Delhi High Court. The Respondent No. 2 has

prayed that the present appeal be dismissed on the following grounds; *a.* The patent has expired; *b.* Non-maintainability of the present Appeal; *c.* Appellant has approached this Hon'ble Tribunal with unclean hands; and *d.* No case has been made out against the Respondent No.2 as per the Impugned Order.

7. In its notes of submissions dated 14.08.2025, the Respondent No. 1/CCI has submitted as under:

“The CCI examined the matter within the jurisdictional confines of CCI as given under the provisions of the Competition Act, 2002, and after finding no prima facie case, CCI closed the matter vide order dated 25.10.2022. While examining the case, CCI referred the judgment dated 20.05.2020, passed by the Hon'ble Delhi High Court in the case of Monsanto Holdings Private Limited and others Vs CCI and Others (WP (C) No. 1776/2016 and CM Nos. 7606/2016, 12396/2016 and 16685/2016, Para 48 and 49 of the Judgment). The Commission observed that Section 3(5) of the Act makes it clear that the jurisdiction of the Commission is not ousted in any manner merely because the matter is also a subject matter of the Patent Act or any other intellectual property law statute. (Please refer order dated 25.10.2022 at page no. 43 to 72, paragraph nos. 65, 66, 67 & 79 of the Appeal Vol-I)

Thereafter, Monsanto Holdings Private Limited challenged the order dated 20.05.2020 in LPA No. 150 of 2020 before the Division Bench of the Hon'ble Delhi High Court. The Hon'ble Division Bench was hearing multiple related cases and it passed a judgment on 13.07.2023 (2023 sec Online Del 4078). In this Judgement, the Hon'ble Division Bench reversed the Monsanto judgment dated 20.05.2020 passed by the single Judge of the High Court of Delhi. CCI has challenged the order of the Delhi High Court dated 13.07.2023 through SLP No. 25026 of 2023 before the Hon'ble Supreme Court of India, which is pending.”

8. Heard. We note that the CCI has examined the complaint of the appellant on merits and has held that prima facie there is no case and has closed the matter vide impugned order dated 25.10.2022. We also note that the Patent on drug FCM has expired and it is now available in public domain for manufacturing. We now examine whether the CCI has power to examine the case, where the subject matter, being drug FCM was protected by the Patent Act. The Competition Act, in Section 3(5) has laid down that the Competition Act will not restrict the right of any person in protecting his rights under the Patent Act.

9. In any case, the Division Bench of the Hon'ble Delhi High Court in the case of *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India*, reported in (2023 SCC OnLine Del 4078-LPA 247/2016) has held that the Patent Act will prevail over the Competition Act. The relevant portion of the said judgment, being para 48 to 58 are reproduced below for ready reference:

“48. The question of whether an agreement under which a patent is licenced will cause an appreciable adverse effect on competition within India or will amount to an abuse of dominant position is not one that is reserved for the CCI. To the contrary, the factors that the CCI is required to consider under Sections 19(3) and 19(4) when assessing a potential, violation of Section 3 or Section 4 of the Competition Act are not very different from those that the Controller, in exercise of power to grant a compulsory licence, will consider in terms of Sections 84(6) and 84(7), especially when read with Sections 83 and 89 of the Patents Act.

49. In our view, the inquiry that the CCI proposes to conduct in respect of an assertion of patent rights is nearly identical to that which the Controller will conduct under Chapter XVI of the Patents Act. The legislative intent is apparent in that the Patents Act - especially as amended by the 2003 Amendment that introduced Chapter XVI after the Competition Act was enacted. It is especially for the field pertaining to patents, unreasonable conditions in

agreements of licensing, abuse of status as a patentee, inquiry in respect thereof and relief that is to be granted therefor are all to be governed by the Patents Act.

50. In our view, the Competition Act is a general legislation pertaining to anti-competitive agreements and abuse of dominant position generally. The inclusion of Section 84(6)(iv)⁴⁶ in the Patents Act by way of an amendment after the Competition Act was passed with Section 3(5)(i)(b) is particularly instructive of the above legislative intent as regards anti-competitive agreements.

51. For deciding an application for compulsory licensing, the Controller is empowered by the Patents Act to consider the reasonability of conditions imposed in a licence agreement. The CCI is empowered under the Competition Act to examine anti-competitive agreements and abuse of dominant position. However, the Competition Act makes provision for reasonable conditions being imposed in an agreement concerning exercise of rights under the Patents Act. Since such reasonable conditions are exempted from examination under Sections 3(5)(i)(b) of the Competition Act, it is indicative of the legislature's intendment as to the exclusive domain of the Patents Act regarding reasonable conditions. Similar, in our view, is the situation with the language of Section 83(f) of the Patents Act as compared with that of Section 4 of the Competition Act.

52. In our opinion, Chapter XVI of the Patents Act is a complete code in itself on all issues pertaining to unreasonable conditions in agreements of licensing of patents, abuse of status as a patentee, inquiry in respect thereof and relief that is to be granted therefor.

53. In reconciling the two statutes, the subject-matter that is in focus is not merely anti-competitive agreements and abuse of dominant position, which both the Patents Act (in Chapter XVI) and the Competition Act (in Sections 3 and 4) deal with. The subject-matter that is relevant for this assessment is anti-competitive agreements and abuse of dominant position by a patentee in exercise of their rights under the Patents Act.

54. On this issue, there is no scope of doubt beyond the pale of doubt that the Patents Act is the special statute, and not the Competition Act. It is also a fact that Chapter XVI of the Patents Act is a subsequent legislation as compared to the Competition Act.

55. Therefore, when assessed, by the maxim *generalia specialibus non deroganti* & or by the maxim *lex posterior derogat priori*, the Patents Act must prevail over the Competition Act on the issue of exercise of rights by a patentee under the Patents Act. Even assessed by the rigours of *Ashoka Mktg. Ltd.* cases, which require the conflict to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein, the Patents Act must necessarily prevail. over that of the Competition Act.

56. For this reason, in our view, LPA Nos. 246 of 2016, 247 of 2016, 150 of 2020, 550 of 2016 and WP(C) No. 8379 of 2015 ought to be and are allowed. The 2016 judgment in *Ericsson AB v. CCI* and. 2020 judgment in *Monsanto Holdings (P) Ltd. v. CCT* are set aside. The proceedings initiated by the CCI, that are impugned in the said appeals/petitions are hereby quashed.

57. This judgment, of course, must not be understood as expressing any opinion on the merits of the claims of any of the parties as to whether *Ericsson* or *Monsanto* have, in fact, Imposed anti-competitive conditions, or abused their dominant position.

58. For the above reasons, the 2015 judgment in *Ericsson AB v. CCT* is sustained. The CCI's proceedings deserve to be quashed for want of power. The court is of the view that once a settlement has been reached between the informant and person against whom the information is filed, the very substratum of the proceedings by CCI is lost and the 2015 judgment in *CCI v. Bharti Airtel Ltd.* has rightly quashed the same. The question of liberties granted by the 2015 judgment in *CCI v. Bharti Airtel Ltd.* being sustainable do not arise, given as this Court has already held that CCI has no power to conduct the investigation that was impugned.”

(Emphasis supplied)

10. As submitted by the CCI, they had challenged the judgment of the Division Bench of Hon'ble Delhi High Court in SLP No. 25026/2023 before the Hon'ble Supreme Court. The said SLP has been dismissed by the Hon'ble Supreme Court recently on 02.09.2025. The relevant portion of the judgment of the Hon'ble Supreme Court is reproduced below:

“3. This petition arises from the judgment and order passed by the High Court of Delhi dated 13th July, 2023 in the Letters Patent Appeal No. 247 of 2016, by which the LPA filed by the respondent-Telefonaktiebolaget LM Ericsson (Publ), came to be disposed of, with the following observations recorded by the High Court in paragraph 58. Paragraph 58 reads thus: -

"For the above reasons, the 2015 Judgement is sustained. The CCI's proceedings deserve to be quashed for want of power. The Court is of the view that once a settlement has been reached between the informant and person against whom the information is filed, the very substratum of the proceedings by CCI is lost and the 2015 Judgement has rightly quashed the same. The question of liberties granted by the 2015 Judgement being sustainable do not arise, given as this Court has already held that CCI has no power to conduct the investigation that was impugned."

3. The Competition Commission of India being dissatisfied with the impugned judgment and order passed by the High Court is here before us with five appeals arising from the common judgment and order passed by the High Court.

4. We heard Mr. Samar Bansal the learned counsel appearing for the Competition Commission of India and on the other hand Mr. Mukul Rohatgi, Mr. Navin Pahwa, Ms. Vibha Datta Makhija and Mr. CS Vaidyanathan, the learned senior counsel appearing for the respective respondents.

5. In the peculiar facts and circumstances of the case, more particularly, keeping in mind what has been observed by the High Court in Paragraph 58 of its impugned judgment, referred to above and also taking into consideration the fact that the original complainants/informants have nothing further to say in the matter, we should not interfere with the impugned judgment passed by the High Court.

6. If there are any questions of law involved in this litigation, the same are kept open to be agitated in some other appropriate case.

7. In view of the aforesaid, the petitions stand disposed of."

11. Considering the judgment of the Hon'ble Delhi High Court in the case of *Telefonaktiebolaget LM Ericsson (PUBL)* and the Hon'ble Supreme Court in

the SLP No. 25026/2023, it is apparent that the CCI lacks the power to examine the allegations made against Vifor International (AG). The Patent Act will prevail over the Competition Act in the facts of this case, as the subject matter of contention is FCM, which was developed and patented by Respondent No. 2. There is no dispute that Respondent No. 2 held the said patent at the relevant time. Further, we have noted that Section 3(5) of the Competition Act provides protection to a person holding patent to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting its rights.

12. Following the judicial guidance as noted above, we hold that there is no merit in this appeal. Accordingly, the appeal is dismissed. No order as to costs. Pending application(s), if any, are also closed.

**[Justice Yogesh Khanna]
Member (Judicial)**

**[Mr. Ajai Das Mehrotra]
Member (Technical)**

Place: New Delhi

Dated: 30.10.2025

Ram N.