

via Video-conferencing

\$~5

\*

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

+

LPA 163/2021

WHATSAPP LLC

..... Appellant

Through: Mr. Harish Salve, Senior Advocate with Mr. Amit Sibal, Senior Advocate, Mr. Tejas Karia, Advocate, Mr. Shashank Mishra, Advocate, Ms. Supritha Prodaturi, Advocate and Mr. Aasish Somansi, Advocate.

versus

COMPETITION COMMISSION OF INDIA & ANR. ... Respondents

Through: Mr. Aman Lekhi, ASG with Mr. Samar Bansal, Advocate, Mr. Anirudh Bakhru, Advocate. Mr. Ritwiz Rishabh, Advocate, Mr. Ujjwal Sinha, Advocate, Ms. Mehak Huria, Advocate, Mr. Aniket Seth, Advocate, Ms. Shikha Sandhu, Advocate, Ms. Devahuti Pathak, Advocate, Ms. Harsheen Madan, Advocate and Mr. Sachin Mishra, Advocate for respondent No.1. Mr. Pavit Singh Katoch, Advocate with Mr. Yaman Verma, Advocate, Mr. Shyamal Anand, Advocate and Ms. Anjali Kumar, Advocate for respondent No. 2.

**CORAM:**

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**HON'BLE MR. JUSTICE JASMEET SINGH**

**ORDER**

%

**21.06.2021**

**C.M. No.18801/2021 and 18911/2021 (exemption)**

Exemptions are allowed, subject to just exceptions; and subject to requisite compliances being made within 01 week of resumption of physical functioning of the court.

Applications stand disposed of accordingly.

**C.M. No.18800/2021 (stay)**

By way of this application, the appellant/WhatsApp LLC, seeks stay of notice dated 04.06.2021 issued by the Director General, Competition Commission of India ('DG', for short) as also a restraint against any further action pursuant to order dated 24.03.2021 made by the DG in Suo-Motu case No.1/2021, during the pendency of the present appeal. By way of the Letters Patent Appeal (LPA), the appellant has impugned judgment dated 22.04.2021 rendered by a learned single Judge of this Court, whereby a challenge to order dated 24.03.2021 issued by the DG initiating a certain investigation against the appellant under the provisions of the Competition Act 2002 was rejected.

2. The subject matter of the LPA is, in substance, a challenge to an investigation initiated by the DG to the 2021 Update to the Terms and Privacy Policy of the application/software called 'WhatsApp'.
3. Notice on the LPA was issued by a Division Bench of this court headed by Hon'ble the Chief Justice *vidé* order dated 06.05.2021.
4. Alongwith the LPA, the appellant had also moved an application seeking interim relief bearing C.M. No.15908/2021, whereby the appellant had sought *ex-parte ad-interim* stay of operation of impugned judgment dated 22.04.2021 as also a stay against operation of order dated 24.03.2021 made by the DG in Suo-Motu case

No.1/2021. On 06.05.2021, the Division Bench had also issued notice on the aforesaid application seeking *ex-parte ad-interim* relief.

5. Both the LPA and the application seeking interim relief are now posted for 09.07.2021.
6. At this point, it would be relevant to extract the prayers made in C.M. No.15908/2021 and in the present application being C.M. No.18800/2021 :

<b><i>Prayers made in C.M. No.15908/2021</i></b>	<b><i>Prayers made in C.M. No.18800/2021</i></b>
<p>a. <i>Pass an ex-parte ad interim order staying the operation of the Impugned Judgment and Final Order dated April 22, 2021, passed by the Hon'ble Single Judge in Writ Petition 4378 of 2021, during the pendency of the present Appeal;</i></p> <p>b. <i>Pass an ex-parte ad interim order <u>staying the operation of order dated March 24, 2021</u> passed by the Respondent No.1 in Suo-Motu Case No.1 of 2021 and restrain Respondent No.1 <u>from taking any action in terms of the same</u>; and</i></p> <p>c. <i>Pass any further orders that this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the present case. (emphasis supplied)</i></p>	<p>a. <i>Pass an ad interim order staying the Impugned Notice dated June 4, 2021, issued by the Director General of Respondent No.1;</i></p> <p>b. <i>Pass an order restraining Respondent No.1 <u>from taking any further actions in terms of its order dated March 24, 2021</u> passed in Suo-Motu Case No.1 of 2021 during the pendency of the Appeal; and</i></p> <p>c. <i>Pass any further orders that this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the present case. (emphasis supplied)</i></p>

7. As is evident from a perusal of the prayers extracted above, there is almost complete identity as far as prayers (b) in the two applications are concerned. Both seek restraint on any further action pursuant to order dated 24.03.2021 issued by the DG.

8. Mr. Harish Salve, learned Senior Counsel appearing on behalf of the appellant submits, that while the present LPA is pending before a Division Bench of this court, in an act that smacks of overreach, the DG has issued notice dated 04.06.2021 purporting to be under section 41(2) read with section 36(2) of Competition Act 2002, demanding from the appellant information and response to certain queries, which are 22 in number, and which are already subject matter of the challenge in the LPA. Mr. Salve informs this court that related challenges are also pending before the Hon'ble Supreme Court. It is further pointed-out that in the concluding part of the impugned notice, the DG says this:

*“4) Since the present investigation is time bound, you are directed to submit the above information, within 15 days from the receipt of this Notice. The reply should be properly indexed and page-numbered, and shall be signed by any director of the company. A soft copy of the reply shall also be sent by email to [anushka.khurana@cci.gov.in](mailto:anushka.khurana@cci.gov.in) and [sanjoy@cci.gov.in](mailto:sanjoy@cci.gov.in).*

*5) Failure to comply with the Notice may attract penalty u/s 43 of the Competition Act 2002.”*

(emphasis supplied)

9. Mr. Salve submits that in view of the DG's demand for information within 15 days of receipt of notice on pain of penalty, it is clear that the DG's effort is to take precipitate action against the appellant, without awaiting a decision of the pending issues by the Division Bench, in an act of overreach of the judicial process, which deserves to be restrained.

10. Issue notice.

11. Mr. Aman Lekhi, learned ASG instructed by Mr. Samar Bansal, Advocate appears on advance copy; accepts notice in the application; and seeks time to file a reply. Let reply be filed within 10 days; rejoinder thereto, if any, be filed before the next date of hearing, with advance copy to the opposing counsel.
12. In our view, there is no doubt that the issuance of impugned notice dated 04.06.2021 by the DG is a step in furtherance of the investigation commenced in Suo-Motu case No.1/2021 pursuant to order dated 24.03.2021, which investigation is subject matter of the challenge in the present LPA.
13. However, we find that an application seeking stay of further steps in the investigation already stands filed by way of C.M. No.15908/2021, on which notice has already been issued to the DG; *in which no interim relief was given by the Division Bench on 06.05.2021* or thereafter; and which is already listed before the Division Bench (Roster Bench) for further consideration on 09.07.2021. We also find that there is substantial overlap, in fact near identity, as between the prayers made in C.M. No. 15908/2021 and those made in the present application being C.M. No. 18800/2021.
14. For the foregoing reason, we do not consider it appropriate to stay the operation of impugned notice dated 04.06.2021, at this stage.
15. On another note however, on being queried in the course of the hearing, Mr. Lekhi fairly states that he has instructions to say that though issuance of notice dated 04.06.2021 was perfectly in line with the procedure contemplated under the statute for taking forward an on-going investigation, which has *not* been stayed by the Division

Bench, it would take substantial time for preparation of a report pursuant to the receipt of the information called-for by way of the impugned notice; which report would thereafter be forwarded to the Competition Commission of India. Mr. Lekhi accordingly submits that preparation of the report would not be completed *at least before the next date of hearing* before the Roster Division Bench *i.e.*, 09.07.2021.

16. Taking note of Mr. Lekhi's statement as above, we would only urge the DG to bear in mind that investigation against the appellant is under judicial consideration before a Division Bench of this court ; and we direct that the matter be listed before the Roster Division Bench on 09.07.2021, the date already fixed.

**C.M. No.18910/2021 (for bringing on record reply)**

17. List before Roster Bench on 09.07.2021.

**ANUP JAIRAM BHAMBHANI  
(VACATION JUDGE)**

**JASMEET SINGH  
(VACATION JUDGE)**

**JUNE 21, 2021/Ne**