IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF JULY, 2021

PRESENT

THE HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

WRIT APPEAL NO.562/2021

C/W WRIT APPEAL NO.563/2021 (GM-RES)

WA NO 562 OF 2021

BETWEEN

FLIPKART INTERNET PVT LTD
HAVING ITS REGISTERED OFFICE
AT BUILDING ALYSSA BEGONIA
AND CLOVER
EMBASSY TECH VILLAGE
OUTER RING ROAD,
DEVARABEESANAHALLI VILLAGE
BENGALURU 560103,
THROUGH ITS AUTHORISED SIGNATORY
MR PRADEEP REDDY

...APPELLANT

(By SRI HARISH SALVE, SENIOR ADVOCATE
ALONG WITH SRI DHYAN CHINNAPPA, SENIOR ADVOCATE
ALONG WITH ARJUN P.K, VINUTA WAMAN, RAYADURG,
SHARDUL, AMARCHAND, NISHA KAUR UBEROI AND
ANURADHA AGNIHOTRI)

AND

1 . COMPETITION COMMISSION OF INDIA
OFFICE BLOCK -1,
KIDWAI NAGAR (EAST)
OPPOSITE RING ROAD,
NEW DELHI 110023,
THROUGH ITS SECRETARY

2 . DELHI VYAPAR MAHASANGH
NO 877, 1ST FLOOR,
QUTUB RAOD,
SADAR BAZAR, DELHI 110006,
THROUGH ITS SECRETARY

3 . AMAZON SELLER SERVICES PVT LTD
BRIGADE GATEWAY 26/1,
DR RAJKUMAR ROAD,
BENGALURU 560055
REP BY ITS AUTHORISED REPRESENTATIVE

4 . CONFEDERATION OF ALL INDIA TRADERS
A SOCIETY REGISTERED UNDER THE
SOCIETIES REGISTRATION ACT 1860
(AS APPLICABLE TO NCT OF DELHI)
HAVING OFFICE AT
VYAPAR BHAVAN NO 925/1,
NAIWALAN, KAROL BAGH
NEW DELHI 110005

…RESPONDENTS

(BY SMT.MADHAVI DIWAN,
ADDITIONAL SOLICITOR GENERAL FOR R-1
ALONG WITH SRI ABIRROY, ADVOCATE FOR R2,
SRI. GOPALA SUBRAMANIYAN, SENIOR ADVOCATE
ALONG WITH SRI NIKHIL JOY, ADVOCATE FOR R3
SRI GOUTAMADITYA S, ADVOCATE FOR R4)

THIS WRIT APPEAL IS FILED U/S 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE IMPUGNED ORDER DATED 11/06/2021 PASSED BY THE LEARNED SINGLE JUDGE OF THIS HON'BLE HIGH COURT OF KARNATAKA, BANGALORE IN WP NO.4334/2020 CONSEQUENTLY, SET ASIDE THE CCI ORDER DATED 13/01/2020 IN CASE NO.40/2019, BEFORE THE CCI AND ETC.

WA NO 563 OF 2021

BETWEEN

AMAZON SELLER SERVICES PRIVATE LIMITED
A PRIVATE LIMITED COMPANY
INCORPORATED UNDER THE
COMPANIES ACT 1956 AND
HAVING ITS REGISTERED OFFICE
AT 8TH FLOOR, BRIGADE GATEWAY, 26/1,
DR RAJKUMAR ROAD,

BENGALURU-560055
REPRESENTED HEREIN BY ITS
AUTHORIZED SIGNATORY
MR RAHUL SUNDARAM

...APPELLANT

(By SRI GOPALA SUBRAMANIYAN, SENIOR ADVOCATE
ALONG WITH SRI NIKHIL JOY, ADVOCATE)

AND

1 . COMPETITION COMMISSION OF INDIA
THROUGH THE CHAIRPERSON.
9TH FLOOR, OFFICE - OPPOSITE RING ROAD,
BLOCK-1, EAST KIDWAI NAGAR,
KIDWAI NAGAR,
NEW DELHI-110023

2 . DELHI VYPAARMAHASANGH
877, 1ST FLOOR, QUTAB ROAD,
SADAR BAZAR,
DELHI-110006

3 . FLIPKART INTERNET PRIVATE LIMITED
BUILDINGS ALYSSA,
BEGONIA AND CLOVER,
EMBASSY TECH VILLAGE,
OUTER RING ROAD,
DEVARABEESANAHALLI VILLAGE,
BENGALURU-560103

4 . CONFEDERATION OF ALL INDIA TRADERS
TRADERS VYAPAR BHAWAN,
NO.925/1,
NAIWALAN, KAROL BAGH,
NEW DELHI-110005

...RESPONDENTS

(By SMT. MADHAVI DIWAN, ADDITIONAL SOLICITOR GENERAL
SRI. ABIRROY, ADVOCATE FOR R2,
SRI. HARISH SALVE, SENIOR ADVOCATE ALONG WITH
SRI.DHYAN CHINNAPPA, SENIOR ADVOCATE ALONG WITH
SRI. ARJUN P.K., SMT.VINUTA WAMAN,
SRIYUTHA RAYADURG, SHARDUL, AMARCHAND,
MANGAL DAS & CO., SMT. NISHA KAUR OBEROI ALONG WITH
SMT.ANURDADAHA AGNIHOTRI, ADVOCATES FOR R3
SRI GOUTHAMADITYA, ADVOCATE FOR R4)

THIS WRIT APPEAL IS FILED U/S 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO ALLOW THE APPEAL BY SETTING ASIDE THE ORDER AND JUDGMENT DATED JUNE 11, 2021 PASSED BY THE LEARNED SINGLE JUDGE IN W.P.NO.3363/2020 C/W 4334/2020 (GM-RES) AND ETC.,

THESE WRIT APPEALS COMING ON FOR ORDERS AND HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 25.6.2021, THIS DAY **SATISH CHANDRA SHARMA J.**, PRONOUNCED THE FOLLOWING:

JUDGMENT

Regard being had to the similitude in the controversy involved in these two cases, they were heard analogously together and a common judgment is being passed.

2. The present writ appeals are arising out of the common order passed by the learned Single Judge dated 11.6.2021 in W.P.No.3363/2020 c/w W.P.No.4334/2020, by which the learned Single Judge has dismissed the writ petitions filed by both the petitioners.

3. The appellant-Flipkart Internet Private Limited is a Private Limited Company incorporated under the Companies Act, 1956 having its registered office at Bengaluru, Karnataka and it operates as an e-commerce platform and online marketplace, which facilitates independent third party sellers to sell goods to consumers. The appellant has about 200 million registered users and 15 million transacting customers per month.

3.1. The facts of the case reveal that respondent No.2/Delhi Vyapar Mahasangh filed an information on 24.10.2019 to Competent Commission of India (CCI) under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the Act) against both the appellants alleging that the appellants are involved in alleged anti-competitive practices and conduct, such as deep discounting, preferential listing, sale of private label brands through preferential sellers and exclusive tie-ups, alleged to be in violation of Section 3(1) r/w Section 3(4) of the Act.

3.2. It has been further stated that the CCI, based upon the information received by it, has passed an order dated 13.1.2020 in case No.40/2019 directing an investigation under Section 26(1) of the Act by the Director General. The order dated 13.1.2020 was challenged before this Court and the learned Single Judge has dismissed the writ petitions by an order dated 11.6.2021, which is under challenge in the present two writ appeals.

3.3. The appellant-Flipkart has challenged the legality and validity of the order passed by the learned Single Judge and a main ground has been raised stating that the learned Single

Judge has acted contrary to the judgment of the Supreme Court of India in the case of **Competition Commission of India v. Steel Authority of India Ltd. & Anr.,** reported in (2010) 10 SCC 744, (hereinafter referred to as CCI v. SAIL) while upholding the order passed by the Competition Commission of India (hereinafter referred to as CCI). It has been contended that the Hon'ble Supreme Court in CCI v. SAIL has held that the CCI while passing an order under Section 26(1) of the Competition Act, 2002 (hereinafter referred to as the Act of 2002) must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring general issuance of direction for investigation to the Director General (paragraph 97). It has been further contended that the order passed by the CCI in the present case is merely speculative in nature and it has not given any finding on the contravention of the provisions of the Act of 2002. It has been further contended that the learned Single Judge has erroneously upheld the order passed by the CCI on the basis that the order passed by the CCI is supported by some reasoning. Therefore, the impugned order upholding the order passed by the CCI is contrary to the judgment of the Hon'ble Supreme Court delivered in the case of **CCI v. SAIL.**

3.4. Learned Senior counsel for the appellant has contended that the learned Single Judge while upholding the CCI order has erred in observing that the scope of judicial review is limited and that the CCI order records "*some reasons*". Section 26 (1) of the Act empowers the CCI to pass an order directing the Director General to carry out an investigation where, "*it is of the opinion that there exists a prima facie case…*" and a plain reading of Section 26 establishes the following:

(i) The CCI can act on the receipt of a reference from the Central/State government or a statutory authority or on its own knowledge "*or information received under Section 19*".

(ii) The material in its possession must lead the CCI to form an opinion that there exists a *prima facie* case.

3.5. It has been contended that as explained by the Hon'ble Supreme Court in ***CCI v. SAIL,*** "the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter…" and the said paragraph, which is at paragraph 37 of the judgment reads as under;

> **"37.** As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence

> of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53-A of the Act."

3.6. It has been further contended that it is settled law that even where the statute requires the authority conferred with the power to order an investigation to form an opinion, the opinion must be in writing, meaning thereby it must record "minimum reasons substantiating the formation of such opinion." Additionally, the order must unequivocally express the mind of the authority that "it is of the view that a prima facie case exists". The statute requires this; no more but equally no less.

3.7. Learned Senior counsel for the appellant has contended that the parameters for judicial review are now well settled, where the law requires the formation of an opinion, the repository of power, who is required to form an opinion before exercising the power, must take into account all relevant facts, eschew the relevant facts and material, and appropriately

instruct itself in law (Barium Chemicals Ltd v. Company Law Board, AIR 1967 SC 295). It has been further contended, the Hon'ble Supreme Court in the Bharti Airtel Case has recognised the test for determining whether writ petition would be maintainable against the formation of an opinion was the one laid down in the Constitution Bench decision in the *Barium Chemicals Case*.

3.8. It has been further contended that the scope of judicial review of administrative orders is now well established. Where the statute requires the authority to form an opinion, one of the ground of judicial review is that the authority did not form an opinion in accordance with law. This would be where:

(i) the authority has taken into account irrelevant or extraneous considerations,

(ii) the authority has failed to take into account relevant considerations and

(iii) the authority has misdirected itself in law.

3.9. It has been contended by the learned Senior counsel for the appellant that, the CCI Order was challenged by the appellant/Flipkart *inter alia* on the grounds that:

(i) The CCI Order failed to express its mind in no uncertain terms that the CCI was of the view that a

prima facie case exists requiring a direction to the director-general to cause an investigation;

(ii) The CCI Order fails to examine whether the alleged agreements were of the kind so as to attract Section 3 (4) of the Act; and

(iii) The CCI Order failed to take into account (on its own admission on **Vol. 4, p. 400-401- CCI affidavit**) the provisions of Section 19 in forming an opinion that there was a prima facie case of appreciable adverse effect on competition (***AAEC***). On a misdirection of law that the provision did not apply at this stage.

3.10. It has been further contended that the facts indisputably establish that the appellant/Flipkart operates an online marketplace platform on which independent third parties and sellers sell their wares. The appellant is neither the seller nor a buyer of goods. The allegations against the appellant were that:

(i) There are certain sellers who are designated "assured sellers" (conveniently mischaracterised as preferred sellers) and such designation by the appellant violated section 3(4) of the Act;

(ii) There are certain situations in which the appellant offered "deep discounts" to certain sellers, and

(iii) in relation to mobile phones, some of the manufacturers had exclusivity agreements with the appellant, thereby violating section 3 (4) of the Act.

3.11. It has been contended that the CCI failed to examine whether, assuming that the allegations were established on an

investigation (their veracity was seriously in dispute), the agreements complained of would be violative of Section 3(4) of the Act. It has been further contended that another fatal flaw in the CCI Order is, the failure of the CCI to examine whether the alleged agreements are between persons are enterprises at different stages or levels of the production chain.

3.12. It has been contended that the phrase "production chain" would necessarily imply that the arrangement/agreement relates to a product or a group of products made by a manufacturer. If multiple manufacturers of a product enter into an agreement, it is a matter to be examined under Section 3(3) of the Act. Where the different persons at different stages acting under a manufacturer enter into an agreement, such an agreement, being between persons at different stages or levels of the production chain, would be such as to qualify for further examination under Section 3(4) of the Act.

3.13. It has been further contended that the fundamental requirement is that the person entering into an agreement should be a part of a production chain, which commences from the manufacturer and ends with the retailer. It has been further contended that the appellant is not a retailer and is not in the

business of (in fact is prohibited from) selling goods and cannot be considered to be a part of the production chain. It has been stated that admittedly the appellant operates a platform on which a large number of sellers, dealing with diverse commodities, sell their goods. Hence, the appellant cannot be treated as a part of the production chain for all the goods sold on its platform.

3.14. It has been stated that in the present case, on a perusal of the submissions made by the CCI, it is clear that the CCI proceeded on the premise that the requirement of the agreement relating to entities at different stages or levels of the production chain was not a sine qua non, since other agreements would also fall in the latter words of the provision. It has been further contended that the CCI thus misdirected itself in law. An analysis of the material paragraphs in the CCI Order as well as the submissions made by the CCI makes it apparent that the CCI has not considered the factors in Section 19(3) while passing the CCI Order. This is another fundamental misdirection in law and amounts to a failure to take into account relevant considerations while forming the prima facie opinion. It has been further stated that the CCI has asserted on affidavit before the learned Single Judge that Section 19 is not considered at the stage of Section

26(1) of the Act. During the oral submissions before the learned Single Judge, the CCI took the position that the word "inquiry" in Section 19(1) must mean that Section 19(3) does not come into play at the stage of formation of opinion under Section 26(1) of the Act. This construction by the CCI is in the teeth of Section 19 of the Act.

3.15. It has been contended that the CCI's submission that Section 19 is not required to be considered at the stage of passing an order under Section 26(1) is plainly wrong as Section 19(1) refers to an inquiry at its commencement. Section 19 (1) recognises the power of inquiry of the regulator (the CCI) into any alleged contravention of Section 3 or Section 4. Section 19(1) recognises that the CCI may conduct an inquiry on receipt of any information or either on its own motion. In the event of receipt of information, the CCI cannot rely on newspaper reports (such reports having been liberally cited in defence of the CCI Order) but on information received in such manner as may be determined by the regulations. Sections 19(3) and 19(4) of the Act set out the matters which the "commission shall" have due regard to while engaging in a matter. The statute compels that the CCI shall give due regard to the enumerating factors.

3.16. It has been contended that the submission of the CCI that reading in the requirements of Section 19(3) of the Act at the stage of forming an opinion under Section 26(1) would stultify the working of the law is deeply unattractive and is contrary to the language used in the provision itself ("the Commission **shall** … have due regard to…"). It has been further contended that when the CCI is applying its mind to a set of allegations or information in its possession, in order to form an opinion as to whether there has been a prima facie violation of Section 3, it must consider the factors referred to in Section 19 (3). However, as has been laid down by the Hon'ble Supreme Court in CCI v SAIL, the level of examination would be only prima facie. At the second stage after receiving a report under Section 26, and when finally deciding the matter, the CCI would again be required to have regard to the factors set out in Section 19(3), this time to give a final finding and not merely a prima facie view. There is no reason to suggest that if the CCI is required to have regard to the factors in Section 19(3), it would emasculate its powers to order investigations in appropriate cases. In any event, the above submission by the CCI is contrary to judgment of the Division Bench of the Bombay High Court in

Star India v CCI, 2019 SCC Online Bom 3038 (**the Star Case**), which is binding on the CCI.

3.17. Learned Senior counsel for the appellant has contended that the CCI Order failed to meet the jurisdictional threshold, i.e., "formation of an opinion in no uncertain terms" which is a sine qua non for passing an order under Section 26 (1) of the Act. This has been settled by the Hon'ble Supreme Court of India in ***CCI v. SAIL*** (2010) 10 SCC 744. Heavy reliance has been placed upon paragraphs 37, 97 and 98 and the same reads as under:

> Para 37 (as extracted above in Para 3 of the present submissions);
>
> "97. …Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions, conclusions or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons but must **express its mind in no uncertain terms that it is of the view that prima facie case exists**, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to Commission. Such opinion should be formed on the basis of records, including the information furnished and reference made to the Commission under the provisions of the Act, as aforereferred… In other words, the **Commission is expected to express prima facie view** in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by **recording minimum reasons substantiating the formation of such opinion**, while all its other orders and decisions should be well reasoned."(CC, p. 44)

> "98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. **The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act.**"(CC, p. 44)

It has been stated that as per the aforesaid judgment, the Hon'ble Supreme Court has summarised the issue involved as under:

a. At the stage of Section 26(1) of the Act, the CCI is expected to examine the information and other material on record;

b. On the basis of such examination, the CCI must form an opinion whether there exists a prima facie case of contravention of the provisions of the Act;

c. Such opinion must be recorded in the prima facie order of directing an investigation, which order must show expression of an opinion in "no uncertain terms";

d. The opinion must be "substantiated" in the order with reasons. Though the CCI may not record detailed reasons, it is required to give "minimum reasons" and yet most importantly, such reasons should substantiate the "formation of an opinion" and should do so in "no uncertain terms". These requirements make it apparent that the need for substantiation and the determination in no uncertain terms are peremptory. Minimal reasons is only a matter of length and never of weight of reasons;

e. Such an opinion must be made with reference to the material on record;

f. The CCI is required to give reasons on every issue raised before it whilst passing an order under Section 26(1) of the Act.

3.18. It has been contended that the CCI Order in the present case fails to meet the aforesaid jurisdictional threshold, as it does not record "formation of an opinion" in "no uncertain terms". In other words, there is no mention of formation of an opinion by the CCI on any contravention of the provisions of the Act by the appellant. It is further contended that the CCI Order merely reiterates the allegations of the Informant and makes some cursory remarks, stating that the allegations 'merit an investigation'. It has been further contended that there is not even a single instance in the CCI Order (and the CCI has also failed to demonstrate the same before this Court from the CCI Order or otherwise from the material available), wherein the CCI, assuming all the allegations against the appellant to be true and correct, concludes that such allegations constitute a contravention of the provisions of the Act. In the absence of such a "formation of an opinion", leave alone being "substantiated" even by "minimum reasons", the CCI Order has been passed contrary to the provisions of Section 26(1) of the Act itself and deserves to be set aside by this Hon'ble Court.

3.19. It has been further contended that the CCI Order is bad in law as it has changed the test for the exercise of the

powers under Section 26 (1) of the Act from a "prima facie case of contravention of the Act" to a "prima facie case for investigation". In respect of the aforesaid ground, the following observations in the CCI order have been referred:

a. "Whether funding of discounts is an element of the exclusive tie-ups is a matter that **merits investigation**."

b. "Thus allegations are interconnected, and **warrant a holistic investigation** to examine how the vertical agreements operate, what are the key provisions of such agreements and what effect do they have on competition."

c. "It **needs to be investigated** whether the alleged exclusive arrangements, deep-discounting and preferential listing by the OPs are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition …."

d. "…the Commission is of the opinion that there exists a **prima facie case which requires an investigation** by the DG to determine whether the conduct of the Ops have resulted in …"

3.20. Learned Senior counsel for the appellant has stated that a perusal of the above in itself demonstrates that the CCI has erred by applying the incorrect test while exercising its power under Section 26(1) of the Act. It has been further contended that this issue goes to the root of the matter and unequivocally establishes that it is fit case for judicial review by this Hon'ble Court. The fact that the CCI has incorrectly

interpreted the provisions of Section 26(1) of the Act and has applied the wrong test is evident from:

a. ***CCI v. SAIL*** (2010) 10 SCC 744, Para 37 ;

b. Judgement of the Hon'ble High Court of Delhi (Division Bench) in ***Google Inc v. CCI,*** *2015 SCC OnLine Del 8992,* wherein the Hon'ble High Court of Delhi has held that CCI can order/direct investigation only if forms a prima facie opinion of violation of provisions of the Act.The Hon'ble Court held:

> "18(R) Again, as aforesaid, **CCI can order/direct investigation only if forms a prima facie opinion of violation of provisions of the Act having been committed.** Our Constitutional values and **judicial principles by no stretch of imagination would permit an investigation where say CCI orders/directs investigation without forming and expressing a prima facie opinion or where the prima facie opinion though purportedly is formed and expressed is palpably unsustainable**. The remedy of Article 226 would definitely be available in such case."

It is contended that in view of the above, it is apparent that the threshold jurisdictional test for exercise of power under Section 26(1) of the Act is formation of an opinion on "prima facie case of contravention of the Act" and not an opinion on "prima facie case for investigation". The CCI has evidently failed to apply the correct test, i.e., failed to prima facie establish contravention of the provisions of the Act by the appellant, as has been demonstrated in the above paragraph, and on this count alone, the CCI Order deserves to be set aside. The learned

Single Judge has also failed to appreciate these facets and pre-requisites, and accordingly the Impugned Order too deserves to be set aside.

3.21. It has been contended that in response to the aforesaid submission of the appellant, the CCI made the following submissions:

a. An order under Section 26(1) of the Act is a mere administrative order and CCI is not required to undertake any adjudicatory exercise;

b. In an order under Section 26(1), the CCI is required to form only a preliminary / tentative opinion;

c. An order under Section 26(1) of the Act entails no civil consequences;

d. The CCI is merely required to record "some reasons" at the 26(1) stage;

e. The CCI has deliberately passed an order directing an investigation with minimal reasons, as a detailed order may influence the DG during its investigation against the appellants.

3.21.1. It is stated that the appellant made the following submissions in response to the above submissions of CCI:

Regarding an order under Section 26(1) of the Act is a mere administrative order and CCI is not required to undertake any adjudicatory exercise, it has been stated that the CCI Order is an administrative order may not be of any assistance to the CCI in the present case, as the CCI Order (as has been elaborated

above) is contrary to the judgment of the Hon'ble Supreme Court in CCI v. SAIL and such submission of the CCI also completely ignores the judgment of the Hon'ble Supreme Court in **Bharti Airtel Ltd v. CCI& Ors.,** (2019) 2 SCC 521 and **Barium Chemicals Ltd v. Company Law Board**, AIR 1967 SC 295. The Hon'ble Supreme Court in the Bharti Airtel Case has recognised in paragraph 118 that the test for determining whether a writ petition would be maintainable against the formation of an opinion was the one laid down in the Constitution Bench decision in the Barium Chemicals case. Despite the aforesaid judgment of the Hon'ble Supreme Court, the CCI has taken an incorrect position that judgment of the Hon'ble Supreme Court in Barium Chemicals case is inapplicable to the present case.

3.21.2. It has been stated that the Hon'ble Supreme Court in Barium Chemicals Case has held that if it could be shown that an authority which was required to form an opinion "had in fact not formed an opinion, its order could be successfully challenged." The Hon'ble Supreme Court had in the said case held that:

> **"10.** … **It is only after the formation of certain opinion by the Board that the stage for exercising the discretion conferred by the provision is reached**. The discretion conferred **to order an investigation is administrative and not judicial** since its exercise one way or the **other does not affect the rights of a company nor does it lead to any serious consequences** as, for instance, hampering the business of the company. As has been pointed out by this Court in Raja Narayanalal Bansilal v. Maneck Phiroz Mistry [1961 1 SCR 417] the investigation undertaken under this provision is for ascertaining facts and is thus merely exploratory. The scope for judicial review of the action of the Board must, therefore, be strictly limited. **Now, if it can be shown that the Board had in fact not formed an opinion its order could be successfully challenged.** This is what was said by the Federal Court in Emperor v. Shibnath Banerjee [1961 6 FCR 1 : AIR 1943 FC 75] and approved later by the Privy Council. Quite obviously there is a difference between not forming an opinion at all and forming an opinion upon grounds, which, if a court could go into that question at all, could be regarded as inapt or insufficient or irrelevant. It is not disputed that a court cannot go into the question of the aptness or sufficiency of the grounds upon which the subjective satisfaction of an authority is based. …"

It has been contended that a perusal of the above makes it apparent that :

a. The Hon'ble Supreme Court in the Bharti Airtel Case had held that the principles laid down by the Hon'ble Supreme Court in the case of Barium Chemicals Case would be applicable to judicial review of an order under Section 26(1) of the Act;

b. The Hon'ble Supreme Court in the Barium Chemicals case was examining the scope of judicial review of an administrative order. Even in the said case, the Hon'ble Supreme Court was not examining an adjudicatory order;

c. The Hon'ble Supreme Court in the Barium Chemicals case was also considering validity of an order directing an investigation against an entity / individual. It must be noted that even an order under Section 26(1) of the Act refers the matter to the DG for investigation.

d. The Hon'ble Supreme Court in the Barium Chemicals case had held that the discretion to refer the matter to investigation can only be exercised after formation of an opinion;

e. In the absence of a formation of an opinion, the order can be successfully challenged by way of a writ petition.

3.21.3. Learned Senior counsel for the appellant has contended that applying the aforesaid principles to the facts of the present case, since the CCI has failed to form an opinion of a prima facie breach of Section 3(4) of the Act and record its reasons in "no uncertain terms" in its order, the CCI Order should be set aside. Merely because the order is categorised as administrative in nature, the same cannot be a reason to allow an order to be sustained, even though the same has been passed without satisfying the threshold jurisdictional test required for passing such an order. It has been further contended that it is also settled law that when a statutory authority passes an order based on certain grounds, its validity must be judged by the reasons mentioned in the order and cannot be supplemented or improved by fresh reasons in the shape of affidavit or otherwise. The order should be res ipsa loquitor (**Mohinder Singh Gill v. Chief Election Commr., (1978)** 1 SCC 405, para 8**; Punjab State Leather v. Bandeep Singh,** (2016) 1 SCC 724, para 4). However, the learned Single

Judge erroneously allowed all sorts of additional reasons to be adduced in affidavits and submissions by the CCI's officers, which reasons are not articulated in the CCI Order, and such post facto affidavits cannot be relied upon to substitute or improve upon the reasoning provided in the CCI order.

3.21.4. Regarding an Order under Section 26(1), the CCI is required to form only a preliminary/tentative view, it has been contended by the learned counsel for the appellant that the CCI having failed to satisfy the jurisdictional threshold of "formation of an opinion" itself, cannot be permitted to defend its order by stating that an order under Section 26(1) of the Act is merely a preliminary/tentative view. In other words, even if the submission made by the CCI is accepted, the CCI Order fails to record any view of contravention of the provisions of the Act leave alone preliminary/tentative view. A preliminary or tentative view does not mean that the opinion is sans intelligible reasons. Even on this count, even assuming the submission made by the CCI to be correct, the CCI Order deserves to be set aside as the CCI has failed to establish a prima facie of contravention of the provisions of the Act in certain terms, as it is required to do so under Section 26(1) of the Act.

3.21.5. Regarding an Order under Section 26(1) entails no civil consequences, it has been contended that the commencement of an investigation under Section 26(1) of the Act against an entity involves substantial and significant civil consequences for the said entity. This issue has already been dealt with and decided by the Hon'ble High Court of Delhi in *Google Case ,* wherein the High Court was pleased to observe as under:

> "18(N) The Supreme Court, in Rohtas Industries (Supra) and the Calcutta High Court in New Central Jute Mills Co. Ltd. (Supra), cited by the counsel for the respondent No. 2 / complainant, also has held that an investigation against a public company tends to shake its credit and adversely affect its competitive position in the business world even though in the end it may be completely exonerated and given a character certificate and that the very appointment of Inspector (in that case under Section 237 (b) of Companies Act to investigate the Company's affairs) is likely to receive much press publicity as a result of which the reputation and prospects of the Company may be adversely affected"

3.21.6. It has been contended that a direction of investigation against an entity under the Act entails the following serious consequences:

(a) Reputational harm/ loss of goodwill;

(b) Significant managerial time spent on the investigation, given that the DG can call for information and deposition(s); and,

(c) Legal and other costs.

3.21.7. It has been contended by the learned Senior counsel for the appellant that it is for this reason that the CCI is required to ensure that its order passed under Section 26 (1) of the Act complies with the mandatory prerequisites of law, i.e., threshold jurisdictional test, which requires the formation of an opinion of contravention of the provisions of the Act 'in no uncertain terms'. This is also relevant given that the DG has the power to expand the scope of the investigation and conduct a fishing inquiry.

3.21.8. It has been further contended that the investigation by the Director General involves an intrusive and free-ranging inquiry into every aspect of an entity's business including in relation to an entities commercially sensitive information, which has a tremendous impact on the entity being investigated. For the purposes of carrying out an investigation, the DG has been conferred with "the same powers as are vested in a civil court" under the Code of Civil Procedure 1908, while trying a suit. These specifically include the power to (i) summon and enforce the attendance of any person; and (ii) direct the discovery and production of documents. Failure to comply with any direction of the DG has been made punishable with fine of up to INR 1 crore. The commencement of an investigation under Section 26(1) of the Act involves substantial and significant civil consequences.

It has been stated that if the intention of the legislature was to permit an investigation into every allegation that may be made, the requirement of formation of a "prima facie opinion" would never exist in the Act. This specific requirement imposed by the law on the CCI is significant and mandatory and requires compliance which compliance must be disclosed from the reasons as contained in the order under Section 26(1) in no uncertain terms.

3.21.9. It has been contended that the High Court of Delhi in the Google case has held that the powers of the Director General during such an investigation are far more sweeping and wider than the powers of investigation conferred on the Police under the Code of Criminal Procedure 1973. It has been stated that the Delhi High Court in the Google case has observed as under;

> "18(E) It would thus be seen that the powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on the Police under the Code of Criminal Procedure. While the Police has no power to record evidence on oath, DG has been vested with such a power."

3.21.10. It is stated that therefore, it may not be correct to aver that an order under Section 26(1) does not entail any civil

consequences. On the contrary, an order under Section 26(1) has very serious consequences, which casts an additional responsibility on the CCI to ensure that the jurisdictional threshold are satisfied prior to referring a matter for investigation under Section 26(1) of the Act.

3.21.11. It has been contended that the CCI relied on ***Cadila Healthcare v CCI***, (2018) 252 DLT 647(***Cadila Case***) to argue that there is no harm to business reputation due to an inquiry under Section 26(1) of the Act. However, the reliance on the Cadila *Case* is misplaced and erroneous, given that the Cadila *Case* has been challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court has passed an interim order that no coercive steps can be undertaken, and as such, the reliance on the Cadila Case is misplaced. It is stated that the CCI has sought to rely on the number of informations received and number of cases directed for investigation. It is further stated that the same is irrelevant for the purposes of the present case, as the validity of the CCI Order will be examined solely on the basis of reasons set out in the CCI Order alone and not on the basis of number of other cases directed for investigation by the CCI.

3.21.12. It has been contended that the CCI averred before the learned Single Judge that the proceedings under Section 26 of the Act are time-bound and should not be delayed in the interest of a free and fair market and economy. It is further contended that the CCI is mandated under the provisions of the Act to only direct an investigation after forming a prima facie opinion of contravention of the provisions of the Act, in no uncertain terms. An investigation cannot be directed merely on the grounds that proceedings before the CCI are time bound and such proceedings are in the interest of a free and fair market and economy. The averment of the CCI is contrary to the scheme of the Act, which unambiguously mandates that an investigation can only be directed by the CCI after the formation of a prima facie opinion of contravention of the provisions of the Act, based on due consideration of the factors laid down under Section 19(3) of the Act. It has been further stated that by way of such submissions that the CCI has attempted to circumvent its statutory mandate set out under Section 26(1) of the Act.

3.21.13. Regarding the CCI is merely required to record "some reasons", it has been contended that the CCI has sought to defend the CCI Order by submitting that since it is required to

record only "some reasons" in an order under Section 26(1) of the Act, the CCI Order is a valid order. However, such submission is incorrect and is premised on a selective reading of the judgment of the Hon'ble Supreme Court in CCI v. SAIL and completely ignores para 97 of the judgment. The Hon'ble Supreme Court in para 97 of the CCI v. SAIL judgment has observed that "at the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons but must **express its mind in no uncertain terms that it is of the view that prima facie case exists**, requiring issuance of direction for investigation to the Director General". Therefore, though the CCI is required to record "some" or "minimum" reasons in an order under Section 26(1) of the Act, it is not absolved from expressing its prima facie opinion of contravention of the provisions of the Act in "no uncertain terms" and therefore, as the CCI has failed to do so in the CCI Order and on this ground alone, the CCI Order should be set aside.

3.21.14. In support of his contention, the learned Senior counsel for the appellant has placed reliance upon the following extracts from the judgment of the Hon'ble Supreme Court in CCI

v. SAIL, in respect of the orders passed in an administrative proceeding.

> **"95.** The Court examined various judgments of this Court in relation to its application to administrative law and held as under: (Shukla &Bros. case, [(2010) 4 SCC 785] pp. 791-92, paras 11 &13-14)
>
> *"11.* The Supreme Court in S.N. Mukherjee v. Union of India, [(1990) 4 SCC 594] while referring to the practice adopted and insistence placed by the courts in United States, emphasised the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said **'administrative process will best be vindicated by clarity in its exercise'**. To enable the courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlying the action under review. This Court with approval stated: (SCC p. 602, para 11)
>
> *'11 .* ... "the orderly functioning of the process of review requires that the **grounds upon which the administrative agency acted be clearly disclosed** and adequately sustained".'
>
> ...
>
> *13.* At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. **Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; Firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice**. **These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements**. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher court in the event of challenge to that judgment ... .
>
> *14.* The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and

> granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the court should meet with this requirement with higher degree of satisfaction. **The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders**."

It has been stated that in this very judgment, the Hon'ble Supreme Court while referring to other decisions held that **it is essential that administrative authorities** and Tribunals should accord fair and proper hearing to the affected persons and **record explicit reasons in support of the order** made by them.

Reliance has also been placed upon paragraphs 96 and 97 of the aforesaid judgment and the same reads as under;

> **96.** Even in cases of supersession, it was held in Gurdial Singh Fijji v. State of Punjab, (1979) 2 SCC 368 that reasons for supersession should be essentially provided in the order of the authority. **Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law**. Clarity of thoughts leads to clarity of vision and therefore, proper reasoning is foundation of a just and fair decision. Reference can be made to Alexander Machinery (Dudley) *Ltd.* v. Crabtree[1974 ICR 120] in this regard.

97. The above reasoning and the principles enunciated, which are consistent with the settled cannons of law, we would adopt even in this case…"

3.21.15. It has been contended that though the CCI in an order under Section 26(1) is required to give "some" / "minimum" reasons, it must at the very least (a) disclose the grounds upon which the CCI formed a view of contravention of the provisions of the Act and (b) demonstrate a clear link between the materials before the CCI and the opinion formed by the CCI. The CCI Order fails to satisfy either of the aforesaid two tests.

3.21.16. Regarding the CCI has deliberately passed such an order, as a detailed order may influence the DG during its investigation against the appellants, it has been contended by the learned Senior counsel for the appellant that as a matter of practice, whenever the CCI passes an order directing the DG to investigate a matter under Section 26(1) of the Act, it states that "nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein." (**Para 29 of the**

CCI Order). The stand that the Director General may be swayed by reasons provided by the CCI is quite unacceptable given the statutory mandate that the CCI must express a prima facie opinion of contravention of the provisions of the Act. It has been further contended that in the event the submissions above made by the CCI are accepted, the same would result in following serious consequences:

a. The CCI's role in Section 26(1) of the Act will be reduced to a mere post office, as it will be simply forwarding allinformation(s) received to the DG for investigation and will not be required to apply its mind to the information(s) and forward only those information(s) to the DG that merits investigation.

b. Given that there is no right of hearing at the Section 26(1) stage, the only protection available to anopposite party against arbitrary exercise of power by the CCI, i.e., disclosure of mind in no uncertain terms with reference to material on record, will be taken away (pertinently, there is no other protection available to an opposite party in the form of opportunity of hearing, reasoned order etc.).

c. An opposite party will be subjected to a very intrusive investigation without there being any checks and balances.

3.22. In respect of the issue that the CCI Order failed to satisfy the existence of jurisdictional facts of contravention of the provisions of the Act, it has been contended by the appellant that the impugned order fails to consider that the CCI Order does not demonstrate the formation of a prima facie opinion on the

contravention of the provisions of the Act, which by necessary implications would have involved the formation of a view on:

a. the existence of an 'agreement' in contravention of the provisions of the Act;

b. the agreement being between enterprises at different stages of a production chain; and,

c. an appreciable adverse effect on competition ("**AAEC**")being caused or likely to be caused by this agreement, having regard to the factors enumerated under Section 19 (3) of the Act.

3.23. In respect of the issue that the CCI Order seeks to direct an investigation against the appellant for the alleged contravention of the provisions of Section 3(4) of the Act, the appellant has submitted that each of the three elements mentioned above paragraphs are jurisdictional facts and necessary pre-requisites for establishing a prima facie case of contravention under the provisions of the Section 3(4) of the Act. Without the existence or establishment of such jurisdictional facts, the CCI did not have the jurisdiction to pass the CCI Order under Section 26 (1) of the Act. The learned Single Judge despite recognizing that one of the aspects of judicial review is to examine the "decision making process", has failed to appreciate that the CCI Order completely fails to address these

three essential jurisdictional facts. Accordingly, the CCI Order is bad in law and liable to be set aside.

3.24. In respect of the issue relating to existence of an agreement in contravention of the provisions of the Act, it has been contended that the Informant had not placed any "agreement" before the CCI that demonstrated the allegations of deep discounting, exclusive tie-ups, preferred sellers and/or preferential listing. Pertinently, even the CCI in the CCI Order fails to record any conclusion that there exists an agreement in contravention of the provisions of the Act to which the appellant is a party to. The only agreement identified by the informant in the Information was between Amazon and its sellers. It has been stated that it has been the categorical stand of the appellant before the learned Single Judge that the CCI Order, failed to form an opinion (even a prima facie one) as to the existence of an agreement to which the appellant was a party.

3.25. It has been stated that the appellant has in its writ petition before the learned Single Judge clearly pleaded that :

> "11. FOR THAT the Impugned Order fails to record any finding that there is an agreement, let along an agreement in contravention of the provisions of the Competition Act. The Impugned Order only records that the Information's allegations relating to four supposed "practices" namely, (a) exclusive

> launch of mobile phones; (b) preferred sellers on the marketplace (c) deep discounting ; and (d) preferential listing or promotion of private labels. Further the Impugned Order does not identify in clear terms the parties to these unilateral practices and how the same would fall with[in] the ambit of Section 3(4) of the Competition Act.
>
> 12. Instead of identifying such alleged ant-competitive agreements the Impugned Order refers to the … alleged unilateral practices of the Petitioner. …. It is respectfully submitted that mere unilateral practices of an enterprise do not amount to an "agreement" for the purpose of Section 3 of the Competition Act. An agreement by its very definition under the Competition Act, requires the concurrence of wills, i.e, it is a bilateral action having the concurrence of two or more parties. Furthermore, it much be noted that the only agreement that the Information identified was the Amazon Seller Agreement. No Agreement of any nature was identified by the Informant with respect to the Petitioner. …"
>
> (Vol. II, p. 124 at 148,149)

The CCI had in its Objection to the writ petition not denied the pleadings made by the appellant and therefore, the orders passed by the CCI and the learned Single Judge deserves to be set aside.

3.26. It has been contended that the Hon'ble Bombay High Court (Division Bench)in **Star India *v CCI,*** 2019 SCC Online Bom 3038 (**the Star Case**), a decision that is binding on the CCI, held that while considering a contravention of Section 3(4) of the Act, the CCI ought to render a prima facie finding as to the existence of an agreement. The Bombay High Court in the said decision has held as under:-

> "83. In the Impugned Order, in order to hold a prima facie contravention of Section 3(4), CCI ought to have formed a prima facie view that there exists an agreement either between Star/Sony and NSTPL which provides for a refusal to produce, supply, distribute, store or trade in goods or provision of services with/to NSTPL and that such agreement causes AAEC."

3.27. In respect of the issue regarding different Stages of a Production Chain, it has been contended that the CCI has failed to examine the question of whether the appellant, i.e., an online marketplace platform and the sellers/manufacturers (with whom the appellant is alleged to have entered into anti-competitive agreements with) are situated at different levels of a "production chain", as required for a violation of Section 3(4) read with 3(1) of the Act. It has been further contended that for the CCI to direct an investigation into a violation of Section 3(4) of the Act, the agreement which is alleged to have contravened the Act must be between enterprises at different stages or levels of a "production chain". It is submitted that the appellant being an online marketplace platform is not a part of the production chain of any product, as it admittedly merely provides intermediary services to sellers of products.

3.28. It has been further contended that the production chain starts from the manufacturer and ends with the sellers of

products. Indeed, there are different production chains for each product that is being sold on the online marketplace platform, however, the online marketplace platform does not become a part of the production chain merely because it provides certain services to the sellers of products on its platform. As such, an online marketplace platform by providing intermediary services such as storage and warehousing, does not become part of the production chain for the purpose of Section 3(4) of the Act. These are adjunct services which are outside the purview of a production chain. It has been stated that the appellant is an online commerce marketplace platform on which various sellers sell different products which are purchased by customers. The platform neither buys the goods nor sells them. It only facilitates the sale and purchase of products by providing intermediary services. The online marketplace provides a platform to the seliers for sale of products but does not add any value to the products being sold. Unlike a seller, the online marketplace platform does not take title to goods but provides intermediary services for the sale of such products on its platform.

3.29. It has been further contended that the appellant stands on the same footing as an entity which owns and operates a shopping mall. Similar to an entity which owns and

operates a shopping mall, the appellant only provides a platform for the different sellers to sell their products to consumers that visit the shopping mall. Merely providing the platform, i.e., space in the shopping mall, does not make the appellant a part of the production chain of the products sold in the shopping mall. The owner of a shopping mall also provides several services such as parking, security, maintenance etc., however, the provision of such services does not make the owner of a shopping mall a part of the production chain of the products sold in the shopping mall.

3.30. It has been further contended that the CCI has sought to argue that a physical mall is completely distinct from the marketplace of the appellant as in the CCI's view an e-commerce marketplace is more closely involved in supply and distribution and is a stakeholder in the said process by earning commissions. This averment of the CCI fails to recognise that physical malls are in the nature of business enterprises that are more involved in commercial activities in their premises, and not mere landlords. This is for the following reasons:

a. Malls can have rent based on sales revenues;

b. Malls organise events to attract footfall;

c. Malls organise festivalswhere discounts are offered by shops (across the mall);

d. Malls offer various services like parking, valet services, security and maintenance services;

e. Malls advertise and provide space for brands to advertise inside as well as outside the mall; and

f. Malls provides home delivery and ancillary logistics services.

It is stated that therefore, it is completely incorrect to suggest that a physical mall is completely distinct from an e-commerce marketplace

3.31. It has been further contended that it is pertinent to note that there are tens of thousands of products which are sold on the marketplace platform of the appellant. It would be absurd to conclude that the appellant becomes a part of production chain for all the products sold on its platform. It has been further contended that the phrase "different stages or levels of production chain" which are found in Section 3(4) of the Act are words of limitation, and the section cannot be read by ignoring those words. It has been stated that if the words are not given their due importance, it would render the words redundant, which would be against all cannons of statutory interpretation. Therefore, as the appellant is not part of the production chain of the products sold on its online marketplace platform, any agreement entered into by the appellant to

provide services to sellers on its platform cannot be held to be an agreement between enterprises operating at different levels of the production chain. Accordingly, such an agreement could not have formed the basis for the CCI's direction to investigate violation of Section 3(4) read with Section 3(1) of the Act. Hence, the orders passed by the CCI and the learned Single Judge deserves to be set aside.

3.32. It has been contended that during the oral submissions before the learned Single Judge, the CCI had submitted that the words "production chain" as used in Section 3(4) of the Act would derive its colour from the latter part of Section 3(4) of the Act, i.e., "supply, distribution, storage, sale or trade". It is stated that such a submission is completely erroneous and contrary to the principles of statutory interpretation. The same completely ignores the language used in Section 3(4) of the Act. The provision expressly refers to "enterprises or persons at different stages or levels of production chain in different markets" and thereafter specifically states that the "agreement … in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services". Therefore, whilst "production chain" refers to entities, "supply, distribution, storage, sale or trade" refers to the content

of the agreements. Evidently, these two are different aspects and the CCI's submission seeks to erroneously ignore the former criteria, i.e., there must be an agreement between enterprises at different stages or levels of the 'production chain'.

3.33. It has been contended that the words occurring in the latter half of the Section 3(4) would colour the phrase "production chain" is plainly wrong for two reasons:

(i) A reading of Section 3 (4) makes it clear that it focuses upon the nature of the entities and their relationship, and not the subject matter of the agreement. The agreement has to be between persons at different stages or levels of "the production chain". If this precondition is not satisfied, the section is not attracted. The subject matter of the agreement is described in language of width: it can be an agreement for production commerce supply, storage, distribution etc. and may relate to sale price of goods, and may also relate to any one of the elements in the non-exclusive list set out in the provision. The CCI's reading of the provision confuses between the primary requirement of the relationship between the parties (different stages of the production chain) and the content of the agreement (distribution, sale, storage etc.)

(ii) The words "different stages or levels of the production chain" are the defining feature of the provision and are the words of limitation. The submission on behalf of the CCI would in effect be an invitation to ignore the words of limitation and broaden the scope Section 3 (4) of the Act beyond the language used therein.

3.34. It has been contended that the Parliament has carefully crafted the provision by inserting two requirements that have to be fulfilled in order to enable the CCI to exercise its

power. The first is that the agreement should be at different stages or levels of the production chain, and the second should be that the agreement causes or is likely to cause AAEC. The submission of the CCI invites this Hon'ble Court to empower the regulator to order an investigation into all agreements in respect of production supply storage and distribution of goods without examining either fulfilment of the limitation (different stages or levels of the production chain) or the prima facie existence of facts and circumstances that show an appreciable adverse effect on competition. It has been further contended that the CCI has sought to argue that "production chain" must be read as supply chain. Whilst making the above submission during the oral submissions before this Hon'ble Court, CCI had referred to the judgment of the Hon'ble Supreme Court in **Excel Crop Care Ltd v. CCI**, (2017) 8 SCC 47. It is important to note that the *Excel Crop Care* decision was a decision regarding collusive bidding (a horizontal agreement in violation of Section 3(3) of the Act, where an appreciable adverse effect on competition ("**AAEC**") is presumed and as opposed to Section 3(4) of the Act, AAEC need not be established at the prima facie stage. Further. the reference made in paragraph 21 of this judgment to the "supply side" is wholly unrelated to vertical agreements that are in

question here, and was instead a discussion regarding how competition law seeks to regulate enterprises selling goods to consumers, for the benefit of said consumers. This does not, in any manner, take away from the statutory requirement under Section 3(4) of the Act to establish an agreement between persons at different levels of the 'production chain'.

3.35. It has been contended that in response to the submission of the appellant that Section 3(4) of the Act is not applicable to the facts of the present case, it has been submitted by the CCI that it can proceed against the appellant under Section 3(1) of the Act which as per the CCI is wider in scope. In this regard, it has been stated that the scope of the present proceedings before this Hon'ble Court is to examine if the CCI Order meets the jurisdictional threshold for initiating an inquiry under Section 3(4) of the Act. In the event that the appellant is able to demonstrate that the CCI Order does not satisfy such jurisdictional thresholds, CCI cannot be permitted to justify the Order by relying on other provisions of the Act, which do not form the basis for passing the CCI Order. In Arguendo, and on a without prejudice basis, the CCI order fails to meet the jurisdictional threshold under Section 3(1) of the Act as well. It is further stated that Section 3(1) also requires an agreement to

be identified and an AAEC to be found. Even if an investigation is to be directed under Section 3(1) of the Act, the CCI is required to consider the factors laid down under Section 19(3) of the Act and prima facie establish that the agreement in question causes or is likely to cause an AAEC India. It has been further stated that reliance on Section 3(1) of the Act by the CCI does not absolve it from its statutory duty to analyse the factors set out under Section 19(3) of the Act for a prima facie finding of AAEC in India. It is further stated that the CCI Order fails to examine AAEC.

3.36. In respect of the issue regarding appreciable Adverse Effect on Competition, it has been contended by the learned counsel for the appellant that the CCI Order ought to have carried out a prima facie analysis of the factors under Section 19(3) of the Act to show how the alleged agreement causes or is likely to cause an AAEC. In the absence of such an analysis of Section 19(3) factors, the CCI could not have come to a conclusion of contravention of the provisions of Section 3(4) of the Act, as an agreement is in contravention of the provisions of Section 3(4) of the Act **only if** such an agreement causes an AAEC. The same is evident from a bare perusal of Section 3(4) of the Act which specifically stipulates that the agreement shall

be in contravention of the section "if such agreement causes or is likely to cause an appreciable adverse effect on competition in India". As such an agreement may be considered to in contravention of the provisions of Section 3(4) of the Act only if such an agreement causes or is likely to cause an appreciable adverse effect on competition in India.

3.37. It has been contended that factors to be considered by the CCI to examine if an agreement causes AAEC or not, have been provided for in Section 19(3) of the Act. Pertinently, Section 19(3) (a) to (c) sets out adverse impact of an agreement on competition and Section 19(3) (d) to (f) sets out positive impact of an agreement on competition. Therefore, the CCI in order to arrive at a finding on AAEC is required to consider both adverse and positive impact of the agreement. The CCI cannot ignore the legislative guidance provided in terms of Section 19(3) as to what constitutes AAEC. It has been further contended that the CCI Order fails to undertake any analysis (leave alone recording any prima facie opinion) if any alleged agreement to which the appellant is party, "causes or is likely to cause an appreciable adverse effect on competition in India". Therefore, the CCI Order deserves to be set aside on this ground alone.

3.38. It is contended that the Hon'ble Bombay High Court in the Star Case, i.e., **Star India v CCI,** *2019 SCC* Online Bom 3038, held that CCI must undertake an analysis under Section 19(3) of the Act at the stage of forming a prima facie opinion.

> "80. Another aspect that leads us to hold that the Impugned Order cannot be sustained is that the Petitioners as also CCI were ad idem as to the onus cast upon CCI under Section 26(1) of the Act. **This meant that a prima facie finding AAEC would be an essential and mandatory finding before CCI could direct investigation**. However, the Impugned Order lacks this necessary finding. In our considered opinion, the Impugned Order cannot be sustained on this count alone…"
>
> "82. Further, whilst considering a contravention of Section 3(4) of the Act, CCI ought to render a prima facie finding as to the existence of an agreement refusing to deal and that such agreement causes/is likely to cause AAEC in India. However, as already held by us hereinabove, such material finding is lacking in the Impugned Order. …**Before directing an investigation, the CCI ought to have applied its mind to and scrutinized the Petitioners' conduct based on the factors set out under Section 19(3) of the Competition Act…"**
>
> "84. The impropriety of the Impugned Order stands further buttressed from the fact that **whilst it says that the Petitioners have prima facie violated Section 3(4) read with 3(1) of the Competition Act, the factors to arrive at such finding viz Section 19(3) have not been considered**. The Impugned Order is once again found lacking in the requirement to analyse and apply the factors laid down under Section 19(3) of the Competition Act and therefore cannot be sustained."

3.39. It has been contended that a perusal of the above makes it apparent that analysis of factors provided for in Section 19(3) of the Act is *sine qua non* for arriving at a finding of

contravention of the Section 3(4) of the Act. Additionally, such an analysis needs to be undertaken even at the stage of formation of an opinion under Section 26(1) of the Act. The purpose of carrying out a prima facie analysis of AAEC based on the Section 19(3) factors at the Section 26(1) stage is to ensure that only those information(s) that merit investigation are forwarded to the DG. In the counterfactual, if the prima facie AAEC analysis is not required or necessary then every information filed with the CCI would be directed for investigation, which is not the intent of the legislature at the Section 26(1) stage.

3.40. It has been contended that the decision of the Bombay High Court in the Star *Case* though cited finds no mention in the Impugned Order and has not been addressed by the CCI at all during the oral arguments. The decision although under appeal before the Hon'ble Supreme Court, has not been stayed and therefore, binds the CCI. The CCI before the learned Single Judge as well as before this Hon'ble Court (during oral submissions) submitted that it was not required to analyse factors mention in Section 19(3) at the stage of Section 26(1) of the Act.

3.41. It has been stated that in this regard, the relevant extract of the affidavit filed by the CCI before the learned Single Judge reads as under:

> "33. On the issue of assessment of AAEC at the time passing an order under Section 26(1), it is respectfully submitted that there is **no necessity of such a 'prima facie' finding at that stage.**
> …
>
> 35. It is respectfully submitted that the very nature of factors enumerated above require detailed analysis not only of the facts surrounding the impugned conduct but also aspects of economics and law. **Therefore, it would be contrary to the legislative scheme and the very nature of an order passed under Section 26(1) of the Act, if the requirement of prima facie determination of AAEC is read into it**. Moreover, the Petitioner is wrong in suggesting that the rule of reason in determining AAEC is required to be applied in totality at the prima facie stage, when no investigation into the alleged actions/conduct has yet been carried out by the Respondent Commission. As stated above, the exercise of assessing AAEC requires going into facts and evidence both in relation to the conduct and its effect on the market especially in light of the factors enshrined under Section 19(3) of the Act and is not a perfunctory exercise, as it entails serious consequences on the marker and its constituents. The Answering Respondent at the stage of Section 26(1) of the Act, in terms of settled jurisprudence, particularly CCI v. SAIL (supra), is not required to conduct a full-fledged enquiry, particularly when it is handicapped in the absence of detailed findings of investigation at that stage."

3.42. It has been contended by the learned counsel for the appellant that it was submitted by the appellant before the learned Single Judge that by virtue of Regulation 18(2) of the CCI (General) Regulations, 2009, as the inquiry commences only post an order under Section 26(1) of the Act, the CCI is not

bound to consider provisions of Section 19(3) of the Act at the stage of passing an order under Section 26(1) of the Act. It has been submitted that the submissions made by the CCI before this Hon'ble Court and before the learned Single Judge (as extracted hereinabove) are devoid of any merits for the following reasons:

(a) Such submission is contrary to the judgment of the Hon'ble Bombay High Court in the *Star Case* (Para 80-84, as extracted hereinabove) wherein the Hon'ble Bombay High Court has held – (i) that for a finding on contravention of the provisions of the Section 3(4) of the Act, it is imperative that there should be a finding on AAEC on the basis of provisions of Section 19(3) of the Act, and, (ii) an analysis of the provisions of Section 19(3) must be undertaken at the stage of Section 26 as well.

(b) Such submission is contrary to the provisions of Section 3(4) of the Act itself, which provides that an agreement shall be considered to be in contravention of the provisions of the Act "if such agreement causes or is likely to cause an appreciable adverse effect on competition in India". As such factors are provided under Section 19(3) of the Act, at the stage of formation of a prima facie opinion of contravention of Section 3(4) of the Act, CCI cannot be permitted to ignore the factors contained in Section 19(3) of the Act;

(c) If the submission of the CCI is accepted then it will lead to an absurd situation wherein the CCI will be required to apply different tests for violation of provisions of Section 3(4) - at the stage of Section 26(1) of the Act as opposed to other stages of the proceedings before the CCI.

(d) Such a submission of the CCI does not have any statutory support in as much there is no provision in the Act which provides that the test for contravention of Section 3(4) of the Act is different at the stage of Section 26(1) as against other stages of proceedings before the CCI;

(e) If the submission of the CCI is accepted, it will result in giving unbridled powers to the CCI, as the CCI will be permitted

to conclude that an agreement is or is not in violation of the provisions of Section 3(4) of the Act without considering the factors provided under Section 19(3) of the Act. It is submitted that the factors as provided under Section 19(3) of the Act, are guiding principles for the CCI to determine whether or not an agreement causes AAEC. Such guiding principles must necessarily be considered and analysed by the CCI, irrespective of the stage of proceedings.

(f) The submission of the CCI is also contrary to provisions of Section 19(1) of the Act. As per Section 19(1) of the Act, the "inquiry" is undertaken by the CCI on receipt of Information. Pertinently, at the stage of mere receipt of information, Section 26(1) order does not exist. Therefore, CCI is required to keep into consideration factors enumerated under Section 19 of the Act at every stage and not merely after passing an order under Section 26(1) of the Act. The purpose of analysing the AAEC factors at the prima facie stage is to ensure that only those cases are referred to the DG that merit investigation.

(g) Without prejudice to the above, it is submitted that submission made by the CCI is misleading and is contrary to the provisions of Section 19(3) of the Act itself. It is submitted that Section 19(3) does not even use the word "inquiry". Therefore, even if the submission made by the CCI is accepted that the "inquiry" commences only after issuance of an order Section 26(1) of the Act, even then the factors contained in Section 19(3) of the Act ought to have been considered at the stage of Section 26(1) of the Act. This needs to be compared with Section 19(4) which uses the word "inquiring". The legislature has deliberately used different words in these sections and this should be given effect to. This makes it clear that the legislative intent was that Section 19(3) would be considered at the prima facie stage as well.

(h) Further, such an assertion is contrary to the CCI's own practice in the cases set out below, where the CCI analysed the factors provided under Section 19(3) of the Act at the prima facie stage itself:

I. **Mohit Manglani v. Flipkart India Pvt Ltd,** 2015 SCC Online CCI 61 (an order involving the Appellant);

II. **Vishal Pande v Honda Motorcycle and Scooter Pvt Ltd,** 2018 SCC Online CCI 15;

III. **M/s Karni Communication Pvt Ltd. & Anr. vs Haicheng Vivo Mobile (India) Pvt Ltd. & Ors,** 2019 SCC Online CCI 11 (pr. 27-28).

3.43. It is stated that therefore, the CCI has committed a fatal error on interpretation of the provisions of Section 19(3) and Section 3(4) of the Act. This error goes to the root of the matter. A bare perusal of the CCI Order demonstrates that the CCI has not undertaken any analysis of existence of jurisdictional facts for a contravention of the provisions of Section 3(4) of the Act. Having failed to do so, the CCI Order lacks jurisdictional facts and ought to be set aside by this Hon'ble Court exercising its powers of judicial review.

3.44. It has been contended that the CCI has relied on Para 23 and Para 26 as the only instances in the CCI Order wherein it has examined AAEC. The relevant extracts of Para 23 and 26 are produced below:

> "23 … Thus, exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that **may** lead to an appreciable adverse effect on competition."

> "26. **… It needs to be investigated** whether the alleged exclusive arrangements, deep-discounting and preferential listing by the Ops are being used as exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competiton contravening the provisions of Section 3(1) read with Section 3(4) of the Act"

It has been stated that a perusal of the above extract makes it evident that:

g. There is no analysis or finding of AAEC in both the above paragraphs, reliance on which has been placed by the CCI. In one instance, the CCI is speculating and in the other, the CCI is merely stating that it needs to be investigated if there is any AAEC;

h. The CCI has not examined the factors as provided under Section 19(3) of the Act to determine whether*prima facie* the agreements cause or are likely to cause an AAEC in India.

Therefore, it is contended that reliance on Para 23 and 26 of the CCI Order is misplaced.

3.45. It has been contended that the CCI is a creature of the statute and cannot deviate from the mandate of the statute. The Act allows the CCI to investigate only - dominant enterprises for abuse of dominance (Section 4), and agreements if they cause an AAEC (Section 3). The CCI cannot be permitted to investigate anything beyond the express provisions of the Act. In this case, the CCI has expressly recorded its conclusion that that there is no case made out against the appellant of contravention of Section 4. Having arrived at such conclusion, the CCI has sought to investigate appellant under Section 3(4) read with 3(1) of the Act. As submitted above, whilst proceeding against the appellant for an alleged violation of Section 3(4) of the Act, the CCI has failed to examine and establish the existence of

jurisdictional facts in no uncertain terms, which were essential for directing an investigation against the appellant under Section 3(4) of the Act.

3.46. It has been contended by the learned Senior counsel for the appellant that the CCI's mandate is to enforce the Act, not to investigate and examine things that the Act does not cover. If there is no statutory backing for an examination, that examination cannot be allowed. The CCI seems to be making an attempt to exercise control over and regulate affairs over which it has not been conferred jurisdiction under the grab of public interest. The same is evident from the submissions of the CCI before this Hon'ble Court wherein the CCI has sought to proceed against the appellant merely on the basis of certain "serious allegations", which as per the CCI warranted investigation, without even examining the veracity of such information or if prima facie there was any contravention of the provisions of the Act.

3.47. It has been contended that the CCI seems to be approaching this with a premeditated mind – it wants to investigate appellant, and so is figuring out a way to shoe-horn Flipkart's conduct into the Act. That is inappropriate for a

statutory regulator. It is stated that as can be seen from the CCI Order, the CCI has ordered an investigation into conduct that is only prohibited under Section 4 of the Act (i.e., only prohibited when carried out by a dominant enterprise) while explicitly finding that there is no case for dominance made out. This is clearly a case of over-reach. In order to justify this, the CCI has sought to aver that if the submissions of appellant is accepted, the CCI would have no recourse under Act. This again shows that the CCI seems to widen its power to investigate even though there is no express provision enabling it to do so. The same is not permissible under the Act.

3.48. It has been further stated that no case of contravention of Section 3(4) of the Act has been made out. In respect of issue of Preferred Sellers**,** it has been contended that the CCI Order while directing an investigation appears to have erred into coming to a conclusion that the appellant's online marketpiace platform has certain preferred sellers. It is stated that there are no structural links (shareholding, control, common directors, common offices) between the appellant and any seller on its online marketplace platform. Therefore, the question of preferred sellers does not arise.

3.49. It has been contended that as noted by the CCI in the **AIOVA *v.* Flipkart,** 2018 SCC Online CCI 97 (an order involving the appellant), the link between appellant and WS Retail was severed as of 2012. In fact, WS Retail ceased to be a seller on the appellant's online marketplace platform from April 2017. The CCI has in the said case recorded that:

> **"**31.The Commission also observes that so far as the issue of preferential treatment given by OP-1 to exclusive seller (WS Retail Services Private Limited) which is stated to be owned by OP-2, suffice to point out that the Informant itself has admitted in the Information of such structural link between OP-2 and WS Retail existed only till 2012. **Hence, no such concern is present today.** Additionally, Flipkart has pointed out that **WS Retail Services Pvt. Ltd. is no longer a seller on the Flipkart Marketplace post 11 April 2017**."

3.50. It has been contended that the CCI Order failed to even refer to its earlier order in the AIOVA Case where it had come to a categorical conclusion that there were no structural links between the appellant and any of its sellers including in particular WS Retail. As a regulator, it was mandatory for the CCI, to follow the factual findings recorded by it in the AIOVA Case in relation to the same entities. However, the CCI Order fails to do so, let alone even refer to the AIOVA Order while directing investigation against the appellant. It is stated that the appellant had categorically submitted before the learned Single judge that

there were no structural links (by way of any shareholding, board representation, or management rights, or commonality of employees or offices) between the appellant and the sellers on the its marketplace platform. Indeed, this structural link is seminal, as it is on the reliance of this link, that the CCI accepts the allegations against the appellant. It is on the basis of the alleged structural links (which do not exist in case of the appellant) that the CCI arrived at its prima finding of preferred sellers/preferential treatment. Considering that the CCI in the AIOVA Case already noted the absence of such structural links, the CCI ought not to have directed the investigation against the appellant for the same facts.

3.51. It has been contended that the allegation against the appellant is that Omnitech, a seller on the appellant's online marketplace platform, is owned by Consulting Rooms Pvt Ltd, whose director Mr Ajay Sachdeva was also a director of WS Retail in 2016. However, as the CCI had already noted that there were no structural links between the appellant and WS Retail after 2012, any link between Omnitech and WS Retail in 2016 is irrelevant and cannot be even prima facie considered to constitute a link with the appellant, as the CCI has incorrectly

noted. It is stated that in its submissions, the CCI has sought to assign various reasons to justify a complete deviation from its AIOVA Order. It is submitted that none of the reasons now given by the CCI merit any consideration by this Hon'ble Court, as no such reasons were given in the CCI Order. Pertinently, as stated above, the AIOVA Order does not even find a mention in the CCI Order, leave alone any reasons for not following the same. Additionally, one of the reasons given by the CCI for not following AIOVA Order is that e-commerce market is an evolving market. It is submitted that the CCI has failed to state facts in support of these submissions. Additionally, the CCI has also failed to provide factual details in its submissions before this Hon'ble Court, justifying a complete deviation from AIOVA Order.

3.52. It has been contended that the notion of "preferred seliers" is the cornerstone of the entire edifice on which the CCI Order is based. The CCI alleges preferential treatment and listing for preferred sellers, deep discounting to preferred sellers, and exclusive launches through preferred sellers. Therefore, in the absence of any evidence of preferred sellers for a prima facie analysis under Section 26(1) of the Act, the CCI Order cannot be sustained. In any event, allegations of preferential treatment, or

discrimination in favour of certain sellers, can only be examined under Section 4 of the Act, and would only violate the Act, if the enterprise in question was dominant, which the CCI has explicitly rejected in this case.

3.53. In respect of the issue regarding deep discounting it has been contended that the CCI Order directing an investigation appears to have accepted the allegation of the Informant that the appellant indulges in deep discounting. However, the CCI Order fails to appreciate that discounts are legal under the Act, and "deep" is merely an adjective. In fact, there is no statutory meaning to the term "deep discounting". It has been further contended that low prices are good, and are in fact a goal of competition law – low prices means efficiencies are being generated and passed on to customers. Without prejudice, discounts can be claimed to be of some issue when (a) they lead to prices below cost, (b) they are provided by a dominant enterprise, and (c) they are provided with a view to eliminate competition. The CCI order contains no findings on these three aspects. It is stated that the investigating discounts that do not meet the standard of predatory pricing in Section 4 of the Act (which has the elements set out in the paragraph above. above)

is a classic case of over-reach by the CCI. It is submitted that even this alleged practice would not reach to the level of an agreement. A unilateral conduct by the parties can be examined only under Section 4 of the Act and not under Section 3(4) of the Act.

3.54. It has been further contended that to support the allegation of deep discounting, the CCI has relied on the ITAT Order to submit that the appellant seems to deploy a business strategy of incurring loss in the short run by way of 'predatory pricing', to reap benefits and capture the market in the long term. Such reliance on observations in the ITAT Order in the present proceedings is misplaced and untenable in light of the reasons given below:

a. The assessee before the ITAT, was not the appellant. The assessee in respect of which the observations were made by the assessing officer was Flipkart India Private Limited, who is not even party to the present proceedings. Therefore, the ITAT Order cannot be seen as evidence of the appellant's business model.

b. In any case, the observations relied upon are observations of an assessing officer, whose decision was eventually overturned by the ITAT.

c. Moreover, the reliance on the ITAT order by the NCLAT in the AIOVA Case has been stayed by theHon'ble Supreme Court.

d. Even if true, and applicable to the appellant, the allegations in the ITAT order go to discounting, which is not prohibited under Section 3(4) of the Act.

3.55. In respect of the issue regarding preferential listing, it has been contended that the appellant influences search results in favour of certain preferred sellers who are listed at the top of the page and the non-preferred sellers are pushed out. In this regard, it is stated that it is crucially important to note that there are no "preferred sellers" since the appellant has no structural links (by way of any shareholding, board representation, common employees or offices) with any seller on its marketplace platform. As such, the question of preferential treatment or preferred sellers does not arise. It has been further contended that the product listings which feature on the top of the page are chosen through an algorithm based on objective parameters (such as customer intent, customer behaviour, customer needs including "product quality" and "speed of delivery").

3.56. It has been contended that the CCI has mischaracterised "Flipkart Assured" as seeking to favour certain sellers in the search rankings. "Flipkart Assured" is an inclusive customer-centric guarantee from the appellant focused on two

deliverables: quality and speed. Flipkart Assured products are verified, packed with care and dispatched safely. It is not selective and is determined by an algorithm on stringent objective parameters. There are over 20,477 sellers who have a product listed as "Flipkart Assured" and the appellant does not have any common shareholding, common director, common employee or common office with any such seller. In any event, allegations of preferential treatment, or discrimination in favour of certain sellers, can only be examined under Section 4 of the Act, and would only violate the Act if the enterprise in question was dominant, which the CCI has explicitly rejected in this case.

3.57. In respect of the issue regarding exclusive arrangements it has been contended that the CCI failed to appreciate that the smartphones which were alleged to be exclusively available on the appellant's marketplace, continued to be available on the manufacturers own website as well. That being the case there can be no question of any exclusivity. It is sated that it is ultimately the prerogative of the manufacturer of smartphones to decide which platform or mode it chooses to sell its products. An allegation of exclusivity, ought to therefore lie

against the manufacturer and not against the platform, which is only an intermediary.

3.58. In respect of the issue regarding the informant abused judicial process by indulging in forum shopping it has been contended that the learned Single Judge failed to appreciate that the Information filed before the CCI was a gross abuse of judicial process, as the Informant has indulged in forum shopping and approached the CCI with unclean hands. It is a settled proposition of law that any party who approaches the court with unclean hands is neither entitled to be heard on the merits of the case nor is the party entitled to any relief. As the Informant is simply a front of CAIT, this is a relevant factor to weigh the credibility of the allegations and the material placed by such Informant. To establish a nexus of the informant with CAIT, the following reasoning was provided by the appellant:-

a. the Informant is a member of CAIT, an important fact that the Informant neglected to mention before the CCI, but admitted before the learned Single Judge;

b. the Informant's President and authorized signatory serves as the Delhi Secretary General of CAIT; and

c. the demand draft submitted by the Informant towards 'filing fees' for filing the Information with the CCI has been furnished by CAIT. **(Vol. IV. P. 471)**.

3.59. It has been contended that in light of the aforesaid, it was imperative for the Informant to disclose that CAIT has pursued vexatious litigation against the appellant by approaching several judicial for a, directly and through its sister entities, raising exactly the same baseless allegations against the appellant.

3.60. Learned Senior counsel for the appellant in support of his submission relied upon the judgment in K.D. Sharma v. SAIL, (2008)12 SCC 481, wherein the Hon'ble Supreme Court held that:

> "… Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the Court, the Court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of Court for abusing the process of the Court."**(Vol. I, Para 64, Page 65).**

3.61. In respect of the issue regarding the appellant ought to have been treated differently from Amazon, it has been contended that there are a number of observations in the

Impugned Order and the CCI Order which confuse the facts between Amazon's case and the appellant's case and this itself is a ground which vitiates the CCI Order. The Informants had alleged the violation of Section 4 of the Act by the combination of Amazon and the appellant – a concept which was rejected by the CCI itself. Having done so, the CCI should have independently examine the case against each of the two platforms on the facts relevant to those platforms. The failure to do so, and the consequences of which are apparent from a reading of the CCI Order, vitiates the CCI Order. The CCI failed to notice that some of the facts which were present in the case of one were not present in the case of the other and this would have result in the CCI taking into account irrelevant considerations, which in turn vitiates the CCI Order.

3.62. It has been further contended that both the CCI Order as well as the Impugned Order erred in treating the appellant on the same footing as Amazon (the other online marketplace being investigated). For the CCI to direct an investigation against the appellant, it ought to have come to a prima facie opinion that the appellant (alone and irrespective of the allegations against Amazon) had contravened the provisions

of the Act. It is submitted that the allegations and the evidence before the CCI against the appellant were qualitatively different from those relating to Amazon. In fact, Flipkart and Amazon are fierce competitors, a fact which seems to have been lost sight of by the CCI as well as the learned Single Judge. This is all the more essential since the CCI Order, at paragraph 15, has specifically noted that there could have been no violation of Section 4 of the Act ('Abuse of Dominant Position") by the two marketplace platforms, as the Act "does not provide for inquiry into or investigation into the case of joint/collective dominance……". Having rejected the allegation of joint dominance against the appellant and Amazon, the only logical step for the CCI was to consider the allegations individually (based on separate factual matrix of the appellant and Amazon) and come to specific prima facie opinions separately with respect to the appellant on the one hand and Amazon on the other. The learned Single Judge erred in failing to appreciate the lack of such consideration in the CCI Order. This is more so, in view of the peculiar factual differences of the two entities which came to be also highlighted during the course of the hearing before the learned Single Judge.

3.63. It has been contended that Amazon itself differentiates itself from the appellant at paragraph 32 of its Writ Appeal by submitting that the CCI has directed an investigation in relation to an alleged violation of Section 3(4) of the Competition Act against the appellant while primarily relying on evidence allegedly relating to the Appellant. On a without prejudice and demurer basis, despite this, the counsel for CCI, during the course of the arguments before this Hon'ble Court attempted to paint both the online marketplace platform entities with the same brush, which is contrary to the scheme of the Act.

3.64. It has been contended that the contention of Amazon that evidence against the appellant is being used against Amazon is not only misleading but also plainly incorrect. It is an admitted position that the only Agreement on record is the Agreement to which Amazon is a party. Amazon does not dispute this. There is no Agreement on record, and none has even been alleged to even be in place in so far as the appellant is concerned. As such, contrary to the submissions of Amazon, it is the evidence and allegations against Amazon which are sought to be attributed against Flipkart. Moreover, it is submitted that unlike in the case of Amazon there are no structural links of any

kind between the appellant and its sellers who operate on the marketplace platform. The CCI is aware of this in view of its categorical findings in the AIOVA Case.

3.65. In light of the aforesaid, it has been contended that the CCI Order was passed without having regard to the mandatory prerequisites under Section 26 (1) of the Act and is therefore liable to be set aside. The Impugned Order passed by the learned Single Judge erred in not exercising the power of judicial review which has been vested in it and therefore, prays to allow the present appeal and set aside the CCI Order.

4. Learned Additional Solicitor General appearing for respondent No.1/CCI has contended before this Court that the order passed by the learned Single Judge dated 11.6.2021 warrants no interference at all, by which the order passed by the CCI under Section 26(1) directing an investigation has been upheld rightly by the learned Single Judge. It has been contended that the order passed by the CCI under Section 26(1) meets the parameter laid down by the Hon'ble Supreme Court in its authoritative judgment in CCI v. SAIL. It has been further contended that the scope of interference in a writ petition against an order under Section 26(1) of the Act of 2002 is

extremely narrow. It is not a case where mala fides are alleged against the Regulator, nor is there any jurisdictional infirmity made out in the peculiar facts and circumstances of the case. It is further contended that the order of the CCI meets with the parameters of Wednesbury reasonableness as held by the learned Single Judge and there is no ground for interference. In fact, it is a sheer abuse of process and the appellant is deliberately delaying the investigation which is imperative in the public interest.

4.1. It has been contended by the learned Additional Solicitor General that the scope of interference in respect of an order under Section 26(1) of the Act of 2002 is quite limited, as held by the Hon'ble Supreme Court in the case of CCI v. SAIL, which is an order under Section 26(1) and this order can neither be in adjudication nor determinative, but merely an inquisitorial, departmental proceedings in the nature of a direction to the Director General to make an investigation. It is neither a judicial nor a quasi-judicial proceedings [CCI v. SAIL, paragraph 31(2)]. It has been further contended that the order under Section 26(1) is administrative in nature and it is passed at a preliminary/preparatory stage (CCI v. SAIL, paragraphs 38 and 39). She has further contended that under Section 26, the

enquiry only commences after Section 26(1) order is issued and therefore, the order passed under Section 26(1) is an order passed at a pre-enquiry stage. She has further contended that what constitutes a prima facie case at the stage of 26(1) must be gleaned not from the stand point of adjudication, but from the stand point "setting the process into motion". (CCI v. SAIL, paragraph 33).

4.2. The learned Additional Solicitor General has further contended that the degree of satisfaction is far higher under Section 33 of the Act of 2002 under which the CCI may pass an injunction during the enquiry as compared to Section 26(1) order. It is an order passed at pre-enquiry stage and not during the enquiry. The power under Section 33 of the Act of 2002 to pass a temporary restraint order, can only be exercised by the CCI when it has formed a prima facie opinion and directed investigation in terms of Section 26(1) of the Act of 2002. Therefore, the formation of satisfaction while passing an order under Section 33 of the Act of 2002 has to be much higher degree than formation of prima facie view under Section 26(1) of the Act of 2002. (CCI v. SAIL, paragraph 31). She has further contended that no notice or hearing is necessary at this preliminary stage while passing an order under Section 26(1) of

the Act of 2002 as held by the Hon'ble Supreme Court in the case of CCI v. SAIL.

4.3. The learned Additional Solicitor General has further contended that the order under Section 26(1) of the Act of 2002 must record "minimal reasons" or at least "some reasons" and elaborate reasons are not required as the CCI is required to express only a "tentative view". She has also stated that no civil consequences arise from an order passed under Section 26(1) of the Act of 2002 as held by the Hon'ble Supreme Court in the case of CCI v. SAIL (paragraph 38). The learned Additional Solicitor General has further contended that the proceedings under Section 26 are time bound and undue time should not be taken in the interest of a free and fair market and economy. Her contention is that the proceedings are time bound only with an object that the market forces can move swiftly and therefore, if anti-practices are not curtailed in time, the damage to the economy can be irreparable. She has further contended that the order passed under Section 26(1) of the Act of 2002 is not an appealable order in contradistinction with the order passed under Section 26(2), 26(6) and 27 of the Act of 2002, which constitutes the determination as held by the Hon'ble Supreme Court in the case of CCI v. SAIL.

4.4. Learned Additional Solicitor General for the CCI has argued before this Court that the appellant/Flipkart has committed a fundamental mistake by treating the order passed under Section 26(1) as an adjudicatory order followed by an adjudicatory process. The learned counsel has argued that Section 26(1) does not set into motion an unstoppable process that necessarily culminates into an adjudication against the entity against whom an enquiry is initiated. On the contrary, if Section 26 is read as a whole, it discloses a comprehensively and thoughtfully construed, stepwise scheme which contemplates not only a fair hearing to the concerned parties at the appropriate stage, but it is characterized by an inherent robustness by which the proceedings may culminate in closure. It has been further argued that the DG may at a later stage can very well order closure by his investigation report and the same can be accepted by the CCI after hearing the concerned parties. It has been further stated that even if the DG finds a contravention, the CCI is nonetheless precluded from rejecting those conclusions after hearing parties and applying its mind to the DG's investigation report.

4.5. Learned Additional Solicitor General for CCI has further argued that Section 26(1) is only the starting point of the

process and it has to be interpreted/viewed through the lens of the other sub-clauses of Section 26 of the Act of 2002. It has been further contended that the Scheme of the Act allows any person even other than the aggrieved person to file an information under Section 19 and under Section 26(1) stage the CCI does not have the benefit of thorough fact finding exercise/investigation carried out by the expert investigator (DG) appointed for this very purpose under the Act of 2002 r/w CCI (General) Regulations, 2009. It has been contended that the only requirement is of a prima facie case for passing an order under Section 26(1). She has further contended that the order passed by the CCI establishes that the allegations and material brought before it were serious enough to warrant an investigation and the expression of a prima facie case at this stage, when the enquiry is yet to take place, cannot and ought not to amount to a predetermination of the issues involved. It has been further contended that the order passed under Section 26(1) entails no civil consequences and awaits an investigation report by the by the DG and expert investigating authority for competition matters and the CCI keeping in view the prima facie material was justified in passing the order under Section 26(1). It has also been brought to the notice of this Court that the CCI

as on 31.3.2019 out of 1008 cases has ordered investigation by passing an order under Section 26(1) in only 422 cases and out of 422 cases in which the investigation was ordered, ultimately only in 135 cases findings have been arrived at in respect of contravention and adverse findings have been arrived at resulting in imposition of sanctions/penalties. Thus, the CCI has duly and robustly applied its mind in all cases and especially in the case in hand.

4.6. Learned Additional Solicitor General has placed reliance upon the following judgment;

i) Cadila Healthcare Ltd., v. CCI, reported in (2018) 252 DLT 647 (DB) (Delhi High Court) (paras 38, 43-44, P.2632, 2635-2637, Vol.13, Flipkart's Writ Appeal)

ii) North East Petroleum Dealers Association v. Competition Commission of India, reported in 2016 CompLR 71 (CompAT) (para 9, p.3337, Vol.16, Flipkart's Writ Appeal)

iii) Karnataka Film Chamber of Commerce v. Kannada Grahakara Koota, W.P.No.19000/2013 (para 9, P.2578, Vol.13,Flipkart's Writ Appeal).

iv) CCI v. Grasim Industries, reported 2019 SCC Online Del 10017 (para 30-35, page 3373-3375; Vol.17, Flipkart's Writ Appeal)

v) Kingfisher Airlines Ltd. V. CCI, reported in (2010) 4 Comp LJ 557 (Bom) (para 6, p.278-293, List of Cases – Vol.I, filed by CCI)

vi) It has also been endorsed in CCI v. Bharti Airtel, reported in (2019) 2 SCC 521 (paras 116-118, p.1897-1898, Vol.9, Flipkart's Writ Appeal).

vii) Whatsapp LLC v. CCI, W.P.(C) No.4378/2021, Delhi High Court, decided on 22.4.2021.

5. In the connected matter i.e., WA.No.563/2021 filed by Amazon Seller Services Private Limited (hereinafter referred to as Amazon), again the common order passed by the learned Single Judge dated 11.6.2021 in W.P.No.3363/2020 is under challenge.

5.1. It has been stated by the learned Senior counsel for the appellant that the appellant/Amazon is a company incorporated under the Companies Act, 1956 and it is classified as a non Government Company. The company has been operating the Amazon Marketplace, an online marketplace which works with third party sellers, who offer for sale to customers a wide variety of products, forming part of the Indian retail market. It has been further stated that All India Online Vendors Association (hereinafter referred to as AIOVA) under Section 19(1)(a) of the Act of 2002 submitted an information alleging that Flipkart was dominant in the market for services provided for online market platforms for selling goods in India and was abusing its dominance under Section 4 of the Act of 2002,

thereby allegations of deep discounting, preferential treatment accorded to certain sellers, such as, WS Retail Services Private Limited and leveraging its dominant position to promote its private labels such as "Smartbuy" and "Billion".

5.2. The contention of the learned counsel for the appellant is that the CCI after granting an opportunity of hearing to the present appellant and by holding a preliminary conference has passed an order on 6.11.2018 dismissing the information filed by AIOVA in terms of Section 26(2) of the Act of 2002. (AIOVA case)

5.3. It has been further stated that the appellant has been subjected to undue harassment on account of various writ petitions preferred before various High Courts by CAIT and its affiliates. A petition was preferred before the Delhi High Court alleging violation of FDI policy i.e., W.P.No.9332/2018 – CAIT vs. Union of India and the Delhi High Court by an order dated 5.9.2018 has disposed of the said writ petition noticing that the Flipkart was located in Bengaluru and the averments contained in the writ petition would be considered by the Enforcement Directorate and if any enquiry or investigation was warranted,

steps in that regard would be taken by the concerned authorities.

5.4. It has been further stated that after disposal of the writ petition filed by CAIT before the Delhi High Court, another writ petition was preferred i.e., W.P.No.7907/2018 filed by Telecom Watchdog before the Delhi High Court on 28.7.2018 and the appellant was made a party. It has been further stated that the High Court was informed that a similar issue was pending and therefore, vide order dated 18.3.2019 the Delhi High Court disposed of the writ petition.

5.5. It has been further stated that the CAIT has filed another writ petition before the Rajasthan High Court ie., W.P.No.14400/2019 and one more writ petition was filed before the Rajasthan High Court i.e., W.P.No.15570/2019 by the Marwar Chamber of Commerce and Industry and the same issue was agitated before the Rajasthan High Court. Therefore, the contention of the appellant is that the CAIT and various affiliated disgruntled trader lobbies were taking recourse to the legal process before the High Courts as well as the CCI by invoking their jurisdiction simultaneously on substantially identical assertions inter alia issues of deep discounting practices,

influencing the pricing of goods and preferential treatment by the appellant's online market place.

5.6. It has been stated that based upon an information submitted by CAIT, without granting a single opportunity to the appellant to respond to the allegations and to explain its position, the CCI has passed the prima facie order directing the Director General, CCI, to cause an investigation to be initiated against the appellant/Amazon. It has been stated that the CCI decided to accord a personal hearing to the appellant/Amazon in AIOVA case barely a year ago and now without hearing the appellant, an order has been passed by the CCI directing an enquiry. The same was challenged before the learned Singie Judge and the learned Single Judge has dismissed the writ petition.

5.7. The appellant has raised various grounds before this Court while challenging the order passed by the learned Single Judge and it has been stated that the learned Single Judge has failed to exercise the power of judicial review vested in the Court under Article 226 of the Constitution of India to interfere with a manifestly unwarranted, arbitrary, unreasonable order passed by the CCI, which resulted in civil consequences

against the appellant. It has been further contended that the learned Single Judge has failed to appreciate that prima facie the order passed by the CCI was ultra vires the objective and purpose of the Act of 2002 and it has been contended that the learned Single Judge has failed to appreciate that the Summum Bonum of the Act of 2002 itself was to foster competition within India. It has been further contended that the learned Single Judge has failed to appreciate that an online market place, which by its very design is an instrument to promote competition could not be treated as anti-competitive, unless there was a clear and cogent evidence to that effect.

5.8. It has been further stated that the learned Single Judge has failed to appreciate that the CCI had failed to furnish either clear or cogent evidence to support the prima facie order. It has been further contended that the learned Single Judge has failed to appreciate that the overreaching public purpose was the objective which underlay the Act of 2002 (CCI vs. SAIL). It has been further contended that the learned Single Judge has failed to appreciate that the said decision was rendered on the basis that the confidentiality would be maintained by the CCI in respect of prima facie order passed under Section 26(1) of the Act of 2002, which persuaded the Court to take the view that the

said orders are administrative in character, however, the CCI did not concede that ever since 16.1.2013 it was publicizing the orders passed under Section 26(1) of the Act of 2002, as a consequence of which the basis of the said decision, itself was displaced.

5.9. Another ground raised before this Court is that the learned Single Judge has failed to appreciate the true effect and purport of the judgment of the Hon'ble Supreme Court in the case of **Competition Commission of India v. Bharti Airtel Limited**, reported in (2019) 2 SCC 521. It has been further contended that the learned Single Judge has failed to appreciate that the prima facie order of the CCI did not disclose any application of mind in relation to: (a) ensuring consumer wellbeing; (b) ensuring adequate and affordable choices for consumers; (c) noticing that a level playing field in fact existed; and (d) noticing that the marketplace protected competition. It has been further contended that the CCI was unable to adduce any material before the learned Single Judge that any of these factors were disturbed.

5.10. It has been further contended that the learned Single Judge has failed to appreciate that if a marketplace

allowed functioning without any form of discrimination and permitted anyone to sell their goods in the marketplace, then greater competition resulted, and accordingly the prima facie order failed to the touchstone of Wednesbury unreasonableness. It has been further contended that the learned Single Judge has failed to appreciate that all the search and algorithms employed by the appellant are responsive to consumer's preferences, such as, delivery speed and customer ratings. It has been further contended that the learned Single Judge has failed to appreciate that the CCI in its "Market Study on E-Commerce In India: Key Findings and Observations" ("Market Study Report") had acknowledged the efficiencies generated by online marketplaces, such as, increased price transparency and the consequent ease in pricing comparison for consumers and allowing business to have an online presence without being required to operate their own websites.

5.11. It has been further stated that the learned Single Judge has failed to appreciate that the prima facie order of the CCI effectively initiated an investigation against an online marketplace which itself existed for the purpose of facilitating the competition, and for which purpose, the Foreign Direct Investment policy permitted a 100% Foreign Direct Investment

(hereinafter referred to as FDI) in the marketplace-based model of e-commerce. It has been further stated that the learned Single Judge has failed to apply the suitable standards of judicial review keeping in view the judgment delivered by the Hon'ble Supreme Court in the case of **Rohtas Industries Limited v. S.D.Agarwal & Anr,** reported in 1969(1) SCC 325. It has been further contended that the learned Single Judge has failed to appreciate the dictum of the Hon'ble Supreme Court in the case of **63 Moons Technologies Limited v. Union of India,** reported in (2019) 18 SCC 401, which affirm the law laid down in **Barium Chemicals v. Company Law Board,** reported in (1966) Supp. SCR 311. It has been further argued that the learned Single Judge has failed to appreciate the decision of the Bombay High Court delivered in the case of **Star India v. Competition Commission of India,** reported in (2019) SCC Oniine Bom 3038, even though it has not been stayed by the Hon'ble Supreme Court in the appeal, which is pending before the Supreme Court.

5.12. It has been further contended that the learned Single Judge has failed to appreciate that the formation of a prima facie view was in the nature of an "essential and mandatory findings before CCI could direct investigation" and its

absence vitiated the prima facie order. It has been further contended that the CCI before passing an order under Section 26(1) of the Act of 2002 could not arrive at a conclusion that a prima facie case exists keeping in view Section 19(3) of the Act (AAEC). It has been further contended that the learned Single Judge has failed to appreciate the jurisdictional aspect of the matter and the jurisdiction of the CCI in passing the order in the absence of cogent material before it. It has been further contended that the learned Single Judge has failed to appreciate that the CCI fell into serious error when it concluded that there was a prima facie evidence of deep discounting on smartphones when in fact the e-mail related to "gym equipments".

5.13. It has been further contended that the learned Single Judge has failed to appreciate that Cloudtail Private Limited and Appario Retail Private Limited were not related to the appellant/Amazon in any manner, either through common share holding or Directors. Hence, the order passed by the CCI deserves to be set aside.

5.14. Much has been argued in respect of the relationship between the appellant/Amazon, Cloudtail and Appario and it has been stated that no relation of any kind exists

between the Amazon, Cloudtail and Appario. It has been stated that the learned Single Judge has failed to appreciate the judgment delivered in the case of **Amazon Sellers Services Private Limited v. Amway India Enterprises Private Limited,** reported in (2020) SCC Online Del 454.

5.15. Various other grounds have been raised in the writ appeal challenging the order passed by the CCI and it has been vehemently argued that there exists no material for directing initiation of an enquiry by the Director General and the action of the CCI in passing the order is in violation of the principles of natural justice and fair play. It has been further contended that the learned Single Judge has failed to appreciate the fact that CAIT/respondent No.4 had in fact issued a demand draft for a sum of Rs.50,000/- accompanying the information filed by the informant and was in fact the front for alleging the case against the appellant.

5.16. The learned Senior counsel for the appellant/Amazon has placed reliance upon the following judgements;

1) **Udyami Evam Khadi Gramodyog Welfare Sanstha v. State of U.P**, reported in (2008) 1 SCC 560;

2) **Mohinder Singh Gill v. Chief Election Commr.,** reported in (1978) 1 SCC 405;

and his contention is that the learned Single Judge has failed to appreciate the law laid down by the Hon'ble Supreme Court in the aforesaid cases and in fact by no stretch of imagination enquiry could have been ordered keeping in view the facts and circumstances of the case and the observations made in the prima facie order are likely to cause serious prejudice to the reputation and goodwill of the appellant amongst third party sellers and brands which list their products on the Amazon marketplace. A prayer has been made for setting aside the order passed by the learned Single Judge dated 11.6.2021 as well as for quashment of the prima facie order dated 13.1.2020.

6. Respondent No.2/Delhi Vypaar Mahasangh/informant in the present case has vehemently argued before this Court that the question of grant of opportunity of hearing while passing an order under Section 26(1) of the Act of 2002 does not arise and it is an order passed based upon the information submitted by respondent No.2. It has been further argued that the appellants/Flipkart and Amazon want to crush the proceedings at the threshold and they are not permitting the CCI to proceed ahead in the matter on some

pretext or the other. It has been further contended that the principles of natural justice and fair play will certainly be observed and followed as argued by the learned Additional Solicitor General of India on behalf of CCI while conducting an enquiry and the appellants should not feel shy in producing the material i.e., various agreements executed with various parties during the course of the enquiry. It has been further contended that no prejudice has been caused to the appellants and the appellants in fact do not want to cooperate with the enquiry and the same frustrates the object of the Act of 2002.

7. Learned counsel for respondent No.4/Confederation of All India Traders has also supported the arguments canvassed by the learned Additional Solicitor General of India and a prayer has been made to dismiss the writ appeals with costs.

8. Heard the learned counsel for the parties at length and perused the record. The matter is being disposed of with the consent of the learned counsel for the parties at admission stage itself.

9. The relevant statutory provisions under the Act of 2002 which are necessary to decide the present writ appeals are reproduced as under;

> "**2. *Definitions***.—In this Act, unless the context otherwise requires—
>
> ***
>
> (*c*) "**cartel**" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;
>
> ***
>
> (*f*) "**consumer**" means any person who—
>
> (*i*) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
>
> (*ii*) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;
>
> ***
>
> (*l*) "**person**" includes—
>
> (*i*) an individual;

(*ii*) a Hindu undivided family;

(*iii*) a company;

(*iv*) a firm;

(*v*) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;

(*vi*) any corporation established by or under any Central, State or Provincial Act or a government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);

(*vii*) any body corporate incorporated by or under the laws of a country outside India;

(*viii*) a cooperative society registered under any law relating to cooperative societies;

(*ix*) a local authority;

(*x*) every artificial juridical person, not falling within any of the preceding sub-clauses;

***

3. ***Anti-competitive agreements***.—(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

***

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(*a*) directly or indirectly determines purchase or sale prices;

***

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

***

(*e*) resale price maintenance,

***

18. ***Duties of Commission***.--Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:

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.

19. ***Inquiry into certain agreements and dominant position ofenterprise***.—(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4 either on its own motion or on—

(*a*) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(*b*) a reference made to it by the Central Government or a State Government or a statutory authority.

***

26. ***Procedure for inquiry under Section 19***.—(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under Section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject-matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under Section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

***

35. ***Appearance before Commission***.—A person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

Explanation.—For the purposes of this section—

(*a*) "**chartered accountant**" means a chartered accountant as defined in clause (*b*) of sub-section (1) of Section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;

(*b*) "**company secretary**" means a company secretary as defined in clause (*c*) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;

(*c*) "**cost accountant**" means a cost accountant as defined in clause (*b*) of sub-section (1) of Section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;

(*d*) "**legal practitioner**" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

***

45. ***Penalty for offences in relation to furnishing of information***.—(1) Without prejudice to the provisions of Section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information—

(*a*) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or

(*b*) omits to state any material fact knowing it to be material; or

(*c*) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid,

such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission.

(2) Without prejudice to the provisions of sub-section (1), the Commission may also pass such other order as it deems fit.

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53-B. ***Appeal to Appellate Tribunal***.—(1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (*a*) of Section 53-A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

***

53-N. ***Awarding compensation***.—(1) Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under Section 42-A or under sub-section (2) of Section 53-Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

(2) Every application made under sub-section (1) shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed.

(3) The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise:

Provided that the Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation.

(4) Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Appellate Tribunal, make an application under that sub-section

for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of Rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.

Explanation.—For the removal of doubts, it is hereby declared that—

(*a*) an application may be made for compensation before the Appellate Tribunal only after either the Commission or the Appellate Tribunal on appeal under clause (*a*) of sub-section (1) of Section 53-A of the Act, has determined in a proceeding before it that violation of the provisions of the Act has taken place, or if provisions of Section 42-A or sub-section (2) of Section 53-Q of the Act are attracted.

(*b*) enquiry to be conducted under sub-section (3) shall be for the purpose of determining the eligibility and quantum of compensation due to a person applying for the same, and not for examining afresh the findings of the Commission or the Appellate Tribunal on whether any violation of the Act has taken place.

***

53-S. ***Right to legal representation***.—(1)-(2) * * *

(3) The Commission may authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal.

Explanation.—The expressions "chartered accountant" or "company secretary" or "cost accountant" or "legal practitioner" shall have the meanings respectively assigned to them in the *Explanation* to Section 35.

53-T. ***Appeal to Supreme Court***.—The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them:

Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days."

(emphasis supplied)

The relevant regulations that are contained in the Competition Commission of India (General) Regulations, 2009 ("the 2009 Regulations") are set out as under:

"**2. *Definitions***.—(1) In these Regulations, unless the context otherwise requires—

* * *

(*i*) "**Party**" includes a consumer or an enterprise or a person defined in clauses (*f*), (*h*) and (*l*) of Section 2 of the Act respectively, or an information provider, or a consumer association or a trade association or the Director General defined in clause (*g*) of Section 2 of the Act, or the Central Government or any State Government or any statutory authority, as the case may be, and shall include an enterprise against whom any inquiry or proceeding is instituted and shall also include any person permitted to join the proceedings or an intervener;

* * *

10. *Contents of information or the reference*.—(1) The information or reference [except a reference under sub-section (1) of Section 49 of the Act] shall, inter alia, separately and categorically state the following seriatim—

(*a*) legal name of the person or the enterprise giving the information or the reference;

(*b*) complete postal address in India for delivery of summons or notice by the Commission, with Postal Index Number (PIN) code;

(*c*) telephone number, fax number and also electronic mail address, if available;

(*d*) mode of service of notice or documents preferred;

(*e*) legal name and address(es) of the enterprise(s) alleged to have contravened the provisions of the Act; and

(*f*) legal name and address of the counsel or other authorised representative, if any;

(2) The information or reference referred to in sub-regulation (1) shall contain—

(*a*) a statement of facts;

(*b*) details of the alleged contraventions of the Act together with a list enlisting all documents, affidavits and evidence, as the case may be, in support of each of the alleged contraventions;

(*c*) a succinct narrative in support of the alleged contraventions;

(*d*) relief sought, if any;

(*da*) details of litigation or dispute pending between the informant and parties before any court, tribunal, statutory authority or arbitrator in respect of the subject-matter of information;

(*e*) Such other particulars as may be required by the Commission.

(3) The contents of the information or the reference mentioned under sub-regulations (1) and (2), along with the appendices and attachments thereto, shall be complete and duly verified by the person submitting it."

10. The record of the case reveals that respondent No.2 – Delhi Vyapar Mahasangh filed an information on 24.10.2019 to CCI under Section 19(1)(a) of the Act of 2002 against both the appellants alleging that the appellants are involved in alleged anti-competitive practices and conduct, such

as deep discounting, preferential listing, sale of private label brands through preferential sellers and exclusive tie-ups, alleged to be in violation of Section 3(1) read with Section 3(4) of the Act of 2002. The CCI based upon the information received by it, has passed an order dated 13.1.2020 in Case No.40/2019 directing an investigation under Section 26(1) of the Act of 2002 by the Director General.

11. The order passed by the CCI dated 13.1.2020 is reproduced as under;

> Directions for investigation under Section 26(1) of the Competition Act, 2002
>
> 1. The present information has been filed by Delhi Vyapar Mahasangh (hereinafter,referred to as 'Informant'/'DVM'), a society registered under the Societies Registration Act, 1860 under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the 'Act') alleging contravention, of the relevant provisions of Section 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1) of the Act, by Flipkart Internet Services Pvt. Ltd. (hereinafter, 'Flipkart/Flipkart marketplace') and Amazon Seller Services Pvt. Ltd. (hereinafter, 'Amazon/Amazon marketplace'). Flipkart and Amazon are, hereinafter, coilectively referred to as 'Opposite Parties/'OPs'
>
> Facts and Allegations, as stated in the Information
>
> 2. As stated, the Informant's members comprise many Micro, Small and Medium Enterprises ('MSME') traders which rely on trade of smartphones and related accessories. It is stated that many such traders regularly list their smart phones for sale on online marketplaces to take the benefit of online distribution channel.
>
> 3. Flipkart, having its registered office in Bengaluru, is an ecommerce portal operating as a platform facilitating third

party sellers to sell their goods to consumers on its online marketplace.

4. Amazon marketplace, having its registered office at Bengaluru, is the marketplace affiliate of Amazon.com Inc., a multi-national technology company based in Seattle, Washington and operates the Amazon India e-commerce portal, operating as a platform facilitating third party sellers to sell their goods to consumers on its online marketplace.

5. The Informant states that there are instances of several vertical agreements between (i) Flipkart with their preferred sellers on the platform and (ii) Amazon with their preferred sellers, respectively which have led to a foreclosure of other non-preferred traders or sellers from these online marketplaces. It has been alleged that most of these preferred sellers are affiliated with or controlled by Flipkart or Amazon, either directly or indirectly.

Allegations under Section 3(4) of the Act

6. The Informant alleges that there is a clear violation of Section 3(4) read with Section 3(1) of the Act. Allegedly, there is an existence of various vertical arrangements between (i) Flipkart with their preferred sellers on the platforms; and (ii) Amazon with their preferred sellers on the platforms, respectively which leads to a foreclosure of other non-preferred sellers from the online marketplace. These preferred sellers are also alleged to be affiliated with or controlled by Flipkart/Amazon either directly or indirectly.

7. Further, these platforms are allegedly capable of influencing prices being charged by sellers by providing several discounts as well as inventory (in the form of private labels at the B2B level) to the sellers. OPs also gather data on consumer preferences and allegedly use them to their advantage. As per the information, the agreements/arrangements between Amazon and its sellers and Flipkart and its sellers respectively can be said to be in violation of Section 3 (1) of the Act which isan omnibus clause. The Informant has alleged that the OPs are involved in following practices which are anti-competitive in view of Section 3(1) read with Section 3(4) of the Act.

7.1.Deep discounting:

7.1.1.Flipkart provides deep discounts to a select few preferred sellers (such as Omnitech Retail)on its platform

which adversely impacts non-preferred sellers such as members of the Informant from competing with such sellers on Flipkart's online platform. The Informant alleged that there is evidence in the form of communications from Flipkart to its sellers stating that it would incur a part of the cost during the Big Billion Days (BBD)sales or Diwali sales etc. However, no such opportunity is available to other sellers who are, thus, unable to compete with such preferred sellers.

7.1.2.Amazon has preferred sellers on its platform namely Cloudtail India (a joint venture between Amazon and Catamaran Ventures) and Appario Retail (a wholly owned subsidiary of a joint venture between Amazon and Mr. Ashok Patni which received a round of investment from Frontizo Business Services Ltd.) which are related to Amazon. Similar allegations of deep discounts by Amazon to the detriment of non-preferred sellers have been levelled. Further, the fact that Amazon and these preferred sellers have the same contact details are also evidence of linkage between them. Moreover, Amazon has its own private label brands which are sold only through these preferred sellers.

7.2.Preferential Listing

7.2.1.Flipkartlends the word "Assured Seller" to the products sold by its preferred sellers such as Vision Star, Flashstar Commerce and Flashtech Retail (since July 2017), and allegedly create sa bias in favour of preferred sellers to the detriment of other sellers. Besides receiving deep discounts, such assured sellers also receive preferential listing on the website of Flipkart, pushing the results of the non-preferred sellers further down in the search results without any basis whatsoever.

7.2.2.Amazon lends the word "Fulfilled" to the products sold by preferred sellers and further allegedly creates search bias by listing its preferred sellers in the first few pages of the search results. The products sold by Cloudtail India and Appario Retail allegedly dominate first few pages of search results whereas the products with the same ratings sold by non-preferred sellers are listed on later pages.

7.3.Exclusive Tie-ups and Private Labels: Both the OPs have several tie-ups and private labels which get more preference in terms of sales. The OPs' private label brands, sold through their platforms, are routed through a few

preferential sellers. It is submitted by the Informant that this modus operandiis being employed by Flipkart across all categories, including smartphones. It is alleged that by having exclusive tie-ups in the relevant market with the smartphone companies, it provides exclusivity through discounting and preferential listings. 7.4.This leads to other competitors being excluded and foreclosed from the market. It is stated that any benefit to the consumers is only apparent at the initial stage till critical mass of network effects is reached or competitors are eliminated. This arrangement has far-reaching consequences on the economy as the non-preferred sellers are relegated to sell only through traditional brick and mortar set-up which involves significant fixed costs and are devoid of wide pan-India reach which online marketplaces offer.

Market Power

8. It is alleged that Amazon and Flipkart are able to cross-subsidise because of the huge amount of funding received from their investors, which has resulted in incentives that allow pricing below cost on their platforms, through their sellers, resulting in creation of high entry barriers and high capital costs for any new entrant in the market. Resultantly, the existing sellers find it difficult to launch their own portals or marketplaces in order to compete with the OPs.

9. The Informant averred that the OPs have the ability to unilaterally terminate their agreements with non-preferred sellers without assigning any reason as a result of which non-preferred sellers have no option but to comply with their mandates (Clause 3 of Amazon Seller Agreement). Thus, unreasonable vertical restraints are created.

Sections 4(2)(a)(ii); 4(2)(b)(ii) and 4(2)(c) allegations

10. Both Flipkart and Amazon are alleged to be jointly dominant in the relevant market and are stated to be abusing their dominance in the present case.

10.1.Both OPs individually and jointly have extremely high market shares in the relevant market. Flipkart itself held more than 53 % of the market shares in the relevant market in the first quarter of 2019 and Amazon held 36% of the market shares in the relevant market in the first quarter of 2019. Market shares, while not the only source

of dominance, can be categorized as an important factor for determining dominance.

10.2.Due to deep pockets, OPs are able to facilitate their sellers'predatory pricing on their respective platforms.

10.3.The OPs have been limiting the provisions of service and market of MSMEs and other small retailers by creating a separate 'preferential list'. The preferred sellers are put into an advantageous position as their names appear on the initial pages as compared to the non-preferred sellers, despite selling product with 'identical rating'. Thus, there has been restriction of services in the market.

10.4.Due to huge market base and market power, the OPs have large repositories of data which allow them to target advertisements based on consumer preferences and marginalise other competitors which are unable to capture the market due to lack of access to data. This has resulted in creation of high entry barriers on account of network effects.

10.5. Both OPs havethe ability to unilaterally terminate agreements with their sellers without any reason and treat them arbitrarily.

11. Based on the above, the Informant alleged that Flipkart and Amazon have established an inherently anticompetitive model for e-commerce which consists of providing deep discounts and preferential treatment to a select few preferential sellers on their platform and the same merits examination by the Commission.

12. It is, thus, prayed by the Informant that an investigation be caused into the matter and the OPs be directed to cease and desist from indulging in anti-competitive activities and maximum penalty under Section 27 of the Act be imposed upon the OPs.

13. After considering the matter on 12.12.2019, the Commission directed the Informant to file an affidavit with supporting documents under Section 65-B of the Indian Evidence Act, 1872 in respect of certain documents annexed with the Information. The Informant filed the said affidavit on 10.01.2020.

14. The Commission has carefully perused the information, documents filed by the Informant and relevant information available in the public domain.

15. At the outset, the Commission notes that the Informant has levelled allegations against Flipkart and Amazon marketplaces under Section 4 of the Act on account of joint dominance. The Commission notes that it is a settled position that the Act does not provide for inquiry into or investigation into the cases of joint/collective dominance as the same is not envisaged by the provisions of the Act. Therefore, the Commission need not deliberate further on allegations on account of joint dominance as the same being untenable under the Act.

16. The Commission notes that Flipkart marketplace and Amazon marketplace are e-commerce entities, following a marketplace based model of e-commerce. They essentially provide online intermediation services to sellers on one side and consumers on the other.These platforms/marketplaces and the sellers selling on these platforms operate at different stages of the vertical/supply chain. Thus, any agreement between the platforms and sellers selling through these platforms can be examined under section 3(4) of the Act, which deals with agreements amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services. For the sake of convenience, the section is reproduced herein below:

"3(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(emphasis supplied)

17. It is also pertinent to note that the definition of 'Agreement' under the Act is an encompassing/inclusive one. It includes any arrangement, understanding or action in concert neither necessarily in writing nor intended to be enforceable by legal proceedings. Further, the list of vertical agreements provided under Section 3(4) of the Act is an inclusive one.

18. Online intermediation services have been identified as key enablers of entrepreneurship which offer access to new markets to sellers/business users and increase the consumers' choice of goods and services. These services form a fulcrum of the commercial success of the sellers who avail such services to reach consumers on the platform. At the same time, online platforms providing intermediation services result in the growing dependence of businesses on these platforms.

19. The IT industry body the National Association of Software and Services Companies (Nasscom) estimated that the Indian ecommerce market was $33 billion in 2017-18 that reached $38.5 billion during 2018-19. Flipkart and Amazon comprise bulk of the online retail market in India.1Though these platforms are used for selling various categories of products, for some categories the online channel constitutes a predominant channel of distribution. Smartphones is one such categoryof product. The Informant has claimed that Amazon and Flipkart had36% and 53% market share, respectively, in the market for smartphones sold on online marketplaces in India in the first quarter of the year 2019. Further, it is an accepted position that strong network effects generate a source of market power for such platforms. Large number of users make an ecommerce platform more valuable, which further attracts more users, platforms benefit from a 'positive feedback loop', which gives rise to market power.

20. On careful perusal of allegations levelled by the Informant and the documents provided, the Commission notes that there are four alleged practices on the marketplaces, namely, exclusive launch of mobile phones, preferred sellers on the marketplaces, deep discounting and preferential listing/promotion of private labels.

21. The first issue under examination is that of the exclusive launch of mobile phones on the two major e-commerce platforms. The Informant has provided a list of phones which were exclusively launched on the platforms. The Informant has provided the following evidence in the form of text messages, as shown below, to indicate that due to partnership between mobile manufacturer (VivoZ1x and Vivo U10 models) and platforms (Flipkart and Amazon), offline retailers are forced to purchase smartphones either from manufacturers' e-stores or from the platforms e-portals.

Vivo
Hi Harshit, thank you for showing your interest in vivo handsets. The handset vivo Zix will be available on our online E-store and Flipkart.com portal only. The safe will be started from 13th September 19. For further information kindly check our official E-store: https://shop.vivo.com/in/product/10073?skuId=1027|

Online shopping site for Mobiles, Electronics, Furnit…..
Flipkart.com

Vivo
Hi Harshit, thank you for showing your interest in vivo handset. We would like to inform you that you may purchase our Unstoppable U10 handset from our official E-Store: https://shop.vivo.com/in/product/100077?SkuId=10283 and Amazon as it will be available online only. The first sale will be on 29th of September 2018.

U10 (3+64)

22. The Commission has also noted several reports in the media as well as advertisements by e-commerce portals regarding exclusive launches. Mobile manufacturing companies like One Plus, OPPO, and Samsung have exclusively launched several of their models on Amazon. Similarly, Vivo, Realme, Xiomi etc., have exclusively launched several of heir models on Flipkart. In 2018, Flipkart launched 67 mobile phones and Amazon launched 45 mobile phones exclusively on its platform.2Thus, it appears that these mobile manufacturers partner with the e-commerce platforms and their brands are sold by the platforms' exclusive sellers.

23. The Informant hasalsoallegedthat Amazon and Flipkart have their own set of preferred sellers and that these preferred sellers have nexus with the e-commerce platforms either by way of direct or indirect ownership or some understanding. It is observed that there are only few online sellers, which are selling these exclusively launched smartphones either through Amazon or through Flipkart. Based on the evidence adduced by the Informant and information available in the public domain, it can be prima facie inferred that there appears to be exclusive partnership between smartphone manufacturers and e-commerce platforms for exclusive launch of smartphone brands. Thus, exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition.

24. The issue of deep discounting alleged by the Informant needs to be assessed in the context of exclusive agreement discussed in the foregoing paragraphs. The

Informant has furnished emails inter-alia dated 31.03.2019, 20.09.2019 etc.whereby communications were allegedly sent by Flipkart and Amazon to their sellers for incurring a part of the discounts offered during the big sale events like the Big Billion Days (BBD) of Flipkart and the Great Indian Festival of Amazon. At the same time, it is alleged that preferred sellers at Amazon and Flipkart are in some way or the other connected to Amazon and Flipkart, respectively, through common investors, directors, shareholders etc. Relying on these, it has been alleged that these preferred sellers are extension of these marketplaces, operating through different 'proxy' entities blessed with the support of these marketplaces. The Commission perused the prices for different smartphone brands sold through Flipkart and Amazon, i.e. original price and discounted price. It was observed that certain smartphone brands/models are available at significantly discounted price on these platforms and are sold largely through the sellers identified, by the Informant, as the platforms' 'preferred sellers'. Whether funding of discounts is an element of the exclusive tie-ups is a matter that merits investigation.

25. The issue of preferential listing should also be viewed in conjunction with the foregoing. Competition on the platforms may get influenced in favour of the exclusive brands and sellers, through higher discounts and preferential listing. Thus, the allegations are interconnected, and warrant a holistic investigation to examine how the vertical agreements operate, what are the key provisions of such agreements and what effects do they have on competition. Given that both the major platforms are stated to follow the same mechanics in terms of their exclusive tie ups and preferential terms with brands/sellers, competition between the platforms prima facie does not play a role in mitigating the potential adverse effect on competition on the platforms.

26. Thus, the Commission observes that the exclusive arrangements between smartphone/mobile phone brands and e-commerce platform/select sellers selling exclusively on either of the platforms, as demonstrated in the information, coupled with the allegation of linkages between these preferred sellers and OPs alleged by the Informant merits an investigation. It needs to be investigated whether the alleged exclusive arrangements, deep-discounting and preferentia llisting by the OPs are being used as an exclusionary tactic to foreclose

competition and are resulting in an appreciable adverse effect on competition contravening the provisions of Section 3 (1) read with Section 3(4) of the Act.

27. In view of the foregoing, the Commission is of the opinion that there exists a prima facie case which requires an investigation by the Director General ('DG'), to determine whether the conduct of the OPs have resulted in contravention of the provisions of Section 3(1) of the Act read with Section 3(4) thereof, as detailed in this order.

28. Accordingly, the Commission directs the DG to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the receipt of this order.

29. It is also made clear that nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made therein.

30. The Secretary is directed to send a copy of this order along with the material available on record to the DG forthwith.

12. The aforesaid order was challenged before this Court and the learned Single Judge, after holding that the material was available for forming a prima facie opinion with the CCI, has rightly issued an order directing an investigation under Section 26(1) of the Act by the Director General.

13. The order passed by the learned Single Judge in paragraphs 12 to 65 reads as under;

12. I have carefully considered rival contentions and perused the records. Following points arise for consideration in this case:

A. What is the nature of the impugned order passed under Section 26(1) of the Act?

B. Whether a prior notice and opportunity of hearing is mandatory at the stage of issuing direction to the Director General to hold inquiry under Section 26(1) of the Act?

C. Whether impugned order calls for interference?

Re. Points A & B

13. Both points A & B are inter-connected and hence they are dealt together.

14. The preamble of the Act states that, keeping in view the economic development of the Country, Competition Act has been brought for establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure 'freedom of trade' carried on by other participants in the market in India.

15. Under Section 19 of the Act, the Commission may inquire into allegation of contravention of provisions of the Act either on its own motion or on receipt of any information accompanied by such fee as may be determined by the Regulations or upon a reference made by the Centrai Government or a State Government or a Statutory Authority.

16. Delhi Vyapar Mahasangh has given information against petitioners under Section 19(1)(a) of the Act alleging contravention of Section 3(1) read with Section 3(4) and Section 4(1) read with Section 4(2) of the Act. It has filed a summary of its case together with documents which it has considered supportive of its allegations. Though, the informant has alleged contravention of Sections 3(1), 3(4), 4(1) and 4(2) of the Act, the Commission has held that Act does not provide for an enquiry or investigation in cases of Joint/Collective dominance and has directed inquiry by the Director General

for alleged violation of Section 3(1) read with Section 3(4) of the Act.

17. The informant has alleged that the petitioners have entered into several vertical agreements with preferred sellers and following aspects require investigation and consideration by the Commission:

- Deep discounting;
- Preferential Listing; and
- Exclusive Tie-ups.

➢ **Deep Discounting**

18. With regard to deep discounting the informant has alleged that; Amazon has several preferred sellers and notably among them are 'Cloudtail India' and 'Appario Retail', which are related to Amazon. It provides incentives to its preferred sellers to seli their products at 'predatory prices' throughout the year to the detriment of non-preferred sellers, who are not compensated for the amount of loss which they would incur to keep competing in the market.

19. 'Apparic Retail' is wholly owned subsidiary of a Joint Venture between Amazon and another entity. It has received investments from Frontizo Business Services Pvt. Ltd. Both Apparic and Frontizo have common Director by name Ankit Popat. Frontizo and Amazon Retail India Pvt. Ltd., also have a common Director.

20. Cloudtail is a joint venture between Amazon and Catamaran Ventures.

21. It is alleged that Flipkart follows a model of providing deep discount to few preferential sellers such as 'Omnitech Retail', and it adversely impacts non-preferred sellers. Fiipkart sends communications to its sellers stating that it would incur a part of the 'burn'.

22. Preferred sellers such as 'Omnitech Retail' are connected with Flipkart. Flipkart's founder Sachin Bansal and Binny Bansal owned WS Retail till 2012. Reports confirm that more than 90% of Flipkart’s sale is routed through WS Retail. 'Omnitech Retail' is owned by Consulting Rooms Pvt. Ltd., whose Director Ajay Sachdeva was also a Director of WS Retail till September 2016.

➢**Preferential Listing**

23. It is alleged that Amazon perpetuates the practice of listing its preferred sellers in the first few pages of the search results, thereby creating a search bias. In number of search results, the products are sold by preferred sellers such as 'Appario Retail' and 'Cloudtail' and they dominate the first few pages, whereas, products with same ratings, which are sold by non-preferred sellers are listed in later pages.

24. Flipkart lends the words 'assured' to the products sold by its preferential sellers.

➢**Exlusive Tie-ups**

25. It is alleged that petitioners herein have several exclusive tie-ups and private labels, which get more preference in terms of sales.

26. It is further alleged that providing discounts and preferential listing to preferential sellers creates *defacto* exclusivity to the detriment of other sellers.

27. Thus, in substance, informant's case is, though petitioners claim that 'any person' can sell his product in their market place, in fact, petitioners promote only selected few and do not maintain platform neutrality.

28. Shri. Abhir Roy, learned Advocate for CAIT submitted that Amazon's market place is owned by M/s. Amazon Sellers Services Pvt. Ltd. Adverting to Company's Master data (at pages No.154 & 155 of Statement of Objection by informant), he submitted that the said Company and Amazon Retail India Pvt. Ltd. have a common e-mail ID namely 'gulatip@amazon.com'. The registered address of Amazon Sellers Pvt. Ltd., is in the 8th Floor, Brigade Gateway, 26/1, Dr.Rajkumar Road, Bengaluru. He pointed out that though the registered office of Amazon Retail India Pvt. Ltd., is shown as Nehru place, New Delhi, the place where Books of Accounts are maintained, is shown as the registered office of Amazon Seller Services Pvt. Ltd. (petitioner in W.P. No.3363/2020). He submitted that these facts clearly establish that the Contact e-mail ID of both Companies is the same and maintenance of Books of Accounts of both Companies is at the same address.

29. Shri. Abhir Roy further submitted that Amazon Retail India Pvt. Ltd., and Frontizo Business Services Pvt. Ltd., have a common Director by name Sameer Kshetrapal. Appario Retail is a wholly owned subsidiary of Frontizo business. He pointed out that this aspect has been admitted by Amazon by stating thus in paragraph No.19 of its rejoinder:

> *"19. That the contents of paragraph 22 of the Objections are also denied.* ***It is a matter of public knowledge that Cloudtail India Pvt. Ltd., ("Cloudtail") is a wholly owned subsidiary of Prione Business Services Private Limited ("Prione"), a Joint venture, wherein Amazon Asia Pacific Resources Pvt. Ltd.,*** *and Amazon Eurasia Holdings S.a.r.l, collectively hold a minority, non-controlling interest of 24% shares.* ***It is submitted that Appario Retail Pvt. Ltd., ("Appario") is a wholly owned subsidiary of Frontizo Business Services Private Limited ("Frontizo"), a Joint venture wherein Amazon Asia-Pacific Holdings Pvt. Ltd., and Zafar LLC*** *together hold a minority, non-controlling interest of 24%. While both, Cloudtail India and Appario Retail are third party sellers, who partner with the petitioner to offer products for sale to end consumers on the Amazon market place, it is denied that they are preferred sellers or that the Petitioner has entered into any agreements with either of them to anoint them as preferred sellers. It is further denied that there is a common director between the petitioner and either Cloudtail India or Appario Retail."*
>
> *(Emphasis supplied)*

30. He contended that, obviously, Frontizo and Amazon Retail India Pvt. Ltd., shall have common business interest and this is fortified by the fact that both companies have a common Director namely, Sameer Kshetrapal.

31. Shri. Abhir Roy further submitted that on Flipkart Market Place, Omnitech Retail is the preferred and favoured seller. The said Trademark is registered in the name of 'Consulting Rooms Pvt. Ltd.', of which Ajay Sachdeva is one of the Directors. Earlier, he was a Director on the board of WS Retail. He submitted that Flipkart also practices selling its own inventory at discounted prices to

its preferred sellers. Flipkart also indulges in 'loss funding' in case of preferred sellers as recorded in *Flipkart India Pvt. Ltd., Vs. Assistant Commissioner of Income Tax* in ITA No.202 & 693/Bang/2018 (Annexure-10 to the informant's Statement of Objections).

32. On the aspect of 'cash burning', Smt. Madhavi Diwan, Learned Addl. Solicitor General, adverting to paragraph No.7 of order dated 25.04.2018 in I.T.A. No.202/Bang/2018, also contended that Flipkart's Senior Vice President and Finance Controller of Flipkart Group, has admitted in his statement before the Income Tax Authorities that the strategy of selling at a price lower than the cost price (predatory pricing) is to capture the market and to earn profits in the long run.

33. With regard to the nature of the impugned order, Smt. Madhavi Diwan, submitted that it is an administrative order. In support of this submission, she relied upon *CCI Vs. SAIL* and *CCI Vs. Bharathi Airtel.* She submitted that, in CCI Vs. SAIL, it is held that threshold requirement for establishing prima facie case at the stage of Section 26(1), is a low threshold. She adverted to *Martin Burn Ltd., Vs. R.N. Banerjee, reported in 1958 SCR 514,* and submitted that *prima facie* case does not mean a case proved to the hilt, but a case which can be said to be established, if the evidence which is led in support of the same were believed.

34. It may be also be profitable to recall the words of Lord Diplock in *American Cyanamid Co Vs. Ethicon Ltd, reported in (1975) 1 All E.R. 504,* a case involving injunction at interlocutory stage, wherein, that Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

35. Both petitioners and the Commission have placed reliance on *CCI Vs. SAIL and CCI Vs. Bharathi Airtel.*

In *CCI Vs. SAIL,* it is held as follows:

> ***38.*** *In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction,* ***at the face of it, is an administrative direction*** *to one of its own wings departmentally and is without entering upon any adjudicatory*

process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

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71.** The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a prima facie case for issuance of direction to the Director General to conduct an investigation. **This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received by it.** Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or any other person is required to be issued at this stage. In contradistinction to this, when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, the Central Government, the State Government, statutory authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Sections 26(7) or 26(8) of the Act, as the case may be. **This obviously means that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and we see no compelling reason to read into the provisions of Section 26(1) the requirement

of notice, when it is conspicuous by its very absence. *Once the proceedings before the Commission are completed, the parties have a right to appeal under Section 53-A(1)(a) in regard to the orders termed as appealable under that provision. Section 53-B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or setting aside the direction, decision or order appealed against.*

In *CCI Vs.Bharathi Airtel,* it is held as follows:

116. We may mention at the outset that in SAIL [CCI v. SAIL, (2010) 10 SCC 744] , nature of the order passed by CCI under Section 26(1) of the Competition Act [here also we are concerned with an order which is passed under Section 26(1) of the Competition Act] was gone into. ***The Court, in no uncertain terms, held that such an order would be an administrative order and not a quasi-judicial order. It can be discerned from paras 94, 97 and 98 of the said judgment,*** *which are as under: (SAIL case [CCI v. SAIL, (2010) 10 SCC 744] , SCC pp. 785 & 787)*

"94. The Tribunal, in the impugned judgment [SAIL v. Jindal Steel & Power Ltd., 2010 SCC OnLine Comp AT 5] , has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi-judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in CCT v. Shukla & Bros. [CCT v. Shukla & Bros., (2010) 4 SCC 785 : (2010) 3 SCC (Civ) 725 : (2010) 2 SCC (Cri) 1201 : (2010) 2 SCC (L&S) 133], wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies.

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97. *The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal.* ***Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General.*** *Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties.* ***In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.***

98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during

investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act."

117. There is no reason to take a contrary view. Therefore, we are not inclined to refer the matter to a larger Bench for reconsideration.

36. Thus, from the above authorities, it is clear that:

- An order under Section 26(1) of the Act passed by the Commission is an '***administrative direction***' to one of its wings departmentally and without entering upon any adjudicatory process; and

- Section 26(1) of the Act **does not mention about issuance of any notice to any party before or at the time of formation** of an opinion by the Commission on the basis of information received by it.

Accordingly, Points A and B are answered.

Re: Point C:

37. The aspect that needs to be examined now, is whether the Commission has acted in consonance with the settled law.

38. As held in paragraph No. 71 of *CCI Vs. SAIL*, the intimation received complaining of violation of the provisions of the Act, sets into motion the mechanism stated under Section 26 of the Act. At this stage, the Commission is required to form an opinion whether or not there exists a *prima facie* case.

39. The informant has alleged violation of Sections 3(1) read with 3(4) and Sections 4(1) read with 4(2) of the Act, by the petitioners. In the impugned order, Commission has recorded that the Act does not provide for inquiry into the cases of Joint/Collective dominance and proceeded further to deal with the violation under Section 3 of the Act.

40. Perusal of the impugned order from paragraph No.20, shows that the Commission has examined the material produced by the informant. It has analyzed the information under various heads such as exclusive launch

of mobile phones, preferred sellers on the market places, deep discounting, and preferential listing of private labels. It has recorded that mobile manufacturing Companies like One plus, Oppo and Samsung have exclusively launched several of their models on Amazon and Vivo, Realme, Xiomi etc., have exclusively launched several of their models on the Flipkart. Commission has noticed that Flipkart has launched 67 mobile phones and Amazon has launched 45 mobile phones exclusively on their platforms. Commission has recorded (in paragraph 23) that petitioners have their own set of preferred sellers and there are only few online sellers which sell the exclusively launched smart phones.

41. Commission has further recorded (in paragraph 23) that based on the evidence adduced by the informant and the information available in public domain, it has *prima facie* inferred that there appears to be exclusive partnership between smart phone manufacturers and e-Commerce platforms for exclusive launch of smart phones.

42. The Commission has also recorded that it has taken note of the emails dated 31.03.2019 and 20.09.2019 etc., allegedly sent by Flipkart and Amazon to their sellers offering to incur a part of discounts offered during big sale events. It has further recorded that certain smart phone brands/models are available at significantly discounted price on petitioners' platforms and are sold largely through the sellers identified by informant as 'preferred sellers'. With regard to the allegations such as funding of discount, the Commission has opined that it is a matter that merits investigation.

43. Adverting to preferential listing, the Commission has noted that the allegations are inter-connected and therefore, a holistic investigation is necessary.

44. The Commission has further noted (in paragraph 26) that the exclusive arrangements between smart phone brands and e-Commerce platforms, demonstrated in the information coupled with the allegations of linkage between preferred sellers and the petitioners, merits investigation.

45. Thus, a plain reading of the impugned order shows that Commission has looked into the information in detail and applied its mind.

46. It was argued by Shri. Gopal Subramanium that on the earlier occasions and particularly in the AIOVA case,

though the allegation was against Flipkart, in order to understand the nuances of the trade, the Commission had held preliminary conference with Amazon. In this case, when Commission has taken a drastic decision to initiate an inquiry, it has not chosen to issue notice to the petitioners.

47. As recorded hereinabove, the law on the point with regard to the procedure to be followed at the stage of 26(1) of the Act has been declared by the Apex Court in *CCI Vs. SAIL* and *CCI Vs. Bharthi Airtel*, holding that no notice is necessary at the stage of 26(1) of the Act. Therefore, the said ground is untenable.

48. It was contended by Shri. Gopal Subramanium, Shri. Udaya Holla, Shri. Dhyan Chinnappa, learned Senior Advocates that the informant had not approached with clean hands and acted as a front-man for CAIT which has filed writ petitions in High Courts of Delhi and Rajasthan and failed to get any favourable order. They pointed out that the Demand Draft for Rs.50,000/- tendered along with the information was obtained by CAIT and argued that informant has not approached the Commission with clean hands.

49. Countering this argument, Smt. Madhavi Diwan, submitted that so far as Commission is concerned, what is relevant is the 'information'. With regard to CAIT approaching through Delhi Vyapar Mahasangh, placing reliance on following passage in *Swaraj Infrastructure (P) Ltd. Vs. Kotak Mahindra Bank Ltd.*, reported in (2019) 3 SCC 620, she submitted that when a citizen/litigant is driven to wall, he blows hot and hotter.

> ***"29.*** *When secured creditors like the respondent are driven from pillar to post to recover what is legitimately due to them, in attempting to avail of more than one remedy at the same time, they do not "blow hot and cold", but they blow hot and hotter. ... "*

50. The next contention urged by Shri. Gopal Subramanium is, in *CCI Vs. Bharathi Airtel,* the Apex Court has upheld the judgment of the High Court that the Commission could exercise jurisdiction only after conclusion of proceedings and TRAI returned its findings. He submitted that in the instant case, Enforcement Directorate is already investigating the matter. Therefore, CCI could

not have exercised its jurisdiction whilst investigation by Enforcement Directorate is in progress.

51. In response, Smt. Madhavi Diwan rightly submitted that TRAI is a sectoral regulator and in view of the issues involved in *CCI Vs. Bharathi Airtel,* it has been held that CCI could exercise its jurisdiction after TRAI returned its findings. She contended that the Statement of objects and reasons of FEMA aim at consolidating and amending the law relating to Foreign exchange with the objective of facilitating external trade and payments for promoting orderly development and maintenance of Foreign Exchange markets in India. The FDI policy issued under FEMA specifies entry conditions for Foreign Companies in various sectors. The FDI policy does not offer any immunity or exemption from the law of the land. She submitted that the Hon'ble Supreme Court of India in number of cases has upheld parallel investigation/adjudication by different Regulators/Agencies/ Adjudicators. She submitted that in *Securities Exchange Board of India Vs. Pan Asia Advisors Limited and another,* reported in (2015) 14 SCC 71 (paragraph No.92) it is held that SEBI can exercise its powers while action is taken for violation under FEMA or RBI Act. In *S. Sukumar Vs. Secretary, Institute of Chartered Accountants in India and Ors.*, reported in (2018) 14 SCC 360 (paragraphs No.45 and 46) it is held that Institute of Chartered Accountants, a statutory body can investigate while ED and ROC investigations are in progress.

52 Smt. Madhavi Diwan further submitted that the Foreign Exchange Management Act is an earlier Act, and Competition Act has come into force later. Section 60 of the Competition Act provides that it shall have overriding effect. Section 62 of the Act provides that the provisions of Competition Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force.

53. With regard to investigation by the Enforcement Directorate, Shri. Abhir Roy submitted that ED is not a regulator but a quasi-judicial body. Placing reliance on *Lafarge Umiam Mining Pvt. Ltd., Vs. Union of India and others*, reported in (2011) 7 SCC 338 (paragraph No.122) he submitted that the regulator is a pro-active body with power to frame statutory Rules and Regulations. Regulatory mechanism warrants open discussion, public participation, and circulation of draft paper inviting

suggestions. ED is not clothed with those powers and does not have other attributes. Therefore, ED is not a regulator.

54. It was next contended by learned Senior Advocates for petitioners that the Commission has substantially altered the decision in *CCI Vs. SAIL* with regard to confidentiality and Web-hosting of the impugned order which adversely affects petitioners' business reputation.

55. In reply, Smt. Madhavi Diwan, submitted that decision in *CCI Vs. SAIL* does not mandate any blanket confidentiality. She argued that paragraphs No. 38 and 135(e) of the said judgment, state that confidentiality is to be maintained only in terms of provisions of Section 57 read with Regulation 35. She rightly contended that Section 57 merely protects the confidentiality of the information belonging to any enterprise which has been obtained by or on behalf of the Commission or the Appellate Tribunal and the same cannot be disclosed otherwise than in compliance with or for the purpose of this Act or any other law for the time being in force. She further, rightly submitted that an order under Section 26(1) cannot be described as being outside the purposes of the Act and therefore, position is not altered with regard to confidentiality. So far as the aspect of business reputation is concerned, placing reliance on *Cadila Health Care Limited & Another Vs. Competition Commission of India & Ors.*, reported in 2018 SCC OnLine Del 11229 (paragraph No.44) she submitted that allowing enquiry is akin to adjudicating a tax or commercial dispute or regulatory dispute. The relevant passage reads as under:

> *44. [….] Cadila's reliance on Rohtas Industries and Barium Chemicals is, in the opinion of this court, irrelevant given the facts of this case. Granted, administrative orders should be reasoned; however, where they trigger investigative processes that are not conclusive, having regard to the clear enunciation in SAIL, that notice is inessential, accepting the argument, that inquiry would harm the market or commercial reputation of a concern, would be glossing over the law in SAIL. Moreover, the Rohtas Industries related to the affairs of a company, which implicated its internal management. Allowing inquiry, even an innocuous one, without application of mind, is a different proposition altogether from acting on the information of someone who alleges either direct or indirect or tacit*

dominance in the market place in the course of one's business. The latter is regulatory of the marketplace rather than the core management of the concern; ***it is akin to adjudicating a tax or commercial dispute, or a regulatory dispute****. As stated by Justice Brennan, natural justice in such instances should not —unlock the gate which shuts the court out of review on the merits." (in this case, preclude or chill the exercise of jurisdiction by the DG into a potential abuse of dominant position of a commercial entity).* ***Therefore, this court finds no merit in the argument that the procedure adopted by the DG in going ahead with the inquiry and investigating into the market behaviour of Cadila in anyway affects it so prejudicially as to tarnish its reputation.*** *The CCI has not as yet examined the investigation report in the light of Cadila's contentions; all rights available to it, to argue on the merits are open.*

(Emphasis supplied)

56. In response to petitioner's contention that CCI could not have taken a contrary stand to the one taken in AIOVA case, Smt. Madhavi Diwan submitted that there is no *res judicata* in the case of orders passed by CCI because, Competition Act relates to preservation of competitive forces in the market place. She submitted that the Hon'ble Supreme Court of India has held in *Samir Agrawal Vs. Competition Commission of India,* reported in 2020 SCC Online SC 1024 that Competition Act operates in 'rem' and not in 'personam', since it concerns public interest. Placing reliance on *Cadila Healthcare Limited and Anr Vs. CCI*, reported in 2018 SCC Online Del 11229 (paragraph 59) she submitted that the CCI or an expert body should *ordinarily* not be crippled or hamstrung in their efforts by application of technical rules of procedure.

57. With regard to the market study aspect, Smt. Diwan submitted that market study was undertaken as a part of the 'Advocacy mandate' under Section 49 of the Act and market study is in no manner inconsistent with the impugned order.

58. Petitioners have pleaded *in extenso* and submitted elaborate arguments on the merits of the matter. But, in a writ petition filed under Article 226 of the Constitution of India, seeking judicial review, the High Court can examine only the decision making process with the exception

namely the cases involving violation of fundamental human rights. The law on the point is fairly well settled. It may be profitable to recall following opinion of Lord Greene in *Associated Provincial Picture Houses Ltd., Vs. Wednesbury Corporation,* reported in (1948) 1 KB 223:

> *"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [1926 Ch 66] gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

59. In *G. Veerappa Pillai, Proprietor, Sathi Vilas Bus Service, Porayar, Tanjore District, Madras Vs. Raman and Raman Limited, Kumbakonam, Tanjore District and Three Others* , reported in Air 1952 SC 192, it is held that writs referred to in Article 226 are intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the

decision impugned and decide what is the proper view to be taken or the order to be made.

60. In *T.C. Basappa Vs. T. Nagappa and Another*, reported in AIR 1954 SC 440, it is held that a tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of certiorari may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e.g. when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision. Quoting Morris J, it is held as follows:

> *10. ..... "The essential features of the remedy by way of certiorari have been stated with remarkable brevity and clearness by Morris, L.J. in the recent case of Rex v. Northumberland Compensation Appellate Tribunal [(1952) 1 KB 338 at 357]. The Lord Justice says:*
>
> > *"It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the face of an order or decision or irregularity or absence of or excess of jurisdiction when shown."*

61. In *G.B. Mahajan and others Vs. Jalgaon Municipal Council and others,* reported in (1991) 3 SCC 91 (para 44) the Hon'ble Supreme Court of India speaking through Justice M.N. Venkatachaliah (as he then was), referring to Prof. Wade's comment on Wednesbury doctrine, has held that the point to note is that a thing is not unreasonable in the legal sense merely because Court thinks it unwise. Prof. Wade's comment reads thus:

> *"This has become the most frequently cited passage (though most commonly cited only by its nickname) in administrative law. It explains how 'unreasonableness', in its classic formulation,*

covers a multitude of sins. These various errors commonly result from paying too much attention to the mere words of the Act and too little to its general scheme and purpose, and from the fallacy that unrestricted language naturally confers unfettered discretion.

Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question …."

Further, following observations of Lord Scarman in *Nottinghamshire County Council Vs. Secretary of State for Environment* have also been quoted and they aptly apply to these cases.

"… But I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of "unreasonableness" to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers. Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges or your Lordships' House in its judicial capacity."

"For myself, I refuse in this case to examine the detail of the guidance or its consequences. My reasons are these. Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses …."

(Emphasis supplied)

62. Noted jurist, Shri. V. Sudhish Pai, in his Article '*Is Wednesbury on the Terminal decline?,* reported in (2008) 2 SCC J-15, has opined that the Wednesbury test, long established as ground of judicial review will be applicable in examining the validity of the exercise of administrative discretion. After analyzing the law with regard to Constitutional review in UK and the cases involving human rights, he has stated that it is quite inappropriate to speak of the decline or demise of Wednesbury test. He has concluded that Wednesbury Principles are still alive as follows:

> *"In the ultimate analysis, it can be said that the Wednesbury principles are still alive and applicable in judicial review of administrative discretion where no constitutional/fundamental rights are involved. Wednesbury, is but a facet and an enduring facet of the larger landscape of judicial review.*
>
> *These issues and aspects are not a matter of mere semantics but are the constitutional underpinnings of the exercise of judicial power and the limits thereof."*

63. In the case on hand, the informant has filed information and appended material papers, which according to the informant support its allegations. It was submitted by the learned Additional Solicitor General that the Commission has also called upon the informant to file a Certificate under Section 65B of the Indian Evidence Act and the penalty for incorrect information is upto Rs. One Crore under Section 44 of the Competition Act**.**

64. It is expected that an order directing investigation be supported by 'some reasoning' (*CCI Vs. SAIL para 97),* which the Commission has fulfilled. Therefore, it would be unwise to prejudge the issues raised by the petitioners in these writ petitions at this stage and scuttle the investigation. Therefore, the impugned order does not call for any interference. Accordingly, point (c) is answered.

65. Resultantly, these writ petitions must fail. Accordingly, Rule is discharged and writ petitions stand ***dismissed***.

No costs."

14. This Court has carefully gone through the order passed by the CCI dated 13.1.2020 and the order passed by the learned Single Judge dated 11.6.2021, which are reproduced supra.

15. The aim and object of the Act of 2002 as stated in the Preamble of the Act of 2002 reads as under;

> "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

The Act of 2002 was enacted to curb anti competitive practices and the CCI is given the task as a Regulator to ensure that no such anti competitive practices are undertaken.

16. In the case of **Rajasthan Cylinders and Containers Ltd., v. Union of India,** reported in (2020) 16 SCC 615, the Hon'ble Supreme Court in paragraph 73 has held as under;

> "**73.** It follows from the above that whereas on the one hand the economic policy of the nation has ushered in the era of liberalisation and globalisation thereby giving free play to the private sector in the manner of conducting business, at the same time, in public interest and in the interest of consumers, a regime of regulators has also been brought to

> ensure certain checks and balances. Since competition among the enterprises or businessmen is treated as service for a public purpose and, therefore, there is a need to curb anti-competitive practices, CCI is given the task (as a regulator) to ensure that no such anti-competitive practices are undertaken. In fact, Section 18 of the Act casts a specific and positive obligation on CCI to "eliminate" anti-competitive practices and promote competition, interest of the consumer and free trade."

17. In the considered opinion of this Court, the CCI certainly have a jurisdiction to take appropriate steps to curb the anti competitive practices and a detailed mechanism is provided under the Act itself to ensure that no anti competitive practices are undertaken. The appellants, it appears, do not want to participate at all in the proceedings initiated by the CCI and do not want the CCI to proceed ahead in accordance with law. This Court really fails to understand as to why the appellants do not want to participate in the enquiry, in which the appellants will have an opportunity to produce the material before the Director General on the basis of which, after hearing the appellants and after following the due process of law, the Director General shall be able to conduct an enquiry.

18. The Hon'ble Supreme Court in the case of **Excel Crop Care Ltd., v. CCI,** reported in (2017) 8 SCC 47, has dealt

with the aim and object of Act of 2002 and paragraphs 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the judgment read as under;

> **"21.** In the instant case, we are concerned with the first type of practices, namely, anti-competitive agreements. The Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure "level playing field" for all market players that helps markets to be competitive. It sets "rules of the game" that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. How these benefits accrue is explained in the ASEAN Regional Guidelines on Competition Policy, in the following manner:
>
> "**2.2. *Main Objectives and Benefits of Competition Policy***
>
> ***
>
> 2.2.1.1. *Economic efficiency* : Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.
>
> 2.2.1.2. *Economic growth and development* : Economic growth—the increase in the value of goods and services produced by an economy—is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth, literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the

production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.

2.2.1.3. *Consumer Welfare* : Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures."

22. The aforesaid Guidelines also spell out few more benefits of such laws incorporating competition policies by highlighting the following advantages:

"**2.2.2.** In addition, competition policy is also beneficial to developing countries. Due to worldwide deregulation, privatisation and liberalisation of markets, developing countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.

2.2.3. Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.

In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring jobs creation by new efficient competitors.

2.2.4. Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth and regulatory reform eliminates domestic regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anti-competitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximising the benefits of foreign investment."

23. In fact, there is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that it has an important role to play in improving productivity and, therefore, the growth prospects of an economy. It is achieved in the following manner:

"*International Competition Network -- Economic Growth and Productivity*

Competition contributes to increased productivity through:

Pressure on firms to control costs—In a competitive environment, firms must constantly strive to lower their production costs so that they can charge competitive prices, and they must also improve their goods and services so that they correspond to consumer demands.

Easy market entry and exit—Entry and exit of firms reallocates resources from less to more efficient firms. Overall productivity increases when an entrant is more efficient than the average incumbent and when an existing firm is less efficient than the average incumbent. Entry—and the threat of entry—incentivises firms to continuously improve in order not to lose market share to or be forced out of the market by new entrants.

Encouraging innovation—Innovation acts as a strong driver of economic growth through the introduction of new or substantially improved products or services and the development of new and improved processes that lower the cost and increase the efficiency of production. Incentives to innovate are affected by the degree and type of competition in a market.

Pressure to improve infrastructure—Competition puts pressure on communities to keep local producers competitive by improving roads, bridges, docks, airports and communications, as well as improving educational opportunities.

Benchmarking—Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals."

24. Productivity is increased through competition by putting pressure on firms to control costs as the producers strive to lower their production costs so that they can charge competitive prices. It also improves the quality of their goods and services so that they correspond to consumers' demands.

25. Competition law enforcement deals with anti-competitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation. Enforcement provides remedies to avoid situations that will lead to decreased competition in markets. Effective enforcement is important not only to sanction anti-competitive conduct but also to deter future anti-competitive practices.

26. When we recognise that competition has number of benefits, it clearly follows that cartels or anti-competitive agreements cause harm to consumers by fixing prices, limiting outputs or allocating markets. Effective enforcement against such practices has direct visible effects in terms of reduced prices in the market and this is also supported by various empirical studies.

27. Keeping in view the aforesaid objectives that need to be achieved, Indian Parliament enacted the Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalisation and privatisation as it was found that the law prevailing at that time, namely, Monopolies and Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle the competition aspects of the Indian economy. The law enforcement agencies, which include CCI and COMPAT, have to ensure that these objectives are fulfilled by curbing anti-competitive agreements.

28. Once the aforesaid purpose sought to be achieved is kept in mind, and the same is applied to the facts of this case after finding that the anti-competitive conduct of the appellants continued after coming into force of provisions of Section 3 of the Act as well, the argument predicated on retrospectivity pales into insignificance.

29. One has to keep in mind the aforesaid objective which the legislation in question attempts to subserve and the mischief which it seeks to remedy. As pointed out above, Section 18 of the Act casts an obligation on CCI to "*eliminate*" anti-competitive practices and promote competition, interests of the consumers and free trade. It was rightly pointed out by Mr Neeraj Kishan Kaul, the learned Additional Solicitor General, that the Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved. This is so eloquently emphasised by this Court in *Competition Commission of India* v. *SAIL* [*CCI* v. *SAIL*, (2010) 10 SCC 744] in the following manner : (SCC pp. 755-56 & 794, paras 6, 8-10 & 125)

> "*6*. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold : allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.
>
> ***
>
> *8*. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body, namely, "the Competition Commission of India" (for short "the Commission") which has the power to perform different kinds of functions, including passing of interim

orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialised investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

9. The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed regulations called the Competition Commission of India (General) Regulations, 2009 (for short "the Regulations").

10. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

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125. We have already noticed that the principal objects of the Act, in terms of its Preamble and the Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint

> orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalise the Indian economy to bring it on a par with the best of the economies in this era of globalisation would be jeopardised if time-bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53-B(5) and 53-T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time-bound disposal of such matters."

19. The Hon'ble Supreme Court has held that in order to avoid anti-competitive agreements, which causes harm to consumers by fixing the prices, limits outputs or allocating the markets, the Indian Parliament has enacted Competition Act 2002. The competition law enforcement deals with anti-competitive practices and in those circumstances, once the CCI forms a prima facie opinion on receipt of a complaint which is given under Section 26(1) of the Act of 2002, directs the Director General to conduct an investigation, at that initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the appellants, it would defeat the very purpose of the Act, which is to prevent practices having appreciable adverse effect on the competition. Therefore, at this stage, in the considered opinion

of this Court, the issues and grounds raised in respect of anti-competitive practices as argued by the learned counsel for the appellants does not arise. The appellants are certainly entitled for opportunity of hearing as provided under the Statute and the present petitions/appeals are certainly premature.

20. The Hon'ble Supreme Court in the same case of **Excel Crop Care Ltd.,(supra),** in paragraph 108 has held as under;

> "108. It is well settled that the Competition Act, 2002 is a regulatory legislation enacted to maintain free market so that the Adam Smith's concept of invincible hands operate 1nhindered in the background. [*CCI* v. *SAIL*, (2010) 10 SCC 744] Further, it is clear from the Statement of Objects and Reasons that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic democracy, and support good governance by restricting rent seeking practices. Therefore, an interpretation should be provided which is in consonance with the aforesaid objectives."

21. In the light of the aforesaid, in order to achieve the object of the Act of 2002, the question of interference does not arise. The appellants do have a right to participate in the proceedings and/or under an obligation to produce all the

material as desired during the enquiry by the Director General. The appellants want to crush the proceedings at a preliminary stage in a similar manner like quashing of FIR as prayed in a petition filed under Section 482 of the Cr.PC. Earlier, almost in every criminal case, petitions were filed for quashment of the First Information Report (FIR) and in those circumstances, the Hon'ble Supreme Court has laid down parameters for quashment of the criminal proceedings/ FIR in the case of **State of Haryana and others v. Bhajan Lal and others**, reported in AIR 1992 SC 604. Similarly, in Revenue matters as well as in case of violation of other Statutes on issuance of show cause notices, the aggrieved persons started rushing to Courts and in those circumstances, the Hon'ble Supreme Court in the case of **Union of India & Anr., vs. Kunisetty Satyanarayana,** reported in (2006) 12 SCC 28, has passed the following;

> "13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge sheet or show-cause notice vide Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh ([1996] 1 SCC 327/JT [1995] 8 SC 331), Special Director vs. Mohd. Ghulam Ghouse (AIR 2004 SC 1467), Ulagappa vs. Divisional Commissioner, Mysore (2001(10) SCC 639), State of U.P. vs. Brahm Datt Sharma (AIR 1987 SC 943) etc.
>
> 14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights

> of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.
>
> 15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge sheet.
>
> 16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

22. The Hon'ble Supreme Court in the aforesaid case has held that unless and until the show cause notice is vague or has been issued by an authority not competent to do so, interference can be done in the matter. In the present case, the order passed by the CCI directing an enquiry is the first stage of initiating process under the CCI Act and the enquiry is yet to commence. The appellants do not want to participate in the enquiry for the reasons best known to them.

23. The present case is not a case where the mala fides are alleged against the Regulator, nor there is any

jurisdictional infirmity. The order passed under Section 26(1) is neither an adjudication, nor determinative, but merely an inquisitorial, departmental proceedings in the nature of a direction to the Director General to make an investigation. It is neither a judicial nor a quasi judicial proceedings as held by the Hon'ble Supreme Court in the case of CCI v. SAIL. Paragraphs 31, 38, 87 and 91 of the judgment reads as under;

> "**31.** We would prefer to state our answers to the points of law argued before us at the very threshold. Upon pervasive analysis of the submissions made before us by the learned counsel appearing for the parties, we would provide our conclusions on the points noticed supra as follows:
>
> (*1*) In terms of Section 53-A(1)(*a*) of the Act appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53-A(1)(*a*). The orders, which have not been specifically made appealable, cannot be treated appealable by implication. For example, taking a prima facie view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53-A.
>
> (*2*) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor can any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter.
>
> However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the party(s) concerned to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The

Commission has the power in terms of Regulation 17(2) of the Regulations to invite not only the information provider but even "such other person" which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be "preliminary conference", for whose conduct of business the Commission is entitled to evolve its own procedure.

(*3*) The Commission, in cases where the inquiry has been initiated by the Commission suo motu, shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the Competition Tribunal. The presence of the Commission before the Tribunal would help in complete adjudication and effective and expeditious disposal of matters. Being an expert body, its views would be of appropriate assistance to the Tribunal. Thus, the Commission in the proceedings before the Tribunal would be a necessary or a proper party, as the case may be.

(*4*) During an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order inter alia should:

(*a*) record its satisfaction [which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act] in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed;

(*b*) it is necessary to issue order of restraint; and

(*c*) from the record before the Commission, it is apparent that there is every likelihood of the party to the lis, suffering irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect on competition in the market.

The power under Section 33 of the Act to pass temporary restraint order can only be exercised by the Commission when it has formed prima facie opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations.

(*5*) In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties.

38. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

87. Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in *Krishna Swami* v. *Union of India* [(1992) 4 SCC 605] explained the expression "inquisitorial". The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High-Power Judicial Committee constituted, were neither civil nor criminal but sui generis.

91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (the Director General, being appointed by the Central Government to assist

> the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice or hearing is not contemplated under the provisions of Section 26(1) of the Act."

24. Keeping in view Sections 19 and 26 of the Act of 2002, the order is certainly administrative in nature and has been passed at a preliminary/preparatory stage.

25. Learned Senior counsel appearing for the appellants have argued before this Court that they should have been granted an opportunity of hearing by the CCI before passing an order under Section 26 does not help the appellants in any manner and the Statute does not provide for grant of an opportunity of hearing before passing an order under Section 21 of the Act of 2002 and the order under Section 26(1) is passed at the pre-enquiry stage, as held by the Hon'ble Supreme Court in the case of CCI v. SAIL. The CCI is only required to see whether a prima facie opinion exists or not while passing an order under Section 26(1) of the Act of 2002. The order under Section 26(1) of the Act of 2002 can be passed when there is

prima facie material to direct an enquiry and elaborate reasons are not required, as the CCI is required to express only a tentative view. In case, elaborate reasons are provided in the order passed under Section 26(1), it will certainly prejudice the case of the person against whom a complaint has been made and therefore, the Statute has provided a safeguard for holding an enquiry after an order is passed under Section 26(1) and the Director General is certainly required to grant an opportunity of hearing while holding an enquiry in the matter. Therefore, the petitions filed by the appellants before the learned Single Judge were certainly premature petitions and without permitting the Director General of the CCI to look into various agreements executed by the appellants with the other persons, the appellants want this Court to hold that the appellants have not committed breach of the statutory provisions as contained under the Act of 2002. In the considered opinion of this Court, unless and until a detailed enquiry is conducted by the CCI, the question of giving a finding in respect of the violation of the statutory provisions, does not arise.

26. The Hon'ble Supreme Court in the case of **CCI Vs. Bharthi Airtel Ltd.**, reported in (2019) 2 SCC 521, in paragraph 121 has held as under;

> **"121.** Once we hold that the order under Section 26(1) of the Competition Act is administrative in nature and further that it was merely a prima facie opinion directing the Director General to carry the investigation, the High Court would not be competent to adjudge the validity of such an order on merits. The observations of the High Court giving findings on merits, therefore, may not be appropriate."

The Hon'ble Supreme Court in the aforesaid case has held that the order under Section 26(1) of the Act of 2002 is administrative in nature and the High Court would not be competent to adjudicate the validity of such an order on merits. In the light of the aforesaid, the question of adjudicating the validity of an order passed under Section 26(1) on merits does not arise.

27. Keeping in view the law laid down by the Hon'ble Supreme Court in the case of CCI v. SAIL, the order passed under Section 26(1) does not set into motion an unstoppable process that necessarily culminates into an adjudication against the entity against whom an enquiry is initiated. In fact, Section 26 of the Act of 2002 read as a whole, discloses a comprehensively and thoughtfully construed, stepwise scheme which contemplates not only a fair hearing to the concerned parties at the appropriate stage, but it is characterized by an inherent robustness by which the proceedings may culminate in closure.

28. In the present case, earlier also there was an information submitted against the appellants and the matter is ended in closure (AIOVA case). The Director General after conducting an enquiry recommended closure by submitting an investigation report and the same was accepted by the CCI. Therefore, the appellants should not feel shy in participating in the enquiry, which is yet to commence by the Director general and all the grounds raised by the appellants shall be available before the Director General as well as before the CCI. The order passed under Section 26(1) is only the starting point of the process and the appellants want to crush the process at the threshold and the CCI is not being permitted by the appellants to proceed ahead in the matter.

29. Much has been argued before this Court by the appellants stating that the informant was a sponsored person and much has been said about a draft which was submitted along with the information. The Scheme of the Act of 2002 allows any person and not just an aggrieved person to file an information under Section 19 and even suo motu cognizance can be taken in the matter and after the information is received, the requirement is, whether a prima facie case exists or not. Hence, at this stage, the question of granting of an opportunity as

vehemently argued before this Court does not arise. Once the CCI based upon the material has arrived at a conclusion that the matter warrants an investigation, the question of interference by this Court does not arise as the enquiry is yet to take place for determination of the issues involved.

30. The Hon'ble Supreme Court in the case of CCI v. SAIL has held that the threshold requirement for establishing a prima facie case under Section 26(1) is a low threshold and what constitutes a prima facie case at the stage of Section 26(1) must be gleaned from the stand point of setting the process into motion and not from point of view of granting any interim measure or adjudicating the matter.

31. In the light of the aforesaid, it is apparent from a reading of the CCI order dated 13.1.2020 that the prima facie case was in existence and keeping in view the prima facie case, an enquiry has been ordered by passing an order under Section 26(1) of the Act of 2002 by the CCI. In the considered opinion of this Court, the learned Single Judge was justified in holding that the order passed by the CCI does not warrant an interference.

32. In the considered opinion of this Court, the other ground raised in respect of violation of Section 3 cannot be looked into as various agreements executed by the appellants with different parties, relevant material in respect violation of Section 3 is yet to be produced before the Director General, hence, the petitions/appeals are premature and there cannot be an adjudication in respect of violation of Section 3 at this stage, as argued by the learned counsel for the appellants.

33. The CCI has found out a prima facie case for initiating the process and motion. The 'prima facie case' as defined in the case of **Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd., v. B.Dasappa,** reported in AIR 1960 SC 1352, reads as under;

> "9 …….. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."

In the aforesaid case, the Hon'ble Supreme Court has placed reliance upon its earlier judgment delivered in the case of **Martin Burn Ltd., v. R.N.Banerjee**, reported in (1958) SCR 514. Keeping in view the aforesaid definition of prima facie case

and after going through the material on record, this Court is of the opinion that the CCI has rightly exercised its jurisdiction based upon the prima facie information on receipt of a complaint and therefore, in the considered opinion of this Court, the quashment of the same does not arise.

34. Much has been argued by the learned Senior Counsel appearing for the appellants on the issue of locus. The issue in respect of locus stands concluded on account of the judgment delivered by the Hon'ble Supreme Court in the case of **Samir Agarwal v. Competition Commission of India and others,** reported in (2021) 3 SCC 136 and paragraphs 17 and 20 of the said judgment read as under;

> **"17.** The 2009 Regulations also point in the same direction inasmuch as Regulation 10, which has been set out hereinabove, does not require the informant to state how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Also, Regulation 25 shows that public interest must be foremost in the consideration of CCI when an application is made to it in writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings. What is also extremely important is Regulation 35, by which CCI must maintain confidentiality of the identity of an informant on a request made to it in writing, so that such informant be free from harassment by persons involved in contravening the Act.
>
> **20.** It must immediately be pointed out that this provision of the Advocates Act, 1961 is in the context of a particular advocate being penalised for professional or other misconduct,

which concerned itself with an action in personam, unlike the present case, which is concerned with an action in rem. In this context, it is useful to refer to the judgment in *A. Subash Babu* v. *State of A.P.* [*A. Subash Babu* v. *State of A.P.*, (2011) 7 SCC 616 : (2011) 3 SCC (Civ) 851 : (2011) 3 SCC (Cri) 267] , in which the expression "person aggrieved" in Section 198(1)(*c*) of the Code of Criminal Procedure, 1973, when it came to an offence punishable under Section 494 of the Penal Code, 1860 (being the offence of bigamy), was under consideration. It was held that a "person aggrieved" need not only be the first wife, but can also include a second "wife" who may complain of the same. In so saying, the Court held: (SCC pp. 628-29, para 25)

> "*25*. Even otherwise, as explained earlier, the second wife suffers several legal wrongs and/or legal injuries when the second marriage is treated as a nullity by the husband arbitrarily, without recourse to the court or where a declaration sought is granted by a competent court. The expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which the contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict the right of filing complaint to the first wife and there is no reason to read the said section in a restricted manner as is suggested by the learned counsel for the appellant. Section 494 does not say that the complaint for commission of offence under the said section can be filed only by the wife living and not by the woman with whom the subsequent marriage takes place during the lifetime of the wife living and which marriage is void by reason of its taking place during the life of such wife. The complaint can also be filed by the person with whom the second marriage takes place which is void by reason of its taking place during the life of the first wife."

35. Initially the CCI Act, 2002, provided for receipt of a complaint from 'any person, consumer or an association, or trade association'. This expression was substituted with the expression 'receipt of any information in such manner and', by

2007 Amendment and the substitution was not without significance. As held by the Hon'ble Supreme Court the proceedings under the Act are proceedings in rem which affect the public interest and a complaint can be filed by such person personally affected or not. The CCI Act also provides that the CCI may enquire into any alleged contravention of the provisions of the Act of 2002 on its own motion and even while exercising suo motu powers the CCI may receive information from any person and not merely from a person, who is aggrieved by the conduct that is alleged to have occurred.

36. Regulation 10 of the Regulations 2009 also provides that the informant is not required to state as to how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Therefore, in the considered opinion of this Court, the CCI was justified in directing an enquiry based upon the complaint made by respondent No.2 in the matter for forming a prima facie opinion. The order passed under Section 26(1) of the Act of 2002 is an administrative order and no adjudication has been done at this stage and therefore, in the considered opinion of this Court, the

question of interference as prayed by the learned counsel for the appellants does not arise.

37. The issue relating to deep discounting, preferential listing and exclusive tie-ups will be looked into in depth at the time of enquiry by the Director General only when various agreements executed by the appellants are brought to the notice of the Director General. At this stage, the petitions/appeals filed are premature and deserves to be dismissed. The learned Single Judge was justified in holding that the order passed by the CCI under Section 26(1) is an administrative order and the findings arrived at by the learned Single Judge does not warrant an interference.

38. Much has been argued on the ground of principles of natural justice and fair play. The statutory provisions governing the field do not provide for grant of opportunity while passing an order under Section 26(1) of the Act of 2002. As already stated earlier, the order passed under Section 26(1) is neither an adjudication, nor administrative, but merely an inquisitorial, departmental proceedings in the nature of a direction to the Director General to make an investigation. It is neither a judicial nor quasi judicial proceedings as held by the Hon'ble Supreme

Court in the case of CCI v. SAIL (supra). The order is purely administrative in nature. It is passed at a preliminary/preparatory stage and it is passed at a pre-enquiry stage as held by the Hon'ble Supreme Court in the case of CCI v. SAIL (supra). Paragraph 21 of the judgment reads as under;

> **"21.** The informant i.e. the person who wishes to complain to the Commission constituted under Section 7 of the Act, would make such information available in writing to the Commission. Of course, such information could also be received from the Central Government, the State Government, statutory authority or on its own knowledge as provided under Section 19(1)(*a*) of the Act. When such information is received, the Commission is expected to satisfy itself and express its opinion that a prima facie case exists, from the record produced before it and then to pass a direction to the Director General to cause an investigation to be made into the matter. This direction, normally, could be issued by the Commission with or without assistance from other quarters including experts of eminence. The provisions of Section 19 do not suggest that any notice is required to be given to the informant, affected party or any other person at that stage. Such parties cannot claim the right to notice or hearing but it is always open to the Commission to call any "such person", for rendering assistance or produce such records, as the Commission may consider appropriate."

In the considered opinion of this Court, merely because an opportunity of hearing was not given to the appellants, it does not vitiate the order passed by the CCI.

39. Learned Senior counsel for the appellants have also placed reliance upon a judgment delivered by the Delhi High Court in the case of **Google Inc v. CCI,** reported in 2015 (150) DRJ 192. The limited question before the High Court in the

aforesaid case was whether there exists a power to recall/review notwithstanding the repeal of Section 37 of the Act of 2002, which specifically provides for a power of review and the learned Single Judge of Delhi High Court had no occasion to pass sweeping observations in respect of the powers of Director General, that too, in a manner which is significant departure from the binding judgment of the Hon'ble Supreme Court in the case of CCI v. SAIL (supra). The Hon'ble Supreme Court has in detail gone through Section 26 of the Act of 2002 and by no stretch of imagination the law laid down by the Hon'ble Supreme Court can be diluted by a judgment of a High Court. The judgment delivered in the case of **Bharti Airtel Ltd (supra)** is also not applicable in the peculiar facts and circumstances of the case.

40. We are dealing with a limited issue relating to an order passed under Section 26(1) of the Act of 2002 by the CCI setting the machinery in motion for conducting an enquiry by the Director General and therefore, as the enquiry is yet to commence, wherein all grounds raised in the present petitions/appeals can be looked into, hence, the present petitions/appeals are premature.

41. Learned Senior counsel appearing for the appellants have also argued before this Court that earlier also a similar issue has been looked into by the CCI in the case of AIOVA v. Flipkart, in case No.20/2018, in which the CCI vide order dated 6.11.2018, directed closure of the case under Section 26(2) of the Act of 2002. An appeal was preferred before the NCLAT and the same was allowed by an order dated 4.3.2020 and the order of the NCLAT was challenged by the Flipkart before the Hon'ble Supreme Court and the same has been stayed by the Hon'ble Supreme Court on 2.12.2020.

42. In the considered opinion of this Court, the order passed in the case of AIOVA does not help the present appellants. The order was passed by the CCI on 6.11.2018 directing closure of the case under Section 26(2) of the Act of 2002. The present order has been passed by the CCI under Section 26(1) of the Act of 2002 on 13.1.2021, meaning thereby after a lapse of considerable long time it has been passed and in a competitive market various agreements are executed, new practices are adopted every day and merely because some other issue has been looked into by the CCI earlier, it does not mean that on the ground of res judicata the CCI cannot look into any information subsequently against the appellants. The principle

of res judicata has no application in the matter under the Act of 2002 in the peculiar facts and circumstances of the case. The market place is by its very nature a constantly evolving and dynamic space. The market forces can evolve even in the course of a few months and therefore, by no stretch of imagination, it can be held that the appellants should be out of bound for all times and no action can be taken against them only because at some point of time the matter has been looked into by the CCI.

43. In the case of **Cadila Healthcare v. CCI,** reported in (2018) 252 DLT 647, the Hon'ble Supreme Court has held as under;

> "59. The last point on this issue is the question of res judicata. Here, the court notices that Grasim Industries was a case where the court had ruled that even though there might be an infirmity in the CCI's approach regarding the initiation of proceedings, the material gathered by DG can be treated as information. Therefore, that in a given case, a decision is rendered may not be conclusive of the matter in entirety; complaints and grievances regarding abuse of dominance have an inherently anti-competitive effect, which pervade the marketplace and tend to stifle competition or create barriers to a free trade in goods and services. Conclusions of one or two specific complaints may not always be determinative of an entity's behaviour in the market place; they tend to cover a larger canvas, influencing the outcomes in terms of price, access to articles goods and services, within the commercial stream and their deleterious effects are felt by the general public. Settlement or disposal of individual or some cases might not be determinative of the matter which pertains to abuse of dominance, for the reason that it affects the wider public, just as a crime does. It is like saying that a builder or other service provider who indulges in widespread malpractice that amounts to cheating investors or flat buyers, which is exposed by one

> complaint, that results in a first information report (FIR) and consequent investigation, that unearths that several other consumers are like preys can be quashed on the ground that the errant service provider settles with the complainant/informant. In such event, the High Court would never exercise its discretion to quash the proceeding emanating from the FIR. Therefore, the CCI or an expert body should ordinarily not be crippled or hamstrung in their efforts by application of technical rules of procedure."

44. In the considered opinion of this Court, an expert body cannot be crippled or hamstrung in their efforts by application of technical rules of procedure.

45. It is also contended by the learned Senior counsel appearing for the appellants that the harm is going to be caused to the business reputation of the appellants and before passing an order under Section 26(1) of the Act of 2002, the appellants should have been invited for a discussion.

46. In **Cadila Healthcare's case (supra)**, the Hon'ble Supreme Court in paragraph 44 has held as under;

> 44. …….. Cadila's reliance on Rohtas Industries and Barium Chemicals is, in the opinion of this court, irrelevant given the facts of this case. Granted, administrative orders should be reasoned; however, where they trigger investigative processes that are not conclusive, having regard to the clear enunciation in SAIL, that notice is inessential, accepting the argument, that inquiry would harm the market or commercial reputation of a concern, would be glossing over the law in SAIL. Moreover, the Rohtas Industries related to the affairs of a company, which implicated its internal management. Allowing inquiry, even an innocuous one, without application of mind, is a different proposition altogether from acting on the information of someone who alleges either direct or indirect or tacit

> dominance in the market place in the course of one's business. The latter is regulatory of the marketplace rather than the core management of the concern; it is akin to adjudicating a tax or commercial dispute, or a regulatory dispute. As stated by Justice Brennan, natural justice in such instances should not —unlock the gate which shuts the court out of review on the merits." (in this case, preclude or chill the exercise of jurisdiction by the DG into a potential abuse of dominant position of a commercial entity). Therefore, this court finds no merit in the argument that the procedure adopted by the DG in going ahead with the inquiry and investigating into the market behaviour of Cadila in anyway affects it so prejudicially as to tarnish its reputation. The CCI has not as yet examined the investigation report in the light of Cadila's contentions; all rights available to it, to argue on the merits are open."

In light of the aforesaid, it can be safely gathered that by no stretch of imagination the order passed by the CCI under Section 26(1) is going to cause harm to the business reputation of the appellants.

47. In the light of the aforesaid, in the considered opinion of this Court, by no stretch of imagination, the process of enquiry can be crushed at this stage. In case, the appellants are not at all involved in violation of any statutory provisions of Act of 2002, they should not feel shy in facing an enquiry. On the contrary, they should welcome such an enquiry by the CCI. The writ petitions filed against the order dated 13.1.2021 and the present writ appeals are nothing but an attempt to ensure that the action initiated by the CCI under the Act of 2002 does not attain finality and the same is impermissible in law as the Act of

2002 itself provides the entire mechanism of holding an enquiry, granting an opportunity of hearing, passing of a final order as well as appeal against the order passed by the CCI. In the considered opinion of this Court, the present writ appeals filed by the appellants are devoid of merits and substance, hence, deserve to be dismissed and are accordingly, dismissed.

No order as to costs.

Pending, IAs if any, stand dismissed.

Sd/-
JUDGE

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