IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11152 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11152 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11152 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 9521 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 9521 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 9521 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 9520 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 9520 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 9520 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 9583 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 9583 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 9583 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 10933 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 10933 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 10933 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 12309 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 11124 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11124 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11124 of 2020

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R/SPECIAL CIVIL APPLICATION NO. 11122 of 2020
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In R/SPECIAL CIVIL APPLICATION NO. 11128 of 2020
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CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11128 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 11150 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11150 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11150 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 11146 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022

In R/SPECIAL CIVIL APPLICATION NO. 11146 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11146 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 11155 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11155 of 2020
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 11155 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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M/S. SHREE SHIVAM CORPORATION THROUGH ITS SOLE PROPEIRTOR MR. PRAHLAD DURLABHJIBHAI JOSHI
Versus
COMPETITION COMMISSION OF INDIA

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Appearance:
SCA NOS.10933, 11124, 11122, 11127, 11126, 11123, 11128 OF 2020,
MR MIHIR THAKORE, SENIOR ADVOCATE with ADVOCATE MS.AMRITA M. THAKORE FOR PETITIONERS

SCA NOS.9521, 9520, 9583 OF 2020,
SENIOR ADVOCATE MR.MIHIR JOSHI WITH ADVOCATE MR MITUL SHELAT FOR MS.DISHA NANAVATY FOR PETITIONERS
SCA NOS.11152, 11155 OF 2020,
MR D.M.VARANDANI FOR THE PETITIONERS
SCA NO. 12309 OF 2020
MR TIRTHRAJ PANDYA FOR THE PETITIONERS

SCA NOS. 11150, 11146 OF 2020
MS TANAYA SHAH FOR THE PETITIONERS

SCA NOS. 11152, 10933, 12309, 11124, 11122, 11127, 11126, 11123, 11128, 11150, 11146 11158 OF 2020

MR DEVANG VYAS, Asst. Solicitor General with MR. K.M.ANTANI & MS. GARIMA MALHOTRA ADVOCATE for RESPONDENT Nos.1 AND 2.
PARTY IN PERSON(5000) for the Respondent No.3.

SCA NOS. 9521, 9520, 9583 OF 2022,

MR DEVANG VYAS, Asst. Solicitor General with MR. K.M.ANTANI AND MS. GARIMA MALHOTRA ADVOCATE FOR RESPONDENT NOS.3 AND 4

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CORAM:**HONOURABLE DR. JUSTICE A. P. THAKER**

Date : 09/09/2022

ORAL JUDGMENT

1. The present group of petitions are filed against the order of respondent Nos. 1 and 2 passed in Case No. 24/2019 initiating the investigating proceedings and other notices, issued thereof, and involves the provisions of Competition Act, 2002. All these petitions are tagged together and heard finally at admission stage.

2. Since common arguments has been adressed in relation to Special Civil Application No. 10933 of 2020, the said matter has been treated as lead matter and the facts have been taken from the said petition.

3. At the outset, it requires to be observed that the petitioners of Special Civil Application No.11152 of 2020, Special Civil Application No.9521 of 2020, Special Civil Application No. 9520 of 2020, Special Civil Application No. 9583 of 2020, Special Civil Application No. 10933 of 2020, Special Civil Application No. 11124 of 2020, Special Civil Application No. 11122 of 2020, Special Civil Application No. 11128 of 2020, Special Civil Application No. 11126 of 2020,

Special Civil Application No. 11123 of 2020, Special Civil Application No. 11127 of 2020, Special Civil Application No. 11150 of 2020, Special Civil Application No. 11146 of 2020 and Special Civil Application No. 11155 of 2020 have moved draft amendment in the respective petitions. Considering the facts and circumstances of the case, the same are hereby allowed in respective petitions.

4. The brief facts arising out of the petition are as under:

4.1 Petitioner No.1 is a private limited Company incorporated under the Companies Act having registered office at Ahmedabad, Gujarat. That the primary activity involves printing and binding of School Book and related material, the primary consumer of which in the State of Gujarat is the Gujarat Council and Elementary Education (in short 'GCEE'). GCEE is a registered Society working towards the attaining of the object of Sarvasikshan Abhyan, inter alia, *"Pragna Project"* i.e. activity based learning approach. That it was empanelled with the GCEE in 2016 having met all the pre-requisite set by GCEE in this regard. That the petitioner No.2 is a Director and share holder of petitioner No.1.

4.2 That the petitioner No.1 was arrayed as opponent party in Case No. 32 of 2018 before respondent No.1. The said case was based on the allegation in the Information Petition filed by the father of the respondent No.3 and pertaining

to the work carried out by various printers and binders in the Gujarat State Board of School Text Books [(GSBSTB for the sake brevity)] with regard to the GSBSTB Tenders for printing and binding school text books. Respondent No.3 having failed in the Tender process of GSBSTB filed the Case No. 32 of 2018 against the successful bidders, alleging bid rigging and also filed case No. 4 of 2019 against GSBSTB alleging abuse of dominian possession by GSBSTB.

4.3 By way of order dated 7.8.2019 under Section 26(2) of the Competition Act, 2002 in case No. 4 of 2019, respondent No.1 rejected the allegations against GSBSTB by holding that there was no prima-facie case. As regards case No. 32 of 2018, alleging bid rigging, the respondent No.1 passed order dated 9.11.2018 under Section 26(1) of the said Act, purportedly contending the prima-facie opinion against the bidders and directing respondent No.2 to conduct an investigation as per the Act. The said Order was challenged before this Court vide SCA No. 8010 of 2020 and this Court was pleased to quash the same vide its order dated 18.8.2020, as the said order did not reflect formation of any prima-facie opinion by the respondent No.1.

4.4 It is contended by the petitioner that in continuation of the Information Petition filed by his father, with the sole objective of harrasing other printers and eliminating competition in Gujarat by keeping other printers embroiled

in the litigation and under fear of being penalising for participating and not being awarded any tender, respondent No.3 filed Information Petition in or around June, 2019, which is "for supporting evidence" in the case No. 32 of 2018, filed by respondent No.3's father. It is contended that as per respondent No.3 himself, , there is overlapping information in his Information Petition and that in case No. 32 of 2018, however, he has re-filed the same with respondent No.1 for "proper investigation and outcome". The said Information Petition filed by respondent No.3 was numbered as Case No. 24 of 2019 by respondent No.1. The said Information Petition sought to make baseless allegation of restrictive tendeing by respondent No.1 and bid rigging by the successful bidders in the Pragna Tender quoted by respondent No.4 for the period from 2016-17 to 2018-19.

5. Mr. Mihir Thakore, learned Senior Counsel with Ms. Amrita Thakore, learned advocate for the petitioners in SCA No. 10933 of 2020, SCA No. 11124 of 2020, SCA No. 11122 of 2020, SCA No. 11127 of 2020, SCA No. 11126 of 2020, SCA No. 11123 of 2020, and SCA No. 11128 of 2020 has vehemently submitted that the impugned order of CCI does not comply with the requirements of Section 26(1) of the Competition Act, 2002 and the same is arbitrary, perverse and illegal. He has also submitted that the said order is non-speaking one. According to Mr. Thakore, learned Senior

Counsel, an order under Section 26(1) of the Act is required to contain an opinion that there exists a prima facie case before directing investigation to be made by the Director General and such opinion must be based on the information received by the respondent no. 1, and the respondent no. 1 is duty bound to provide cogent reasons for its opinion. Mr. Thakore has further submitted that an order under Section 26(1) is not appealable but if it does not comply with this requirement or where such prima facie opinion though purportedly formed is palpably unsustainable and/or is not with reference to the information furnished, i.e. where there is no link between the information furnished and the opinion, it would be amenable to judicial review under Article 226 of the Constitution. The petitioner relies upon the provisions of Section 26(1) which is reproduced hereinbelow:

Section 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.

5.1 Mr. Mihir Thakore, learned Senior Counsel has relied upon the extract of certain judgments, which are reproduced hereinbelow

(1) CCI v. Steel Authority of India Limited, reported in 2010 (10) SCC 744,

"31(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."

"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."

(2) Mahindra Electric v. CCI, reported in 2019 SCC Online Del 8032,

> *"85. …CCI is also amenable to judicial review under Article 226 of the Constitution of India as regards the directions it makes procedurally. For instance, if it can be shown that investigation has been launched without a reasoned order prima facie expression of its opinion, under Section 26(2), the CCI's orders can be corrected in writ proceedings. Similarly, in regard to conduct of proceedings during investigation (i.e. the fact gathering exercise) the jurisdiction of the High Courts to ensure fair procedure and compliance with natural justice is assured…"*

(3) Google Inc. v. CCI, reported in 2015 SCC Online Del 8992:

> *"18(A) The CCI, before it passes an order under Section 26(1) of the Act directing the DG to cause an investigation to be made into the matter, is required to, on the basis of the reference received from the Central or the State Government or a statutory authority or on the basis of the information/complaint under Section 19 or on the basis of its own knowledge, form an opinion that there exists a prima facie case of contravention of Section 3(1) or Section 4(1) of the Act. Without forming such an opinion, no investigation by the DG can be ordered to be made. However, while forming such an opinion, as per SAIL (supra), CCI is not mandated to hear the person/enterprise referred/informed against."*

"18(B) The statute does not provide any remedy to a person/enterprise, who/which without being afforded any opportunity, has by an order/direction under Section 26(1) been ordered/directed to be investigated against/into. Though ComPAT has been created as an appellate forum against the orders of CCI but its appellate jurisdiction is circumscribed by Section 53A of the Competition Act and no appeal is prescribed against the order of CCI under Section 26(1) of the Act. The said person/enterprise, in the absence of any remedy, has but to allow itself to be subjected to and participate in the investigation."

"18(K) We are of the opinion that once petitions under Article 226 for quashing of investigation under the Cr.P.C. have been held to be maintainable, on the same parity a petition under Article 226 would also be maintainable against an order/direction of the CCI of investigation under Section 26(1) of the Competition Act particularly when the powers of the DG, CCI of investigation are far wider than the powers of Police of investigation under the Cr.P.C."

"18(L) However, a petition under Article 226 of the Constitution of India against an order under Section 26(1) of the Act would lie on the same parameters as prescribed by the Supreme Court in Bhajan Lal (supra) i.e. where treating the allegations in the reference/ information/complaint to be correct, still no case of contravention of Section 3(1) or Section 4(1) of the Act would be made out or where the said allegations are absurd and inherently improbable or where there is an express legal bar to the institution and continuance of the

investigation or where the information/ reference/complaint is manifestly attended with mala fide and has been made/filed with ulterior motive or the like."

"18(M) Just like an investigation by the Police has been held in Bhajan Lal (supra) to be affecting the rights of the person being investigated against and not immune from interference, similarly an investigation by the DG, CCI, if falling in any of the aforesaid categories, cannot be permitted and it is no answer that no prejudice would be caused to the person/enterprise being investigated into/against or that such person/enterprise, in the event of the report of investigation being against him/it, will have an opportunity to defend."

"18(O) When the effect of, an order of investigation under Section 26(1) of the Competition Act can be so drastic, in our view, availability of an opportunity during the course of proceedings before the CCI after the report of the DG, to defend itself cannot always be a ground to deny the remedy under Article 226 of the Constitution of India against the order of investigation. Though we do not intend to delve deep into it but are reminded of the principle that in cases of violation of fundamental rights, the argument of the same causing no prejudice is not available (see A.R. Antulay v. R.S. Nayak (1988) 2 SCC 602)."

"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."

5.2 Mr. Mihir Thakore, learned Senior Counsel submits that the order dated 13.1.2020 passed by CCI is clearly non-speaking and does not record even "some reason even while forming a prima facie view" since it proceeds on the mere basis that "there is some force in the submission of the Informant" only on the patently false and untenable ground that "each individual item under each package by L1 winner of that package are also lowest". He has also submitted that CCI has completely overlooked the following while arriving at this sweeping false "prima facie view" and directing investigation:

1. CCI has not adhered to the Supreme Court's direction in the case of CCI v. SAIL (Supra) that "such opinion should be formed on the basis of the records".

2. CCI has completely ignored the settled position of law that, wherever the law provides for formation of opinion, such opinion must be an honest one based on the existence of circumstances relevant to the inference, as the sine qua non for action must be demonstrable

and there is no general discretion to go on a fishing expedition to find evidence. In other words, the formation of opinion must be based on objective facts, which were completely absent in this case since there is not even an iota of evidence of meeting of minds or of any agreement between the 16 empanelled printers and the entire allegation proceeds on a conjecture based on lowest price in each item.

For the above submission, Mr. Mihir Thakore, learned Senior Counsel for the petitioners has relied upon the decision in case of Barium Chemicals v. CLB, AIR 1967 SC 295, wherein it is observed in Paras-27, 28, 41 as under:

Hidayatullah, J.

> *27. In dealing with this problem the first point to notice is that the power is discretionary and its exercise depends upon the honest formation of an opinion that an investigation is necessary. The words "in the opinion of the Central Government" indicate that the opinion must be formed by the Central Government and it is of course implicit that the opinion must be an honest opinion. The next requirement is that "there are circumstances suggesting etc." These words indicate that before the Central Government forms its opinion it must have before it circumstances suggesting certain inferences. These inferences are of many kinds and*

it will be useful to make a mention of them here in a tabular form:-

(a) that the business is being conducted with intent to defraud-

(i) creditors of the company, or (ii) members, or (iii) any other person;

(b) that the business is being conducted-

(i) for a fraudulent purpose or (ii) for an unlawful purpose;

(c) that persons who formed the company or manage its affairs have been guilty of-

(i) fraud or (ii) misfeasance or other misconduct-- to wards the company or towards any of its members.

(d) That information has been withheld from the members about its affairs which might reasonably be expected including calculation of commission payable to-

(i) managing or other director,

(ii) managing agent,

(iii) the secretaries and treasurers,

(iv) the managers.

28. These grounds limit the jurisdiction of the Central Govern- ment. No jurisdiction, outside the

section which empowers the initiation of investigation, can be exercised. An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstance leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly:-

> *"It is not reasonable to say that the clause permitted the government to say that it has formed the opinion on circumstances which it thinks exist.....*

Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances. if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of

information of a particular kind. We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the in reference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in s. 237(b) can at all be drawn the action would be ultra vires the Act and void.

41. On the question of mala fides, I am inclined to think that the Chairman passed the order dated May 19, 1965 independently of and without any pressure from the Minister. I am all the more persuaded to come to this conclusion having regard to the fact that in paragraph 14 of his affidavit the Chairman has disclosed the circumstances which he took into account in passing the order. In paragraphs 5, 8 and 16 of his affidavit, the Chairman stated that he had various materials on the basis of which he passed the order. But, on reading this affidavit as a whole and the affidavit of Mr. Dang, I am satisfied that in paragraph 14 of his affidavit the Chairman has set out all the material circumstances which bad emerged on an examination of the various materials before him. Briefly put, those circumstances are delay, bungling and faulty planning by the management resulting in double expenditure, huge losses, sharp fall in the price of the Company's shares and the resignation of some of the directors on account of differences

in opinion with the managing director. I think that these circumstances, without more, cannot reasonably suggest that the business of the company was being conducted to defraud the creditors, members and other persons or that the management was guilty of fraud towards the company and its members. No reasonable person who had given proper consideration to these circumstances could have formed the opinion that they suggested any fraud as mentioned in the order dated May 19, 1965. Had the Chairman applied his mind to the relevant facts, he could not have formed this opinion. I am, there- fore, inclined to think that he formed the opinion without applying his mind to the facts. An opinion so formed by him is in excess of his powers and cannot support an order under s. 237(b). The appeal is allowed, and the impugned order is set aside. I concur in the order which Shelat, J. proposes to pass".

J.M.Shelat, J.

"19. Thus the consideration on which action is permissible under S. 234 and the kind of action taken thereunder are different from those under S. 237. It is true that the authority to take action under S. 235 is the government and the action authorised thereunder is investigation but action can be taken thereunder not suo motu but only on an application by a certain number of members or by members with a certain amount of voting power or on the Registrar's report. Section 234, besides, has nothing to do with investigation as S. 235 and

S. 237 have, though on a report under S. 234, the government can institute investigation under cl. (e) of S. 235. Section 10-E was inserted in the Act by Act LIII of 1963 and deals with the constitution of the Company Law Board. The Board constituted under this section consists of a Chairman and members. By a notification G.S.R. 176 dated February 1, 1964 the Central Government constituted the Company Law Board under S. 10-E. By another Notification No. G. S. R. 178 it delegated some of its powers under the Act including those under S. 237 to the Board. On the same day, it also published Rules under S. 642 (1) read with S. 10-E (5) called the Company Law Board (Procedure) Rules,

1964. Rule 3 empowers the Chairman of the Board to distribute the business of the Board among himself and the other member or members and to specify the cases or classes of cases which shall be considered jointly by the Board. On February 6, 1964, the Chairman, under the power vested in him by R. 3, passed an order distributing the business of the Board between himself, the other member and the Board. Under this order the business of ordering investigation under Sections 235 and 237 was allotted to himself to be performed by him singly".

"27. But the contention which calls for a more serious consideration is that the circumstances disclosed in Para. 14 of the Chairman's affidavit and on which he is said to have formed his opinion

were circumstances extraneous to S. 237 (b) and hence the order was ultra vires the section. The contention a two-fold one, (1) that though under Cl. (b) the opinion of the authority is subjective there must exist circumstances set out in the clause which are conditions precedent for the formation of the opinion, and (2) that assuming that this is not so, since the Chairman has disclosed the circumstances on which he formed the opinion, the Court can examine them and see if they are relevant for an opinion as to fraud or an intent to defraud. Reliance was placed on Paras. 14 and 16 of the Chairman's affidavit to show that the circumstances there stated show that in passing the order, matters totally extraneous to the section were taken into account rendering the order ultra vires Cl. (b) of S. 237. The other affidavits do not matter much as they only repeat what the Chairman has stated in his affidavit. The construction of Cl. (b) suggested by Mr. Setalvad was that the clause requires two things, (1) the opinion of the Central Government, in the present case of the Board, and (2) the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-cl. (i) or that the persons mentioned in sub-cl. (ii) were guilty of fraud, misfeasance or misconduct towards the company or any of its members. According to this construction, though the opinion its subjective the existence of circumstances set out in Cl. (b) is a condition precedent to the formation of such opinion and, therefore, even if the impugned order were to

contain a recital of the existence of those circumstances the Court can go behind that recital and determine whether they did in fact exist. The learned Attorney-General opposed this construction and argued that the clause was incapable of such dichotomy, that not only the opinion was subjective but that the entire clause was made dependent on such opinion, for what the clause lays down is that the authority must come to an opinion on materials before it that there exist circumstances suggesting fraud or intent to defraud, etc. Such dichotomy, according to him, is impossible and not reasonable because it cannot be that the authority must first ascertain by holding an inquiry that there are circumstances suggesting fraud or intent to defraud, etc., and then form a subjective opinion that those circumstances are such as to suggest those very things. He emphasised that the words "opinion" and "suggesting" were clear indications that the entire function was subjective, that the opinion which the authority has to form is that circumstances suggesting what is set out in sub-cls. (i) and (ii) exist and, therefore, the existence of those circumstances is by itself a matter of subjective opinion. The legislature having entrusted that function to the authority, the Court cannot go behind its opinion and ascertain whether the relevant circumstances existed or not".

3. Both ingredients of Section 3(1) of the Act, i.e. that there exists an agreement in respect of

supply/provision of services and that such agreement is likely to cause an appreciable adverse effect on competition, need to be prima facie established before any investigation can be directed under Section 26(1) of the Act. In the present case, CCI has neither come to any prima facie conclusion of there existing an agreement between all opposite parties nor that such agreement, if any, is likely to cause an appreciable adverse effect on competition. Therefore, the ingredients of Section 3(1) are not prima facie satisfied so as to allow an investigation to take place. The presumption under Section 3(3)(d) would only take effect provided there is a conclusion that there is an agreement which directly or indirectly results in bid rigging or collusive bidding. The formation of prima facie opinion in the context of allegation of bid rigging/collusive bidding has to have a nexus with the essential ingredients of bid rigging/collusive bidding. In other words, there ought to be a positive finding based on information/evidence and application of mind, even to a bare minimum prima facie extent, regarding essential ingredients constituting allegation of bid rigging/collusive bidding. 'Bid-rigging' is defined in Section 3 of the Act to

mean any agreement, between enterprises or persons referred to in sub-section (3) of that section engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. In the present case, there was no material on record to even prima facie suggest fulfillment of the ingredients of bid-rigging and no inference could have been drawn of bid-rigging purely based on lowest bids since that would amount to pure conjecture. The respondent no. 1 has not discussed of analyses even to a prima facie extent, that such ingredients could be found from the material produced on record. It is well settled that quoting of lowest price by itself cannot be the basis of drawing any conclusions as to bid-rigging or collusive bidding or cartelization. There may be varied situations such as monopsony or oligopsony, the manner in which the authority conducts the tender process, the control it exercises over awarding of work, etc.

For the aforesaid submission, Mr. Mihir Thakore, learned Senior Counsel has relied upon the decision in case of *Rajasthan Cylinders v. UOI,*

2018, reported in SCC Online SC 1718 and has submitted that CCI has not even prima facie found any evidence of any connected or coordinated action which can amount to bid-rigging or any agreement as defined in the Competition Act, 2002. The said order is therefore ex facie without jurisdiction, perverse, illegal and liable to be set aside.

4. There is no allegation of any wrongdoing by these 16 printers in the matter of their empanelment by GCEE. Pursuant to empanelment, only these 16 persons can participate in GCEE's Tenders for the period upto which they are empanelled. For the bids invited for printing work for 2016-17, 9 empanelled printers became successful bidders in different printing packages. For the bids invited for printing work for 2017-18, 5 empanelled printers (being Mirror Image Pvt. Ltd. – Package D, Reliable Art Printery Pvt. Ltd. – Package B, Sahitya Mudranalaya Pvt. – Package C, M/s. Shri R. K. Printers and Binders Ltd. – Package E and Wilson Printcity Pvt. Ltd. – Package A) became successful bidders in different printing packages. For the bids invited for printing work for 2018-19, 5 empanelled

printers (being M/s. Gajjar Offset – Package D, Gujarat Offset Pvt. Ltd. – Package E, M/s. Maruti Printers – Package B, M/s. Shree Shivam Corporation – Package C, M/s. Yash Printers – Package A) became successful bidders in different printing packages. Thus, the entire case of the respondent no. 3's alleging cartelisation against all empanelled printers falls to the ground and is untenable and hence, such sweeping conclusion which is drawn by CCI by ignoring this vital aspect is ex facie perverse and untenable.

5. Having the lowest rate for each individual item in a package is the direct consequence of quoting lowest price in a package in respect of paper, printing, etc. and therefore there is nothing strange in this. Moreover, these printers have a limited capacity in terms of resources and while they may have submitted bids for multiple packages in the hope of winning somewhere, they would quote lowest rates in selected package depending on their stocks of paper, ink, etc. Therefore, to conclude based on lowest rate in each item of a package is nothing but to proceed purely on conjecture and not on objective facts.

6. Package B of 2016-17 has only 5 items, Package D of 2016-17 has only 3 items, Package C of 2017-18 has only 4 items, Packages A to C of 2018-19 have only 2 items each, Package D of 2018-19 has only 1 item. Therefore, there were several packages which had only few or 1 items and hence, on the basis of such packages, it can hardly be concluded that there was cartelisation in the matter of lowest bid in items. CCI has overlooked even this vital aspect which evidences that the respondent no. 3's case was completely untenable. 5 printers (being M/s. Ajay Offset, Bhavik Publication Pvt. Ltd., M/s. Jagdish Offset, Print Vision Pvt. Ltd. and Shreedhar Printers Pvt. Ltd.) did not succeed in any package.

7. CCI has ignored GCEE's categorical case that it does not look into individual prices of each and every item but the total cost of procurement and thereafter negotiates to bring the cost down further, and that there was a rise in costs of paper, printing, labour, etc and that, in 2019-20, the tendering process underwent a drastic change as it went from nprocure website to GeM.

8. CCI has also ignored the vital fact, which was also pointed out by GCEE that this was a motivated Information Petition by persons who had failed in their earlier attempts before CCI and were trying to take entry in job work of GCEE and was an abuse of process for personal gain.

9. CCI has also ignored the fact that the Informant had approached CCI in respect of matter which were long concluded and there was gross delay which ought to have alerted CCI as to the motivated nature of the Information Petition.

5.3 Mr. Mihir Thakore, learned Senior Counsel submits that the Order suffers from the vice of arbitrariness, discrimination and ipse dixit:

(i) While CCI has the discretion to invite or not invite opposite parties in the preliminary hearing, such discretion has to be exercised in a objective, judicious and fair manner and not arbitrarily or on ipse dixit. Regulation 17 of the Regulations is a provision made by CCI itself conferring upon itself inter alia the discretion to invite "such other person" for a preliminary conference. Therefore, CCI, cannot, on the basis of a provision made by itself, suggest that it can exercise discretion on ipse dixit. It is well settled that

even an administrative authority is required to act fairly and discretion is required to be exercised objectively, judiciously and fairly and not on the ipse dixit or whim of the authority. In support of this submission, he has relied upon the decision in case of *State of Orissa v. Mamata Mohanty, (2011) 3 SCC 436.*

(ii) In the present case, CCI, on complete ipse dixit, arbitrarily decided to invite only GCEE (which is the opposite party no. 1 in the proceedings before CCI) and not invite any of the other opposite parties for the preliminary meeting. GCEE was not only provided the complete set of the Information Petition, but also given an opportunity to address CCI in the preliminary meeting and file its detailed reply. This resulted in CCI getting exonerated in respect of the allegations made against it in the Information Petition while the other opposite parties are now required to undergo a long drawn and expensive investigation proceeding. The procedure followed by CCI before passing the impugned order dated 13.1.2020 is ex facie arbitrary, discriminatory and highhanded and vitiates the said order.

6. Mr. Mihir Joshi, learned Senior Counsel with Mr. Mitul Shelat, learned advocate for Ms. Disha Nanavaty, learned advocate for the petitioners in respect of SCA No. 9520 of

2020, SCA No. 9521 of 2020 and SCA No. 9583 of 2020 has, while endorsing the submissions of Mr. Mihir Thakore, learned Senior Counsel, has submitted that:

6.1 The CCI is authorized to undertake an inquiry as to whether any agreement is an anti-competitive agreement as defined under Section 3 sub-section (1). But before starting an investigation, the Commission has to be satisfied prima facie that; - (i) there is an agreement under Section 3 sub-section (1); (ii) such agreement prima facie directly / indirectly results into bid rigging / collusive bidding.

6.2 The Commission will have the jurisdiction to start the inquiry only if on the available facts it has arrived at a satisfaction to form an opinion that there exists a prima facie case. The Commission cannot assume facts to enter upon the jurisdiction. The existence of facts is always open to Judicial Review. If it is established that the opinion is formed on the basis of :-

(i) assumptions of facts
(ii) consideration of irrelevant facts
(iii) non consideration of relevant facts

The Court must infer that the Authority did not apply its mind to the relevant facts. The opinion is then lacking as the condition precedent for exercise of

powers does not exist. The Court would then exercise jurisdiction under Article 226 of the Constitution of India to review such a decision.

6.3 The impugned order proceeds to record a prima facie opinion that "the rates quoted by parties were not independent and appear to be based on a connected and coordinated action". For arriving at the said opinion the Commission assumes that *the bid/ bidders price for all items comprised in the package were always lowest*.

6.4 The above assumption is factually incorrect as has been demonstrated by the Petitioners. The Petitioners have placed on record the material which demonstrates that the assumption is factually incorrect. None of the following assertions have been denied or disputed by any of the Respondents:-

(i) for the year 2016-17, R.K. Printers was the L1 bidder. The package was in two parts. In part A, R.K. Printers had quoted the lowest price, whereas, in part B, Sr. No.1 to 12 and Sr. No. 17 to 33, had quoted the lowest price of Reliable Printers. For Sr. No. 13, L1 price is of Gajjar Offset;

(ii) for the year 2016-17, in the tender for teacher

training modules, there were six items. In the items at Sr. No.1, Mirror Image had quoted the lowest price; for Sr. No.2, Yash Printers had quoted the lowest price and for Sr. No. 3 to 6, Reliance Arts had quoted the lowest price. The L1 bidder for the said modules was however Reliable Art Printers;

(iii) for the year 2017-18, in the tender for SCE form, there were 16 items in the said package. In Sr. No. 1 to 7, Yash Printers had quoted the lowest price; in Sr. No. 8 to 11, Mirror Image had quoted the lowest price; in Sr. No.12, Maruti Printers had quoted the lowest price, in Sr. No.13 to 16, Yash Printers had quoted the lowest price. The L1 bidder was however; Yash Printers.

In each of the above tenders, undisputedly, the item wise price quoted by the L 1 bidder was not the lowest. It is therefore an incorrect assumption of fact.

6.5 The Competition Commission has then assumed that the L1 rates provided in the tables were not the negotiated rates but were rates derived from individual quoted price.

The tendering agency has stated on oath that the prices referred to in the table were the negotiated rates. The rates quoted in the Table in fact are the negotiated rates. This is evident from reading the extracts at internal page 32 to 36 with page 30 of the impugned order. The quoted price and the final price are different. The final price is less than the sum of the quoted price. It is, therefore, evident that the rates referred to in the table were the negotiated rates. The assumption of fact to the contrary is on the face of it incorrect.

The assumption of jurisdiction is therefore premised on two assumptions of facts both of which are incorrect.

6.6 Even on a demurer, the finding of the Commission by itself would not authorize the forming of a prima facie opinion. In Paragraph 17.2 of the order the Commission has recorded the stand of the GCEE that "GCEE further stated that it does not look at individual prices of each and every item in the package but is concerned with the total cost of procurement of the tendered quantity of books and other items as it is interest in bringing down the total cost of procurement…". This relevant fact is completely overlooked by the Commission. Once it is established that the tendering agency does not look

at individual item prices in the package but is concerned only with the total cost of procurement, the price quoted in the individual items becomes an irrelevant consideration.

6.7 Even if prices of the bidders are the same, that by itself would not be sufficient to form an opinion that there was an agreement which directly or indirectly results in bid rigging or collusive bidding. It is essential to look at the relevant facts which would include the nature of the relationship between the tendering agency and the bidders and the tender conditions.

In support of his above submission, Mr. Joshi, learned Senior Counsel has relied upon the decision in case of Rajasthan Cylinders versus Union of India (Supra), wherein it is observed in Paragraph Nos. 85 to 92 & 95 as under:

> *"85) The first and foremost issue which needs to be considered is that whether there was a situation of monopsony or oligopsony.*
>
> *86) From the aforesaid discussion, it is clear that as far as CCI is concerned, it has come to the conclusion that there was a cartelisation among the appellants herein and a concerted decision was taken to rig the bids which were submitted persuant to the tenders issued by IOCL. On the other hand, the appellants argue that there was no such*

agreement and even if the bids of many bidders were identical in nature, the bidswere driven by market conditions. Their plea is that there was a situation of oligopsony and the modus which was adopted by IOCL in floating the tenders and awarding the contracts would show that the determination of price was entirely within the control of the IOCL. As per them, the way price was determined for supply of these cylinders, it had become an open secret known to everybody. Therefore, there was no question of any competition and no possibility of adversely affecting that competition by entering into any contract.

87) The factors which have influenced the authorities below in coming to the conclusion that the appellants had colluded and formed a cartel which led to bid rigging have already been noted above. To recaptulate, the authorities below have been influenced by the following factors:

1. Market conditions

2. Small number of suppliers

3. Few new entrants

4. Active trade association

5. Repetitive bidding

6. Identical products

7. Few or no substitutes

8. No significant technological changes

9. Meeting of bidders in Mumbai and its agenda.

10. Appointing common agents

11. Identical bids despite varying cost.

88. After deliberating on the aforesaid aspects, the CCI has concluded that there is an active trade association in which many of the appellants are members. That product in question, namely, gas cylinder is of a particular specification which is needed by IOCL in large numbers every year and there are very few manufacturers and suppliers of this product to IOCL and two other buyers. For this identical product which is to be supplied by all the suppliers, there is no substitute and no significant technology change. Further, there is an active trade association in which most of the appellants are the members. Their interest is to ensure that no new entrants are able to join. Further, the trade association also ensures that all the members are able to get some order. It is for this reason the bids submitted in various standards which are floated by IOCL at different places are almost identical despite varying cost. The authorities below attributed this identical bidding to the concerted action of the appellants. This has been inferred from the fact that 2-3 days before the submission of bids, meeting of the association took place which most of the appellants attended. Not only this, common agents, six in number, were appointed who submitted the bids on behalf of these appellants.

89) We may say at the outset that if these factors are taken into consideration by themselves, they may lead to the inference that there was bid rigging. We may, particularly, emphasise the fact that there is an active trade association of the appellants and a meeting of the bidderswas held in Mumbai just before the submission of the tenders. Another very important fact is that there were identical bids despite varying cost. Further, products

are identical and there are small number of suppliers with few new entrants. These have become the supporting factors which persuaded the CCI to come to the conclusion that these are suggestive of collusive bidding.

90) However, that is only one side of the coin. The aforesaid factors are to be analysed keeping in mind the ground realities that were prevailing, which are pointed out by the appellants. These attendant circumstances are argued in detail by the counsel for the appellants which have already been taken note of. We may recapitulate the same in brief hereinbelow:

(i) In the present case there are only three buyers. Among them, IOCL is the biggest buyer with 48% market share. It is also a matter of record that all these appellants are manufacturers of 14.2 kg gas cylinders to the three buyers who are available in the market, nanely, IOCL, HPCL and BPCL. If these three buyers do not purchase from any of the appellants, that particular appellant would not be in a position to sell those cylinder to any other entity as there are no other buyers.

(ii) There are only three buyers, it may not attract many to enter the field and manufacture these cylinders. It is because of limited number ofbuyers and for some reason if they do not purchase, the manufacturer would be nowhere. That may deter the persons to enter the field.

(iii) The manner in which the tenders are floated by IOCL and the rates at which these are awarded, are an indicator that it is the IOCL which calls the shots insofar as price control is concerned. It has come in evidence that the IOCL undertakes the exercise of having its

internal estimates about the cost of these cylinders. Their own expert arrived at a figue of Rs. 1106.61 paisa per cylinder. All the tenders which have been accepted are for a price lesser than the aforesaid estimate of IOCL itself. That apart, the modus adopted by the IOCL is that that final price is negotiated by it and the contract is not awarded at the rate quoted by bidder who turns out to be L-1. Negotiations are held with such a bidder who is L-1 which generaly leads to further reduction of price than the one quoted by L-1. Thereafter, the other bidders who may be L-2 or L-3 etc. are awarded the contract at the rate at which it is awarded to L-1. Thus, ultimately, all the bidders supply the goods at the same rate which is fixed by the IOCL after negotiating with L-1 bidder. The only difference is that bidder who is L-1 would be able to receive the order for larger quantity than L-2 and L-2 may get an order of more quantity than L-3.

(iv) It has also come on record that there are very few suppliers. For thetender in question, there were 50 parties already in the fray and 12 new entrants were admitted. Number of 12, in such a scenario, cannot be treated as less. Therefore, the conclusion of CCI that the appellants ensured that there should not be entry of new entrant may not be correct.

(v) Since there are not many manufacturers and supplies are needed by the three buyers on regular basis, IOCL ensures that all those manufacturers whose bids are technically viable, are given some order for the supply of specific cylinder. For this purpose, it has framed its

broad policy as well. This also shows that control remains with IOCL.

Thus, the appellants appear to be correct when they say that all the participants in the bidding process were awarded contracts in some State or the other which was aimed at ensuring a bigger pool of manufacturers so that the supply of this essential product is always maintained for the benefit of the general public. Had IOCL left some manufacturers empty handed, in all likelihood, they would have shut their shops. However, IOCL wanted all manufacturers to be in the fray in its own interest. Therefore, it was necessary to keep all parties afloat and this explains why all 50 parties obtained order along with 12 new entrants.

(vi) There is another very relevant factor pointed out by the appellants, viz., the governmental control which is regulated by law. As pointed out above, it is not only the three oil companies which can supply LPG to domestic consumers in 14.2 kg LPG cylinders as mandated in the LPG (Regulation and Distribution) Order, 2000 which is issued under the provisions of Essential Commodities Act, 1955, even the price at which the LPG cylinder is to be supplied to the consumer is controlled by the Government. Following features of the aforesaid LPG Order, 2000, are significant:

- *The LPG suppliedin 14.2 kg gas cylinders is an essential commodity. • The distribution of LPG in 14.2 kgs cylinders takes place as part of a public distribution system defined under*

clause 2(1) of the Order as "the system of distribution, marketing or selling of liquefied petroleum gas by a Government Oil Company at the Government controlled or declared price through a distribution system approved by the Central or State Government".

- *The price to the consumer is controlled by the Government.*
- *The supply of LPG to domestic consumers shall be made only in 14.2 kg gas cylinders.*
- *According to clauses 4 and 5 read with Schedule III of the LPG Order, parallel marketeers who supply and distribute LPG cylinders, may do so only for cylinders with size and specifications other than those specified in Schedule II.*

91) The manner in which tendering process takes place would show that in such a competitive scenariao, the bid which the different bidder would be submitting becomes obvious. It has come on record that just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. In a scenario like this, that obviously becomes a guiding factor for the bidders to submit their bids.

92) When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, become valid explanations to the

indicators pointed out by the CCI. We have already commented about the market conditions and small number of suppliers. We have also mentioned that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50. Identical products along with market conditions for which there would be only three buyers, in fact, would go in favour of the appellants. The factor of repetitive bidding, though appears to be a factor against the appellants, was also possible in the aforesaid scneario. The prevailing conditions in fact rule out the possibility of much price variations and all themanufacturers are virtually forced to submit their bid with a price that is quite close to each other. Therefore, it became necessary to sustain themselves in the market. Hence, the factor that these suppliers are from different region having different cost of manufacture would lose its significance. It is a situation where prime condition is to quote the price at which a particular manufacturer can bag an order even when its manufacturing cost is more than the manufacturing cost of others. The main purpose for such a manufacuring would be to remain in the fray and not to lose out. Therefore, it would be ready to accept lesser margin. This would answer why there were near identical bids despite varying cost".

95) To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, quoting almost the same rates in their bids. The parameters on the basis of which these aspects are to be judged are stated in Excel Crop Care Limited as follows:

"50. It needs to be emphasised that collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. Main purpose for such collusive tendering is the need to concert their bargaining power, though, such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. Motive may be that fewer contractors actually bother to price any particular deal so that overheads are kept lower. It may also be for the reason that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet it indicates that the said contractor is still interested in doing business, so that it will not be deleted from the tenderee's list. It may also mean that a contractor can retain the business of its established, favoured customers without worrying that they will be poached by its competitors.

51. Collusive tendering takes many forms. Simplest form is to agree to quote identical prices with the hope that all will receive their fair share of orders. That is what has happened in the present case. However, since such a conduct becomes suspicious and would easily attract the attention of the competition authorities, more subtle arrangements of different forms are also made between colluding parties. One system which has been noticed by certain competition authorities in other countries is to notify intended quotes to each other, or more likely to a Central secretariat, which will then cost

the order and eliminate those quotes that it considers would result in a loss to some or all members of the cartel. Another system, which has come to light, is to rotate orders. In such a case, the firm whose turn is to receive an order will ensure that its quote is lower than the quotes of others.

52. We are here concerned with parallel behaviour. We are conscious of the argument put forth by Mr Venugopal that in an oligopoly situation parallel behaviour may not, by itself, amount to a concerted practice. It would be apposite to take note of the following observations made by European Court of Justice in Dyestuffs:

> *"By its very nature, then, the concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from*

competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the [internal] market and free choice by consumers of their suppliers." (emphasis supplied)

At the same time, the Court also added that the existence of a concerted practice could be appraised correctly by keeping in mind the following test:

"If the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the products in question."

6.8 The Commission failed to take into consideration the relevant factors viz.;-

(i) the tendering agency was the sole procurer of text books in the State of Gujarat. It was a case of "MONOPSONY". In the case of a MONOPSONY, the buyer is in a dominant position and has a complete control over the bidding process. It is not possible for the Petitioners to have exerted any control on the price. The relevant consideration that the market could not have been rigged by the seller when there is only one buyer has been completely overlooked by the Commission.

(ii) The Commission has completely ignored the tender conditions which have fixed parameters in relation to the material sought to be procured. The item wise prices would therefore ordinarily be lowest of the L-1 bidder.

(iii) The tender condition empowers the agency to reject and cancel the tender.

(iv) The Commission has taken into consideration the package tables pertaining to the year 2015-16 while deriving at the conclusion leading to the passing of the impugned order. The complaint filed is for the year 2016-17 onwards; hence details pertaining to 2015-16 are irrelevant and cannot be a factor to derive at a decision. Even while considering the bids as offered for the different packages, only two packages out of seven are looked into and there is no explanation or reason given for the same.

Mere similarity in prices therefore could not have been considered in isolation without reference to the relevant and material terms of the tender. The formation of opinion is therefore flawed and hence amenable to judicial review .

6.9 Upon a plain reading of the impugned order it is evident that no satisfaction is recorded even prima facie that there was an agreement between the Petitioners. In absence of the satisfaction being so recorded , the Committee would not have the authority to order an investigation against the Petitioners.

6.10 The Commission has committed material irregularity in the manner in which it has acted upon the complaint filed by the informant. The Petitioners along with GCEE were the opposite parties in the proceedings. The allegation in the Complaint is that there is cartelization and bid rigging of the tender process. The Commission could have proceeded to order the inquiry without issuing notice to any of the parties. The Commission could not have issued notice to one and not the others. The Commission issues notice upon GCEE; provides to it an opportunity to file an affidavit; bifurcates the issues qua the opposite parties and exonerates GCEE on the basis of the response submitted by it and orders enquiry only in respect of the allegation of bid rigging. The procedure to be followed by the Commission to be fair has to be the same for all parties to the Complaint. If the opportunity is provided to the GCEE it is also required to be provided to the Petitioners. The Petitioners

would also have been able to place on record the correct facts and the Commission on appreciation of such facts could have taken a different view in the matter. The impugned order is premised on a procedure which cannot be said to be fair and is therefore illegal being violative of article 14 of the constitution of india.

6.11 The contention that the Commission and the Director General are independent entities since the Commission is discharging a quasi judicial function whereas the Director General is undertaking an inquisitorial jurisdiction would not be applicable in the facts of the present case. A common affidavit in reply has been filed on behalf of the Commission and the Director General. This is clearly reflective of predetermination and mitigates against any possibility of independence in the adjudication proceedings.

In support of the above submission, Mr. Joshi, learned Senior Counsel has relied upon the decision in case of Union of India Vs. Ram Lakhan Sharma, reported in 2018 Vol. 7 SCC 670.

6.12 The contention on behalf of the informant that only one bidder has the lowest price in each of the packages is also not borne out from the record of the

proceedings. Per Contra , the record shows that 5 of the bidders who have been impleaded in the proceedings and against whom inquiry has been ordered have never been awarded the tender.

7. The Party-in-Person Mr. V.A. Mehta, at whose instance CCI passed the impugned order, has submitted that he has provided the requisite information to the CCI along with necessary data which were based upon the mathematical calculation. He has also submitted that earlier there was different Policy prior to 2016-17 and due to the Policy of the GCEE, there was no healthy competition and many printers have been left out. He has submitted that he has given data for 2015-16 to 2018-20 for the comparison purpose. According to him, for deciding price, individual items needs to be considered and the GCEE has not followed the provision and there is cartel between the private petitioners. He has submitted that bidders have quoted more than one bid. He has referred to the various statements and information submitted by him, which has been referred by the CCI in its impugned order and has submitted that there is no lowest price in every packages and there are different L1 in each packages. He has also submitted that for the different year, L1 is different for each year and if there is real negotiable price then it might be same for every year. He has also submitted that the Commission has asked for further information from the

GCEE. He has submitted that for the year 2019-20, tender has been given to GALA for much less amount than the prior years. He has submitted that he has provided further information to the CCI. He has submitted that GCEE is concealing the fact from CCI. He has supported the impugned order of the CCI directing investigation against all the petitioners. He has submitted to dismission all the petitions.

8. Mr. Devang Vyas, learned ASG with Mr. K.M.Antani and Ms. Garima Malhotra, learned advocates for the Competition Commission of India, has raised the point as to the maintainability of the petition. He has submitted that the petitioners, by way of present petition, have sought to challenge the correctness of material assessed by the Respondent No.1 and the reasons provided while passing the Impugned Order under section 26(1) of the Act thereby amounting to fling of an appeal against the said order, which in respectful submission cannot be entertained and does not warrant interference by way of judicial review under Article 226 of the Constitution of India. That, the instant Petition is liable to be dismissed as the Petitioners under the garb of this Writ Petition, are attempting to appeal against an order passed by the Respondent No.1 under Section 26(1) of the Act which, as held, explicitly by the Hon'ble Supreme Court, as not appealable, in

Competition Commission of India v/s Steel Authority of India (Supra), wherein Para 41 reads as under:

> *"41. The provisions of Sections 26 and 53A of the Act clearly depict the legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Once the legislature has opted to specifically state the order, direction and decision, which would be appealable by using clear and unambiguous language, then the normal result would be that all other directions, orders etc. are not only intended to be excluded but, in fact, have been excluded from the operation of that provision. The presumption is in favour of the legislation. The legislature is deemed to be aware of all the laws in existence and the consequences of the laws enacted by it. When other orders have been excluded from the scope of appellate jurisdiction, it will not be permissible to include such directions or orders by implication or with reference to other provisions which hardly have any bearing on the matter in issue and thus make non-appealable orders appealable.*

8.1 Mr. Devang Vyas, learned ASG has further submitted that it is trite to state that the proceedings under Section 26(1) are administrative in nature and do not entail any civil consequences. Further, the Competition Commission only forms a prima facie opinion of existence of the violations of the provisions of the Act and as such the proceedings at the stage of Section 26(1) of the Act are not adjudicatory in nature and hence the same cannot be assailed at this stage in any event and the Impugned Order is therefore not subject to judicial review at this stage.

8.2 According to him, in the present case, the Respondent No.3 filed Information before the Commission raising allegation of bid rigging against 16 parties including the Petitioner herein to procure the Pragna Tender floated by GCEE. These allegations of bid rigging for the period 2016-17 to 2018-19 were based upon individual item prices, as quoted by L1 bidder in each package, being the lowest in each item of the package than other the bidders, which according to the Informant before CCI is unusual and in normal course, highly improbable. It is submitted that while initiating the proceedings under Section 26(1) of the Act, in its order dated 13.01.2020, the Respondent No.1-CCI considered in detail several relevant and material facts. From the said materials, the Commission was of the opinion that there exists a prima facie case warranting an investigation for the contravention of provisions of Section of the direction from the 3(1) read with Section 3(3)(d) of the Act. Upon receipt of the direction from the Commission, the DG issued a notice dated 25.06.2020 to the Petitioners in Case No. 24 of 2019, under Section 41(2) read with Section 36(2) of the Act, wherein certain information/documents were sought from the Petitioners. It is pertinent to note that this information sought was relevant for the purpose of investigation.

8.3 Mr. Vyas, learned ASG has further submitted that the Hon'ble Supreme Court of India in CCI vs SAIL (Supra) has

observed that an order passed under Section 26(1) of the Act is an administrative order and the Competition Commission has to form a prima facie opinion without entering into adjudicative or determinative process. The Hon'ble Apex Court further held that formation of the prima facie opinion under Section 26(1) of the Act is a direction simpliciter and it is administrative in nature, and a direction is like a departmental proceeding, which does not entail civil consequences. He ahs relied upon the following observations made in paras- 31, 38, 87, 91 and 93 of the said judgment:

> *"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 53A(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 53A(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 53A.*
>
> *2) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can 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 concerned party(s) 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 moto, 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. Wherever, in the course of the proceedings before the Commission, the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable".

"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 the case of Krishna Swami vs. 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 (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 of hearing is not contemplated under the provisions of Section 26(1) of the Act".

"93. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. That is the precise reason that the legislature has used the word `direction' to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission".

8.4 Mr. Vyas, learned ASG has further submitted that it is a settled position of law that, at the stage of either passing of the order u/s 26 (1) of the Act or even at the stage of submission of report by the DG, CCI u/s 26 (3) of the Act, no interference through exercise of writ jurisdiction may be warranted in as much as at such stages in the course of the proceedings, no right can be said to have been infracted of the person(s) subjected to such proceedings under the act, much less their being a question of violation of a fundamental right.

8.5 According to him, the scope of the preliminary conference before the Commission pursuant to which the Impugned Order dated 13.01.2020 was passed u/S 26(1) of the Act, is an administrative order based on a prima facie opinion of

the CCI to cause an investigation by the DG, CCI, against the Petitioners before dealing with all the issues finally and any such order u/s 26(1) of the Act is necessarily only prima facie in nature and therefore in any event no writ is maintainable or warranted against the said prima facie order.

8.6 Mr. Vyas, learned ASG has also submitted that the Act read with the General Regulations of 2009 provide a robust procedure affording the Party under Investigation an opportunity of producing evidence before the DG during the course of investigation. Further, such parties are also given an opportunity to give their objections or suggestions to the Investigation report once it is submitted by the DG to the CCI. Parties are also afforded a fair and reasonable opportunity of a personal hearing before the Commission for consideration of the said objections or suggestions to the Investigation report. Mr. Devang Vyas, learned ASG has relied upon the decision in case of Flipkart Internet Pvt. Ltd. v. Competition Commission of India and Others (Supra), wherein it is observed in Para-22, 23 and 27 as under:

> *"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."

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".

8.7 According to him, the Order passed u/S 26(1) of the Act is only to "trigger investigation". In support of this submission, he has relied upon the decision in case of Competition Commission of India vs Grasim Industries Ltd.,

passed in LPA No. 137 of 2014 of the High Court of Delhi, wherein Paras-28 and 34 read as under:

> *"28. Both Regulations 18 (1) and 20 (4) of the CCI Regulations, require the DG to investigate the matter i.e. the allegations "made in information or reference, as the case may be", together with all evidence, documents, statements or analysis collected during investigation. The investigation has to be a comprehensive one. The DG may not, in fact, be able to anticipate what information may emerge during such investigation. Merely because the information that emerges does not pertain to the specific subject matter which the DG has been asked to investigate, would not constrain the DG from examining such information as well if it points to violation of some other provisions of the Act. Indeed, the directions given by the CCI to the DG under Section 26 (1) of the Act is only to „trigger" investigation.*
>
> *34. The aforementioned decisions clarify that an order of the CCI under Section 26 (1) of the Act „triggers" investigation by the DG, and that the powers of the DG are not necessarily circumscribed to examine only such matters that formed the subject matter of the original complaint. No doubt, the language of the order passed by the CCI issuing directions to the DG will also have a bearing on the scope of such investigation by the DG. In the present case, however, the language of the order passed by the CCI on 26 th February, 2011, is broad enough to cover an investigation by the DG into what appeared to be prima facie violation of Section 4 of the Act by GIL".*

8.8 Learned ASG Mr. Devang Vyas has submitted that therefore, the Petitioners herein cannot be allowed to circumvent this procedure and abuse the process of law by invoking writ jurisdiction of this Hon'ble Court and raising grounds of objecting to the correctness of the information, which can be espoused at the stage of filing its objections or suggestions to the DG's report (or referred to as the "Investigation Report/DG's report") and in a personal hearing before the CCI in case the DG's report brings out contraventions of provisions of the Act on part of the Petitioners.

8.9 Mr. Vyas, learned ASG has further submitted that for reasons best known to the Petitioners, they do not want to participate in the investigation and hence by way of the instant petition are trying every trick in the book to escape participation in the Investigation which is being carried out in accordance with the provisions of the Act. Mr. Devang Vyas, learned ASG has relied upon the judgment of the Division Bench of Karnataka in case of Flipkart Internet Pvt. Ltd. v. Competition Commission of India and Others (Supra), wherein he the Paras - 40, 45 and 47 read as under:

> "*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".

"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".

"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".

8.10 In view of the above submissions, it is submitted by learned ASG Mr. Vyas that the Writ Petition is premature and based

on conjectures and surmises and deserves to be dismissed on this ground itself. He has relied upon the following judgments:-

(a) Flipkart Internet Pvt. Ltd. v/s Competition Commission of India and Amazon Seller Services v/s Competition Commission of India (Supra) - Para 17, 19,20, 24:

> *"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.*
>
> *"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".

"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."

(b) Amazon Seller Services v/s Competition Commission of India and Flipkart Internet Pvt. Ltd. v/s Competition Commission of India (Supra) - Para 58-64

"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 Corporation23 :

"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 23 (1948)1 KB 223 W.P No.3363/2020 C/W W.P No.4334/2020 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.24, 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 AIR 1952 SC 192 W.P No.3363/2020 C/W W.P

No.4334/2020 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 Another25, 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 AIR 1954 SC 440 W.P No.3363/2020 C/W W.P No.4334/2020 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 others26, 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?'27 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".

8.11 Mr. Devang Vyas, learned ASG has also submitted that Investigation is quasi-inquisitorial and does not affect the rights or liabilities of the parties. He has submitted that the Petitioners in the instant Writ Petition have sought a relief to quash and set aside the Investigation proceedings commenced pursuant to the Order dated 13.01.2020 under Section 26(1) of the Act in Case No. 24 of 2019 and has further impugned the notices sent by the Director General-CCI in accordance with the procedure laid down under the Act for the purpose of carrying out investigation. He has relied upon the Para 27.3, 32.4 and 41 of the case of Competition Commission of India vs Grasim Industries (Supra), which reads as under:

27.3 The Supreme Court in Competition Commission of India v Steel Authority of India Limited (supra) has characterized the powers of the CCI under Section 26 (1) of the Act as „an inquisitorial and regulatory power". The Supreme Court then explained as under:

"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 (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 of hearing is not contemplated under the provisions of Section 26(1) of the Act."

32.4 In dismissing Cadila"s appeal, the DB of this Court, after analysing the decision in Competition Commission of India v. Steel Authority of India Limited (supra) and Excel Crop Care Limited v. Competitive Commission of India (supra), held as under:

"43. Cadila's argument, that in Excel Crop Care the issue was inclusion of more than one instance or incident within the ambit of investigation (given that the complaint was in respect of one tender only) is distinguishable, is in this court's opinion, insubstantial and needs to be rejected. Its reliance on Grasim Industries, is no longer apt. At the stage when the CCI takes cognizance of information,

based on a complaint, and requires investigation, it does not necessarily have complete information or facts relating to the pattern of behaviour that infects the marketplace. Its only window is the information given to it. Based on it, the DG is asked to look into the matter. During the course of that inquiry, based on that solitary complaint or information, facts leading to pervasive practises that amount to abuse of dominant position on the part of one or more individuals or entities might unfold. At this stage, the investigation is quasi inquisitorial, to the extent that the report given is inconclusive of the rights of the parties; however, to the extent that evidence is gathered, the material can be final. Neither is the DG's power limited by a remand or restricted to the matters that fall within the complaint and nothing else. Or else, the Excel Crop Care would not have explained the DG's powers in broad terms: (if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report....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). The trigger for assumption of jurisdiction of the CCI is receipt of complaint or information, (when the Commission is of the opinion that there exists a prima facie case exists (per Section 26 (1)). The succeeding order is administrative (per SAIL); however, that order should disclose application of mind and should be reasoned (per

SAIL). Up to this stage, with that enunciation of law, no doubt arguably Cadila could have said that absent a specific order as regards its role, by CCI, the DG could not have inquired into its conduct. However, with Excel Crop Care specifically dealing with the question of alleged "subject matter" expansion (in the absence of any specific order under Section 26 (1)) and the Supreme Court clarifying that the subject matter included not only the one alleged, but other allied and unremunerated ones, involving others (i.e. third parties), the issue is no longer untouched; Cadila, in the opinion of this court, is precluded from stating that a specific order authorizing transactions by it, was a necessary condition for DG's inquiry into its conduct. This court is further reinforced in its conclusion in this regard by the express terms of the statute: Section 26 (1) talks of action by CCI directing the DG to inquire into "the matter". At this stage, there is no individual; the scope of inquiry is the tendency of market behaviour, of the kind frowned upon in Sections 3 and 4. The stage at which it CCI can call upon parties to react is when it receives a report from DG stating there is no material calling for action, it has to issue notice to the concerned parties (i.e. the complainant) before it proceeds to close the case (Sections 26 (5) and (6)). On the other hand, if the DG's report recommends otherwise, it is obliged to proceed and investigate further (Sections 26 (7) and (8)). Again Section 27 talks of different "parties" [enterprise or association of enterprises or person or association of persons‖ - per Section 27 (a)]. Likewise, the steps outlined in Section 26 are amplified in the procedure mandated by Regulation 20 and 21, which requires participation by "the parties" in the event a report after DG's inquiry, which is

likely to result in an adverse order, under Sections 27-34 of the Act. Consequently, Cadila's argument that a specific order by CCI applying its mind into the role played by it was essential before the DG could have proceeded with the inquiry, is rejected."

41. In Cadila Healthcare Limited v. Competition Commission of India (supra), the Court characterized the functions of the DG at the stage of investigation as „quasi inquisitorial." Indeed, the essential function of the DG is to investigate i.e. gathering of facts and evidence and analyzing them to form a prima facie view about the violations alleged in the complaint or information, which forms the subject matter of investigation.

8.12 According to him, the purpose of the investigation is to examine the veracity of the allegations made by the Respondent No.3 and determine anti-competitive effects of the Petitioners' actions with respect to their manner of participation in Pragna Tender, if any. If the Petitioners' conduct is not anti-competitive, the result of the investigation would establish the same and there is no reason for the Petitioners to resist the investigation and no prejudice would be caused to the Petitioners by participating in the Investigation and providing information as sought by the DG vide the impugned notices. Therefore, it is submitted that no prejudice shall be caused to the Petitioners merely because an investigation has been initiated against them under Section 26(1) of the Act.

8.13 Further, it is submitted by learned ASG Mr. Devang Vyas that it is well-established principle that a High Court will ordinarily not interfere with an on-going investigation while exercising its inherent powers under Article 226 of the Constitution of India. As such, it is evident that the Petitioners by way of the present Writ Petition are attempting to shackle the investigation before the Director General-CCI, Respondent No.2 herein. It is settled law that the hands of the investigating authorities should not be tied and the Hon'ble Court should refrain from entering into the domain of investigation. Furthermore, since the Impugned Order is well reasoned and based on the assessment of the evidence brought on record by the Informant, it would be legally untenable to disregard the prima facie opinion of the CCI provided in the order or to consider the same based on merits of the case. For the above submissions, he had relied upon the decision in case of Flipkart Internet Pvt. Ltd. v. Competition Commission of India and Others (Supra), wherein Para-26 reads as under:

"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.

8.14 Mr. Devang Vyas, learned ASG has submitted that with a view to elicit further information and to clear doubt, if the CCI has invited GCEE and called for information from it, it cannot be considered to be a partition action on the part of the CCi. He has also submitted that discretion lies with the CCI of hearing anybody at the stage of Section 26(1). According to him, the procedure under Section 26(10 is not adjudicatory and, therefore, there is no need to adhered to principles of natural justice. According to him, the powers vested under Section 26(1) of the Act is only directive or administrative one. According to him, the adjudicatory process starts after submissions of reported by the concerned DG. He has also submitted that there is no obligation on the part of the CCI to issue notice to bidder for exercising powers under Section 26(1). He has

submitted that the impugned order was passed in June, 2020 whereas the petition has been filed after delay of 9 months.

He has also submitted that from the material placed on record, it was prima-facie found that there was only initiation that L1 bidder and not with other bidders. According to him, initiation must be with all the bidders. While referring to the impugned order of the CCI, he has submitted that the observation made in Paras-23 and 24 of the Order clearly reflects that there is application of mind on behalf of CCI. He has prayed to dismiss the petition.

9. Mr. Mihir Thakore, learned Senior Counsel for the Petitioners has, in response to respondent authorities' allegations, submitted that the respondents' contention that the impugned order being an administrative order, the petition is not maintainable and the court cannot go into it, is also untenable in light of the aforesaid observations of the Hon'ble Supreme Court in CCI v. SAIL (Supra) and other judgments quoted hereinabove, and also in light of the well settled principle that courts have the power to judicially review even administrative orders and actions on illegality, irrationality and procedural impropriety.

9.1 Mr. Mihir Thakore, learned Senior Counsel has submitted that there is no submission of the petitioner that there is

need of prior hearing to the petitioner but only argument is that why GCEE was called for and not bidders. He has submitted that one may be lowest in one package but may not be lowest in other packages as there might be immediate capacity for the concerned bidder. He has submitted that out of the respondents before the CCI, even 6 respondents have not got a single bid and 5 have never got any work in 3 years. He has submitted that though Section 26(1) is an administrative order, it should fulfill teh requirement of reasonableness. According to him, the formation of the information by the CCI is without any basis, there is no prima-facie ground shown or narrated in the impugned order for initiation of the inquiry by the DG.

9.2 Mr. Thakore, learned Senior Counsel has relied upon the decisions in case of :

(i) Mohd. Mustafa v. Union of India, 2022 (1) SCC 294, wherein in para 16-18, it is observed that:

> *"16. The grounds on which administrative action is subject to judicial review are illegality, irrationality and procedural impropriety. The following observations made by Lord Diplock in Council of Civil Service Unions and others v. Minister for Civil Service are apt:*
>
> > *"By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided,*

in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Court's exercise of this role, resort I think is today no longer needed to Viscount Radcliff's ingenious explanation in Edwards (Inspector of Taxes) v. Bairstow, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision makers. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules 16 | P a g e that are

expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all".

17. The discretionary power vested in an administrative authority is not absolute and unfettered. In Wednesbury, Lord Greene was of the opinion that discretion must be exercised reasonably. Explaining the concept of unreasonableness, Lord Greene stated that a person entrusted with discretion must direct himself properly in law and that he must call his own attention to the matter which he is bound to consider. He observed that the authority must exclude from his consideration matters which are irrelevant to the matter he is to consider. Lord Greene concluded that if an authority does not obey aforementioned rules, he may truly be said, and often is said, to be acting unreasonably.

18. Conditions prompted by extraneous or irrelevant considerations are unreasonable and liable to be set aside by Courts in exercise of its power under judicial review. (See: State of U.P. v. Raja Ram Jaiswal , Sheonandan Paswan v. State of Bihar & Others, Sant Raj v. O.P. Singla, Padfield v. Minister of Agriculture). A decision can be arrived at by an authority after considering all relevant factors. If the discretionary power has been exercised in disregard of relevant consideration, the Court will normally hold the action bad in law. Relevant, germane and valid considerations cannot be ignored or overlooked by an executive authority while taking a decision. It is trite

law that Courts in exercise of power under judicial review do not interfere with selections made by expert bodies by reassessing comparative merits of the candidates. Interference with selections is restricted to decisions vitiated by bias, mala fides and contrary to statutory provisions. (See: Dalpat Abasaheb Solunke v. Dr. B.S. Mahajan, Badrinath v. State of T.N., National Institute of Mental Health and Neuro Sciences v. Dr. K. Kalyana Raman, I. P. S Dewan v. Union of India, UPSC v. Hiranyalal Dev20, M. V. Thimmaiah v. UPSC 21 and UPSC v. Sathiyapriya).

(ii) In fact, in the case of CCI v. Bharti Airtel, the Hon'ble Supreme Court has observed as under:

"120. Thus, even when we do not agree with the approach of the High Court in labeling the impugned order as quasi-judicial order and assuming jurisdiction to entertain the writ petitions on that basis, for our own and different reasons, we find that the High Court was competent to deal with and decide the issues raised in exercise of its power under Article 226 of the Constitution. The writ petitions were, therefore, maintainable."

(iii) Insofar as the judgment of the Flipkart Internet Pvt. Ltd. v. Competition Commission of India and Others, by the Division Bench of Karnataka High Court in Writ Appeal No. 562/2021 C/W Writ Appeal No. 563/2021 is concerned, the order of the CCI under Section 26(1) of the Competition Act, 2002 in that case was an exhaustive one with adequate reasoning. It was in the

context of that fact situation that the court did not interfere with the same as observed in para 31 of the Division Bench judgment dated 23.7.2021. Therefore, the facts of that case being entirely different to the present case, the said judgment is not applicable here. It is well settled that decisions cannot be relied upon without discussing how the fact situation fits in with the fact situation of the decision on which reliance is placed.

(iv) In support of the above submission, he has also relied upon the decision in case of Bharat Petroleum v. N. R. Vairamani, 2004 (8) SCC 579, wherein Para Nos. 9 to 12 read as under:

> *"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (AC at p.761),*

Lord MacDermot observed: (All ER p. 14 C-D)

> *"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge...."*

10. In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition it will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said: (All ER p. 761c)

> *"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."*

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"19.....Each case depends on its own facts and a close similarity between one case and another is not enough

because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

9.3 The respondents' contention that the fact that GCEE negotiated with L1 to bring the rates down cannot be considered because L2 and L3 were not invited for negotiations is ex facie untenable since there cannot be any question of negotiating with L2 and L3 in a tender process and thereby rendering the tender process meaningless and even the Central Vigilance Commission has issued circulars banning such practice of negotiating with L2 and L3.

9.4 The respondents' contention that this is akin to a criminal case where until the stage of Section 173 report, the accused has no rights is also untenable since the accused certainly has the remedy of filing a quashing petition or a discharge application.

9.5 The respondents' contention that the successful bidder in a particular package ought to have quoted such competitive rates in other packages also is also untenable since this is based on a questioning of business decision of a bidder and since these printers have a limited capacity in terms of resources and while they may have submitted bids for multiple packages in the hope of winning somewhere, they would quote lowest rates in selected package depending on their stocks of paper, ink, etc.

10. Mr. Mihir Joshi, learned Senior Counsel has also adopted the submissions made by learned Senior Counsel Mr. Mihir Thakore in his rejoinder.

11. Respondent Nos. 1 and 2 have filed joint affidavit-in-reply at Pagfe-568 onwards wherein they have raised the question of maintainability of the petition itself and has also narrated various decisions of various Courts and have contended that the CCI has exercised its power under Section 26 of the Act and there is no bias and the impugned order has been passed within the parameters and jurisdiction of the Commission. It is also contended that the petitioners will get appropriate opportunity as per the provisions of CCI and by initiation of inquiry no prejudice or legal right of the petitioner is affected.

12. The rejoinder has been filed by one Mr. Khagen Ramanlal Patel against the said affidavit-in-reply wherein he has reported the facts narrated in the petition and has also referred to various decisions contendeing that judicial review of the administration order of the CCI is amenable to the jurisdiction of the High Court. It is contended that respondent No.1 has arbitrarily and discriminatorily invited one of the opposite parties and allowed it to make submissions before issuing the order, while tenying opposite parties of such similar opportunity. It is also contended that due to such opportunity being given to one of the opposite parties, it has got opportunity to absolve itself from the allegations made against it and, thus, this procedure adopted by the respondent No.1 smacks about whims, arbitrariness, discrimination and bias. He has prayed to allow the petition."

13. At the outset, it would be germane to refer to the provisions of Section 2, 3, 19, 26 and 53A of the Act, to the extent, the same are relevant for the purpose, read as under:

***Section 2. Definitions**.—In this Act, unless the context otherwise requires,-*

> *(b) "agreement" includes any arrangement or understanding or action in concert,—*

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

(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;

Section 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.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(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;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) xxx xxx xxx

***Section 19**. Inquiry into certain agreements and dominant position of enterprise.—*

(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.

(2) xxx xxx

(3) xxx xxx

(4) xxx xxx

(5) xxx xxx

(6) xxx xxx

(7) xxx xxx

Section 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.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub section(3) to the parties concerned: Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub- section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director General referred to in sub-section (3) recomends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(6) If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiriy to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

Section 53A. *Appellate Tribunal.—*

The National Company Law Appellate Tribunal constituted under section 410 of the Companies Act, 2013 (18 of 2013) shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall—

(a) hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of this Act; and

(b) 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 finding of the Commission or under section 42A or under sub-section (2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

14. On plain reading of Section 2(b), it clearly reveals that an agreement includes any arrangement or understanding or action in concert, whether it is formal or in writing or

whether it is intended to be enforceable by legal proceedings. Thus, for an agreement, under this Act , need not be in writing. On the facts and circumstances of each case, the conduct of the parties to agreement can be inferred. At the same time, under Section 2(c) Cartel would include 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. Thus, even an action which may form itself, may be agreement of creating Cartel. It is obvious that there may not be patent evidence as to forming Cartel or creating an agreement in writing. The facts and circumstances of the case may reflect, prima-facie, that there is agreement and/ or Cartel.

15. Now, according to Section 3 any Agreement, which is Anti-competitive, is deemed to be void. According to sub-section (3) of Section 3, different situations have been provided therein which may be such that it may be an agreement entered into between the enterprises or associations of enterprises or persons or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association or persons, which is anti-competitive agreement. The provisions contained therein also provides as to agreement which may be even in action. Whether

there was an anti-competetive agreement under Section 3, has to be decided on the facts and circumstances of each matter.

15.1 Now, according to Section 19, provision has been made enabling the Commission to inquire into certain agreements and dominant position of enterprise. The Commission has been vested with an authority to inquire into agreement on the basis of receipt of any information which may be sent by any persons, consumer or Association or trade association or even by reference made by either State Government or Central Government or an Statutory Authority. Thus, power of the Commission to inquire is subject to the various provisions of the Act, as held in various decisions referred to hereinabove. The power exercised under Section 19(1) of the Act by the Commission is not a judicial power but it is an administrative in nature. Now it is well established principles of law that when any authority exercises administrative power regarding any inquiry, the Court does not sit as a Court of Appeal over the decisions of such authority but Court clearly reviews the manner in which the decision was made. It is well settled that interference in such administrative action is not permissible unless the order is contrary to law or relevant factors were not considered or irrelevant factors were considered or decision was one which no reasonable persons could have taken.

15.2 Now, considering provisions of Section 26 coupled with the various decisions referred to hereinabove, the legal aspects emerge therefrom can be summarised as follows:

- ➔ The provisions of Section 26(1) indicate exclusion of principle of natural justice, atleast at initial stage in cases where the conduct of an enterprise, Association of Enterprises, persons of Association of Persons or any other legal entity, is such that it would cause serious prejudice to the Public Interest and also violates the provisions of the Act, the Commission will be within its jurisdiction to pass an ex-parte ad-interim injunction orders immediately.
- ➔ The function of the Commission under Section 26(1) of the Act is an inquisitorial and regulatory power.
- ➔ Such function is of a very preliminary nature and it is a departmental function. It does not condemn any person at that stage and, therefore, application of *audi alteram partem* is not called for.
- ➔ Formation of a prima-facie opinion departmentally does not amount to adjudicatory

function but is merely of an administrative nature.

- ➔ The right of notice for hearing is not contemplated under the provisions of Section 26 of the Act.
- ➔ The functions performed by the Commission under Section 26(1) of the Act are in the nature of prepatory measure and in contrast to the decision making process.
- ➔ Under Section 26(1) of the Act, the Commission may not merely record detailed reason, but must express its mind in no uncertain terms that it is of the view that prima-facie case exist, requiring issuance of direction for investigation to the Director General.
- ➔ Such opinion should be formed on the basis of the record, including information furnished and reference made to the Commission under the provisions of the Act.
- ➔ 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.

15.3 Now, it is well settled that under Section 26(1) of the Act, the Commission is only required to see whether a prima-facie opinion exist or not. The order under Section 26(1) of the Act can be passed when there is prima-facie material to direct an inquiry and elaborate reasons are not required, as Commission is required to express only a tentative view. It is also settled that in case elaborate reasons are provided in the order passed under Section 26(1), it will certainly prejudice the person against whom the complaint has been made, and therefore, the Statute provided a safeguard for holding an inquiry after an order is passed under Section 26(1) and the Director General is certainly required to grant an opportunity of hearing by holding inquiry in the matter.

15.4 Now considering the provision of Section 53A, admittedly, the order of inquiry passed by the Commission, by virtue of power under Section 26(1) of the Act, no appeal is permissible. Therefore, the Constitutional power under Article 226 is available to the concerned person to challenge the order of the inquiry issued by the Commission under Section 26(1) of the Act. But, the action under Section 26(1) being an administrative in nature, there would be a judicial restrain on the High Court to interfere with such administrative order unless and until it is shown that the order was contrary to law, or relevant factors were not considered or relevant factors were considered or the

decision was one which no reasonable person could have taken.

16. Considering the aforesaid legal aspects of the case, at this juncture, it is worthwhile to refer to relevant observation of the Commission, which has been made in the impugned order while passing the order of inquiry against the petitioners, which reads as under:

> *"19. The Commission has carefully perused the information and documents filed by the informant and the response of GCEE.*
>
> *20. At the outset, the Commission notes that the Information has raised the allegation of bid rigging against OP-2 to OP-17 with GCEE as the procurer under Pragna tender. Though the Informant has attempted to highlight instances of bid rigging during Pragna tender through escalation of prices etc. during the period 2016-17 to 2018-19, however, the Commission notes that Annexure 3 described as 'Comparison Statement in Table format of Bid Amount by Bidders from year 2015-16 to 2018-19' requires discussion for forming a prima facie view in the matter. The allegations of bid rigging for the said period are based upon 'individual items' prices, as quoted by the L1 bidder in each package, being also the lowest than the other bidders, which according to the Informant is unusual and in normal course, highly improbable.*

21. The informant, on the basis of Annexure 3, alleged that from the FY 2016-17 to 2018-19, other than Package A of FY 2016-17, the prices quoted for individual items under every package by the bid winners of the package,whether 30 items or 2 items, were always the lowest. This, according to the informant indicates bid winner in respect of each package was allegedly decided before the bidding process and the other bidders submitted merely the cover bids. It has been further alleged that it would not be possible to quote lowest (L1) rate in all items of the Package by a single bidder without prior understanding of bidders.

22. During the preliminary conference, the contents of Annexure 3 were not denied by GCEE. However, it was submitted that the rates highlighted therein were negotiated rates. To have a clarity with respect to the oral submissions made by GCEE, the Commission directed GCEE to file its response to the information and clarify this aspect very clearly in its response. In the written response/ comments filed by GCEE, it has been stated that it does not look at individual prices of each and every item but is concerned with the total cost of procurement for the total quantity of books and other items as it is interested in bringing down the total cost of procurement and doing efficient purchase....."

24. Upon perusal of the tables from A to D for certain packages against the tables from E to N as mentioned above, it is apparent that LI rates in total were not the

negotiated rates but the rates derived from individual quoted prices Moreover, from the tables extracted above it is also quite evident that the prices quoted for each individual item under each package by L1 winner of that package are also the lowest Therefore, the Commission, prima facie notes that there is some force in the submission of the Informant. It appears that the rates quoted by the bid parties were not independent and appear to be based on a connected and coordinated action between OP-2 to 17, warranting an investigation under the provisions of Section 3(1) read with Section 3(3)(d) of the Act.

25. Apart from the above, the Informant has alleged that there were restrictions in Tender's terms and conditions floated by GCEE which impeded competition and were designed to benefit a few players. The Commission noted that settled jurisprudence is that the procurer is at liberty to set its terms and conditions for procurement, based on its requirements. Moreover, GCEE has provided the explanation that since the inception of floating of tenders, it has been floating tenders as per the rules and guidelines. These are now being floated on GeM. Therefore, the Commission is of the view that the allegation of the Information on restrictive tenders terms and conditions appears to be untenable in the present case.

26. Further, the Informant has alleged that due to bid rigging, the bids were quoted at escalated rates. On the other hand, GCEE has attempted to provide an explanation

that the rise in prices could be on account of various factors like rise in paper prices alongwith printing cost, labour costs and other ancillary costs. The Commission notes that it would be improper at this stage, to address this issue in a piece meal way and therefore prima facie, is of the view that such issue may also be examined during the investigation.

27. In view of the foregoing, the Commission is of the opinion that there exists a prim-facie case which requires an investigation by the Director General (DG), to determine whether the same has resulted in contravention of the provisions of Section 3(1) of the Act, 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 made clear that, if during the course of the investigation, the DG comes across anti-competitive conduct of any other entity in addition to those mentioned in the Information, the DG shall be at liberty to investigate the same.

30. The DG is also directed to investigate the role of the

persons/officers who were in-charge of, and were responsible for the conduct of the businesses of the parties at the time the alleged contravention was committed as well as person/officers with whose consent or connivance the alleged contravention was committed, in terms of the provisions of Section 48 of the Act.

31. 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 observation made herein.

17. Now, considering the material placed on record, it reveals that the Commission has initiated proceedings in accordance with Section 26 of the Act, pursuant to it, forming an opinion under Section 26(1) of the Act as to the existence of a prima-facie case. This exercise has been undertakne on the basis of the information received by the Commission from Respondent No.3 regarding the Cartel in the form of anti-competitive agreement. No Statutory right is availabe to the person concerned against whom any inquiry is ordered to be initiated by the Commission on the exercise of its administrative power available to it under the Act. Further, it is well settled that in an order of Inquiry under Section 26, which is only prima-facie opinion and does not affect the rights of any person, it cannot be reviewed by the High Court unless and until it is shown that it is contracry to any provisions of the Act or irrelevant material has been considered or relevant material has not

been considered. Moreover, as per the provisions of Act, during the inquiry stage, necessary opportunity of being heard will be available to the person concerned. Moveover, as per the Scheme of the Act, after submission of the Report by the Inquiry Officer i.e. Director General, the person concerned against whom any report is made, will also get an opportunity to defend and place his case before the Commission. At that stage, if no any opportunity of hearing is afforded, then, definitely the person concerned against whom any adverse order is passed, has every right to challenge the same on various grounds, one of which may be breach of natural justice. However, at the stage of passing any order for inquiry on the basis of material placed before it and on forming prima-facie opinion, no right of the person concerned is breached and such person cannot claim as of right of being hearing be provided to him at that stage. Further, as observed earlier in various decisions, it is the prerogative of the Commission to invite any person or sought information from any person for forming prima-facie opinion as to whether any inquiry contemplated under Section 26(1) of the Act is necessary or not. Such action of the Commission cannot be said to be bias one or giving any right to other person against whom any order of inquiry is passed.

18. Now, on perusal of the impugned extract, which has been referred to hereinabove, it clearly reveals that the

Commission has considered material placed on record by the respondent No.3 as well as GCEE for forming its prima-facie opinion as to initiate inquiry under Section 26(1). It clearly reveals that while passing order for initiation of inquiry, the Commission has also considered that the allegation of the informant regarding provision of restriction on Standard terms and conditions have not been accepted by the Commission. Thus, the Commission has considered every material placed before it before arriving at the prima-facie opinion as to inquiry.

19. Now, the main grievance of the petitioner is the interpretation of L1 price and negotiation price in each packet and has submitted that the Commission has mis-interpreted the information provided to it. However, it needs to be observed that it is for the Commission to interprete and consider the information provided to it by the person concerned relating to material, which may be in the form of business transactions, information relating to Accounts or such statistical data, etc. The Court has no such expertise in evaluating or interpreting the business data or statistical data pertaining to a particular commercial activity. Any such information which is in the form of statistical data relating to any business or commercial transaction and accounting procedure may be interpreted in a different manner by different person having such expertise, knowledge in such fields. The angle of

interpretation of such data may be different by different person and, therefore, the submission of the petitioner that information relating to the statistical datea including the interpretation of effect of L1 price in each packet and the negotiated price thereof, etc., is misunderstood by the Commission, cannot be accpeted at this stage, as it is prerogative of the Commission to form prima-facie opinion as to initiation of inquiry. The impugned order of the Commission has dealt with these aspects from its own angle. At this stage, this Court cannot decide such question as to whether the angle or interpretation adopted by the Commission in relation to such data is improper and/ or the Commission should have adopted the angle of interpretation as put forward by the petitioner. Such question is within the realm of the Commission in forming prima-facie opinion for initiation of the inquiry.

20. Further, in the considered opinion of this Court, unless and until a detailed inquiry is conducted by the Director General, the question of dealing a finding in respect of violation of the statutory provision does not arise. Therefore, the petitioner should not have hesitated in participating in the inquiry which is yet to be commenced by the Director General and all the grounds raised by the Petitioners will be available before the Director General as well as before the Commission. The impugned order passed under Section 26(1) is only a starting point of the process

and the petitioners want to stop process at the threshold and the Commission is not being permitted by the petitioner to proceed ahead in the matter.

21. Further, it is well settled that when questions of fact are involved in any matter, the High Court may not exercise its constitutional power under Article 226 of the Constitution. Admittedly, in this case, as discussed hereinabove, the disputed question of facts relating to interpreation of information in the form of data is agitated. Therefore, on this ground also, this court deems it fit not to exercise its discretionary power under Article 226 of the Constitution of India, especially when the impugned order is administrative in nature.

22. In view of the aforesaid observations, this Court is of the considered opinion that the Writ-Petitions are devoid of merit and deserved to be dismissed. However, it is pertinent to note that during the pendency of the petitions, the Director General has also issued certain notices to initiate penalty proceedings under Section 43 of the Act, as there was no stay in operation against the impugned order of the Commission. It is true that there was no stay in operation, however, since the matter was subjudice and there was Covid-19 Pandemic prevailing in the Country, the Commission may not have issued such notices for initiation of Penalty proceedings. Be that as it

may be. Considering the facts and circumstances of the case, the impugned action of issuance of the Notice for initiation of penalty action by the Commission/ Director General needs to be stayed. At the same time, some sort of time needs to be granted to the petitioners to reply the notice, which has been issued on the basis of the impugned order of the Commission for initiation of inquiry.

23. In view of the above discussion, since all the petitions are devoid of merits and deserve to be dismissed, all are hereby dismissed. However, taking into consideration the facts and circumstances of the case, time to reply to the notice issued on the basis of the impugned order, is hereby extended for 4 (four) weeks from today. The petitioners may avail such opportunity of replying such notices in accordance with the law.

24. Consequently, no coercive action be taken against the petitioners till then by the Commission/ Director General. It is made clear that no further extension of time will be granted for any purpose.

No order as to costs.

In view of the disposal of the main petitions, all the Civil Applications in respect of the Special Civil Applications stand disposed of accordingly. Direct Service is permitted.

Sd/-
(DR. A. P. THAKER, J)

SAJ GEORGE