IN THE HIGH COURT OF KARNATAKA, BENGALURU

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DATED THIS THE 23RD DAY OF AUGUST, 2022

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO.50727 OF 2019(GM-RES)

BETWEEN:

1. INTEL TECHNOLOGY INDIA PVT LTD.,
   HAVING ITS OFFICE AT 23-56 P,
   DEVERABEESANAHALLI,
   VARTHUR HOBLI, OUTER RING ROAD,
   BANGALORE – 560 103.
   KARNATAKA, INDIA.
   REPRESENTED BY ITS AUTHORISED
   REPRESENTATIVE MS. PUJA MALHOTRA.

2. INTEL CORPORATION,
   HAVING ITS OFFICE AT 2200
   MISSION COLLEGE BOULEVARD,
   SANTA CLARA, CALIFORNIA, USA.
   REPRESENTED BY ITS AUTHORISED
   REPRESENTATIVE MS.PUJA MALHOTRA.

…PETITIONERS

(BY SRI. DR. ABHISHEK SINGHVI, SENIOR COUNSEL AND
SRI. SAJAN POOVAYYA, SENIOR COUNSEL A/W
SRI. NAVEEN GUDIKOTE S, ADVOCATE)

AND:

1. COMPETITION COMMISSION OF INDIA,
   HAVING ITS OFFICE AT 9TH FLOOR,
   OFFICE BLOCK-1, KIDWAI NAGAR(EAST),
   NEW DELHI – 110 023. INDIA.
   REPRESENTED BY ITS SECRETARY.

2. MATRIC INFO SYSTEMS PVT LTD.,
HAVING ITS OFFICE AT J-1/71, GROUND FLOOR,
KHIRKI EXTENSION, MALVIYA NAGAR,
NEW DELHI – 110 017.
REPRESENTED BY ITS
AUTHORISED REPRESENTATIVES.

…RESPONDENTS

(BY SRI. N VENKATARAMAN, ADDL. SOLICITOR GENERAL OF INDIA A/W SMT.POORNIMA HATTI, ADVOCATE FOR R1;
SRI. A.MAHESH CHOWDHARY, AND
MISS. KHYATI, ADVOCATE FOR R2)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED ORDER DATED 09.08.2019 PASSED IN CASE NO.05 PF 2019 BY THE R-1 U/S 26(1) OF THE COMPETITION ACT, 2022 AS PRODUCED AT ANNEXURE-A.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

Petitioners are knocking at the doors of Writ Court for assailing the order dated 09.08.2019 made by the Competition Commission of India (hereafter '*Commission*') whereby in exercise of powers under Section 26(1) of the Competition Act, 2002 (hereafter '2002 Act') an investigation as to whether their warranty policy has (i) potentially resulted in denial of market access to parallel importers & resellers of *Boxed Micro-Processors* for Desktop and Laptop PCs & (ii) the risk of

higher pricing for the said articles in India. The relevant portion of said order at paragraph 43 reads as under:

> *"43. Based on the above analysis of the facts and materials presented by the Informant and Intel, the Commission is of the prima facie opinion that the new differentiated India specific warranty policy of Intel in regard to its Boxed Micro-Processor is in contravention of Section 4(2)(a)(i) of the Act. The same also prima facie results in limiting or restricting the market for Boxed Micro-Processors for Desktop and Laptop PCs in the territory of India in contravention of Section 4(2)(b)(i) of the Act as well as results in denial of market access to parallel importers in contravention of Section 4(2)(c)(i) of the Act. Consequently, under the provision of Section 26(1) of the Act, the Commission directs the Director General ('DG') to cause an investigation into the matter and submit an investigation report within a period of 150 days of this order."*

2. A Co-ordinate Bench of this Court vide ad interim order dated 14.11.2019 had stayed the impugned order and that the same has been continued from time to time. After service of notice, the Commission has entered appearance through its Panel Counsel has filed its Statement of Objections. Similarly, the private respondent having been represented by their Advocate

too has filed its. Learned Senior Advocates appearing for the petitioners and the learned ASG appearing for the Commission have made elaborate submissions; learned advocate representing the private respondent too has forth his contentions in justification of the impugned order and the reasons on which it has been founded.

3. BRIEF FACTS OF THE CASE:

(A) CASE OF THE PETITIONERS:

(i) The 1st petitioner is a private limited company incorporated in 1997 under the provisions of erstwhile Companies Act, 1956. It is stated to be an '*indirectly held, wholly owned subsidiary of 2nd petitioner'* which is based in the United States of America. They are *inter alia* engaged in the business of manufacturing integrated circuits for computing & communications. Their products include microprocessors, chipsets, motherboards, wireless components and a range of software products. 1st Petitioner states that it does not manufacture or sell any microprocessors or other products in India but only

provides certain '*marketing support services'* for such products as well as for the research & development (R&D) activities.

(ii) The 1st Petitioner-Intel on 25.04.2016 restructured its 'warranty policy' for boxed microprocessors in India to the effect that "…*only Intel products sold by Intel Authorized Distributors in India and purchased in India are eligible for warranty sale within India…For Intel products purchased from other sources, please contact your purchases for warranty services…".* This, it claims to have done in the light of Hon'ble Delhi High Court decision in *KAPIL WADHWA vs. SAMSUNG ELECTRONICS CO. LTD*[1] and Commission's decision in *ASHISH AHUJA vs. SNAPDEAL*[2]*.* It is the case of the petitioners that consistent with their new policy, no warranty is given for Intel Products that are not sold by Intel Authorized Distributors in India.

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[1] (2012) SCC OnLine DEL 5172

[2] ASHISH AHUJA vs. SNAPDEAL Case No. 17/2014 decided on 19.05.2014

(B) CASE OF THE RESPONDENTS:

(i) The case of 2nd Respondent: The 2nd Respondent is a company (Matrix Info Systems Pvt. Ltd.) incorporated in 2015 under the provisions of the Companies Act, 2013. It is also engaged in the import & sale of information technology products namely storage solutions (RAM & hard disks), security hardware (CCTV cameras), computers (desktops & laptops) & display solutions (TFT, computer monitors). Between March 2017 and January 2018, it imported about 4000 *'boxed'* microprocessors of Intel claiming warranty in five instances for as many as 34 units of microprocessors. In three of the five instances, claims for warranty were stated to have been '*raised in Dubai, UAE and the same were honored*'. However, in so far as the claim for warranty in India is concerned, the 1st petitioner informed the respondent to contact the point of purchase, in view of its revised '*warranty policy'* of April 2016.

(ii) The 2nd Respondent lodged the information with the Commission on 11.02.2019 u/s 19(1)(a) of the 2002 Act alleging that petitioner's '*warranty policy*' is in contravention of Section 3 & 4 of the 2002 Act in as much as they were refusing to provide the warranty in India for boxed microprocessors which are imported from authorized sources abroad but not those sourced from the Intel authorized dealers in India. This came to be registered by the Commission as Case No.5/2019 between *MATRIX INFO SYSTEMS PVT. LTD vs. INTEL CORPORATION*. On preliminary inquiry done u/s 26(1) of 2002 Act, the Commission having been satisfied as to *prima facie* case, instructed the Director General to cause an investigation into the matter and submit report thereof within a period of 150 days. The same is put in challenge in this petition.

(iii) It is relevant to mention that the interim order of stay was put in challenge in S.L.P.(C) No.12643/2020 which came to be disposed off by the

Hon'ble Supreme Court vide order dated 26.10.2020 observing that the Writ Petition itself to be expeditiously disposed off within a period of six weeks from the date an application is filed. However, another learned Coordinate Judge of this Court vide order dated 2.7.2021 found it prudent to await the decision of a Division Bench in W.A.Nos.562-563/2021 between *FLIPKART INTERNET PVT LTD AND ANOTHER Vs. COMPETITION COMMISSION OF INDIA*, because its outcome had a great relevance to the final adjudication of this Writ Petition.The relevant part of observations read as under:

> *"…In that view of the matter this Court is of a considered opinion that it would be prudent for the Court and the parties to await the decision of the Division Bench. Hence, list this matter after pronouncement of the Judgment in the aforementioned writ appeal."*

The said Writ Appeals came to be dismissed by a common order dated 23.07.2021 which aspect will be discussed *infra.* Even SLP (C) No.11615/2021 against the said order also met the same fate on 9.8.2021.

(C) AS TO DELAY BROOKED IN DISPOSING THIS WRIT PETITION:

This court apologetically states that the Writ Petition could not be disposed off as desired by the Apex Court in a time bound manner *inter alia* because of pendency of the aforesaid Writ Appeals and Special Leave Petitions. Thereafter, the second wave of COVID-19 pandemic intervened and there were constraints for the functioning of courts. Even the counsel appearing for the petitioners was also struck with COVID – 19. Several Judges, including the one in this case, were also infected with COVID in series and as a consequence, there was heavy workload on the available hands. Some adjournments were taken by both the sides and several by the side of petitioners on health & other grounds. Then came the Summer Vacation, 2022. Thereafter, the matter was heard on several dates, the last one being 10.08.2022.

4. SUBMISSIONS MADE ON BEHALF OF PETITIONERS:

The impugned order being in derogation of earlier decisions of the Commission and Hon'ble Delhi High Court, is not sustainable. It violates the principles of 'precedent and legal certainty' and defeats their legitimate expectation inasmuch as they had reframed their warranty policy in the light of observations made in the said decisions involving comparable factual & legal matrix. Modification of warranty policy consistent with observations made in similar cases is part of normal business practice and therefore, cannot be termed as abuse of dominance. The impugned order apart from being violative of principles of natural justice is arbitrary & discriminatory. Investigation of the kind has serious consequences & implications on the business reputation and therefore, could not have been casually directed by invoking draconian provisions of the 2002 Act. Petitioners pressed into service several Rulings in support of their case.

5. CONTENTIONS PUT FORTH ON BEHALF OF RESPONDENTS:

(a) The Respondent-Commission represented by the learned ASG contended that: case of the petitioners as sought to be made out is only a figment of imagination. The decision of Commission in *ASHISH AHUJA* and Delhi High Court in *KAPIL WADHWA, supra* did not involve comparable fact matrices and therefore, reliance on them is misconceived. The so called reframing of warranty service policy has nothing to do with the said decisions and therefore, the doctrine of legitimate expectation does not come to their aid. The new warranty policy *prima facie* involves abuse of dominance. What is being challenged is only an order directing investigation, there being several stages following the same. The impugned order was made after hearing the petitioners. Matters of this kind do not merit deeper examination at the hands of Writ Courts, there being no coercive action, impugned order being more administrative in nature.

(b) The learned counsel appearing for the 2nd respondent adopted the submissions of learned ASG and added that an investigation into the activities of petitioners is necessary in '*public interest*', regard being had to the abuse potential of warranty policy and of market dominance. The impugned order *per se* does not result into any prejudice to the petitioners. The said order only finds the matter 'investigation worthy' and therefore, directs investigation at the hands of the Director General, they will have full opportunity of participation in the investigation process and can lay a challenge to the investigation report if & when made adverse to their interest, by filing appeal u/s 53B before the NCLT; and there is also a second appeal to the NCLAT as provided u/s 53T of the 2002 Act.

Both learned ASG & learned counsel for the private respondent banked upon certain Rulings supportive of their common case.

6. Having heard the learned counsel appearing for the parties and having perused the Petition Papers & relevant of the Rulings cited at the bar, this court declines indulgence for the following reasons:

A. A SKELETAL DESCRIPTION OF SCHEME OF THE COMPETITION ACT, 2002:

(i) Prior to the present competition law regime, the Monopolistic and Restrictive Trade Practices Act, 1969 (hereinafter '1969 Act') was the primary instrument that dealt with competition, in the light of Directive Principles of State Policy enshrined in the Constitution. Prof. Aditya Bhattacharjea[3] contextualises the enactment of 1969 Act and 2002 Act as under:

> *"…The MRTP Act was passed in a context of growing evidence of concentration in Indian industry, manifested in the absolute size and dominance of family-owned business groups. It drew its inspiration directly from the Directive Principles of State Policy in Articles 38 and 39 of the Constitution…Its core chapter on concentration of economic power singled out "large" undertakings (those whose assets, together with those of their 'interconnected undertakings' exceeded a certain size) and 'dominant' undertakings*

[3] Aditya Bhattacharjea, '*Trade, Development and Competition Law: India and Canada Compared*', Vol. 5(1), Trade L. & Dev, (2013)

> *(those whose market share exceeded one-third). After the adoption of economic reforms in 1991, several official committees in the late 1990s suggested that India needed a new competition law to replace the MRTP Act. Although, a draft Bill was drawn up in 1999, the Competition Act was passed only at the end of 2002"*

(ii) Given the central place of competition in the market economy, the Raghavan Committee Report[4] laid emphasis on the need to harmonize competition policy with other governmental policies. Pursuant to same, the 2002 Act came to be enacted. Its preamble reads as under:

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

The regulatory provisions of the Act can broadly be divided into three categories; (i) prohibition of horizontal

and vertical anti–competitive agreements, (ii) abuse of dominant position by an enterprise; & (iii) regulation of combinations that are likely to have an *'appreciable adverse effect'* on competition in India, which Chapter II of the Act addresses. A former CJI Altamas Kabir[5], succinctly elucidates the objectives & structure of this Chapter as under:

> *"… Chap. II of the Competition Act may be referred to as the soul of the Competition Act as it spells out the raison d'etre for the promulgation thereof. It deals with the prohibition of certain agreements, abuse of dominant position and regulation of combinations, each of which is anathema to the concept of competition and contrary to the objects to be achieved in terms of the Preamble and Arts. 38 and 39 of the Constitution…"*

(iii) The 2002 Act also provides for the establishment of the Competition Commission of India as its primary regulatory body. It comprises of a chairman and six members as the maximum, two being the minimum. All they are appointed by the Central

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[4] Report of the High Level Committee on Competition Policy and Law, Government of India, 2000

Government on the recommendation of the Selection Committee. This Committee is headed on Hon'ble the Chief Justice of India or his nominee. They should be persons of ability, integrity and standing, having special knowledge & professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters. Chapter IV of the 2002 Act provides for its powers, functions & duties. Notably, section 19 empowers the Commission to inquire into certain agreements and dominant position of enterprises in terms of sections 3 & 4.

(iv) Section 26 of the 2002 Act, as recast by 2007 amendment, lays down the procedure for a layered inquiry, which is ordinarily initiated on receiving information from any person whether aggrieved or not, or *suo motu* as well. The Apex Court in *COMPETITION COMMISSION OF INDIA vs. STEEL AUTHORITY OF INDIA*

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[5] Altamas Kabir, *'Competition Laws and the Indian Economy'*, National Law School of India Review, Vol. 23, No. 1 (2011)

LIMITED[6] (hereinafter *'SAIL')* at paragraph 21, said as under:

> "*…When such information is received, the Commission is expected to satisfy itself and express its opinion that a prima facie case exists, from the record produced before it and then to pass a direction to the Director General to cause an investigation to be made into the matter. This direction, normally, could be issued by the Commission with or without assistance from other quarters including experts of eminence. The provisions of Section 19 do not suggest that any notice is required to be given to the informant, affected party or any other person at that stage. Such parties cannot claim the right to notice or hearing but it is always open to the Commission to call any `such person', for rendering assistance or produce such records, as the Commission may consider appropriate…"*

(v) What is observed in SAIL *supra,* at paragraph 37, as to the scheme of section 26, is also relevant:

> *"As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by*

[6] (2010) 10 SCC 744

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

(vi) Under the scheme of 2002 Act, the Commission is vested with enormous powers to perform different kinds of functions such as: inquisitorial, investigative, regulatory, adjudicatory and to a limited

extent, even advisory. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of sections 3 & 4 read with section 19 of the 2002 Act. It has power to award compensation and impose penalty. It can also make interim orders. The Commission being a statutory expert body takes institutional decisions. Regard being had to high stature of the Commission and the qualification & expertise of its constituent members, a strong presumption as to regularity of its proceedings arises; the persons assailing the same have an onerous task of rebuttal. Courts exercising writ jurisdiction under Articles 226 & 227 of the Constitution ordinarily do not have the expertise in matters like this and therefore, should loathe to interfere, subject to all just exceptions.

B. AS TO CONTENTION OF PRECEDENT & LEGAL CERTAINTY IN VIEW OF DECISION IN *ASHISH AHUJA* CASE AND *KAPIL WADHWA* CASE:

Learned Sr. Advocates appearing for the petitioners submitted that the impugned order made under section

26(1) of 2002 Act directing investigation runs counter to what the Commission had said & done in Case No.17/2014 between *ASHISH AHUJA vs. SNAPDEAL.COM* decided on 19.05.2014 and the Delhi High Court decision in *KAPIL WADHWA, supra*. They argued that the petitioners had reframed their *'warranty service policy'* as a part of their normal business practice consistent with the observations made in the said cases, which have since attained finality and therefore, the impugned order being repugnant to principles of precedent & legal certainty, is liable to be voided. This is controverted by the learned ASG appearing for the Commission. Let me examine the said cases:

IN *RE* ASHISH AHUJA CASE:

(i) The 'informant' Ashish Ahuja had purchased certain products from the SanDisk in the open market and not from its authorized distributors and sold them on *Snapdeal* which had stopped sale of informant's products through its portal stating that it is only the authorized partners of SanDisk who could sell items through

Snapdeal. The informant was asked to obtain an NOC from SanDisk for selling its products through Snapdeal which had circulated a letter representing that it would offer warranty services only on those products that are sourced from its four authorized distributors. The said letter was the subject matter of the 'information' treated by the Commission which at paragraphs 19 & 20 of its order dated 19.05.2014 said as under:

> **"***19. The Commission observes that the insistence by SanDisk that the storage devices sold through the online portals should be bought from its authorized distributors by itself cannot be considered as abusive as it is within its rights to protect the sanctity of its distribution channel. In a quality-driven market, brand image and goodwill are important concerns and it appears a prudent business policy that sale of products emanating from unknown/unverified/unauthorized sources are not encouraged/allowed".*
>
> *20. The Commission further observes that, vide its circular, SanDisk had only clarified that the full range of all India after sales and warranty services offered by it is limited to those products brought from its authorized national distributors. The conduct of SanDisk in issuing such circular can only be considered as part of normal business practice and cannot be termed as abuse of dominance…"*

(ii) There is force in the contention of learned ASG that the case of the petitioners is substantially different from that of *ASHISH AHUJA* inasmuch as the 2nd respondent was importing '*boxed*' microprocessors from petitioners' authorized distributors abroad, whereas in *AHUJA's* case, the products were purchased from unauthorized sources. What is significant to note is: Prior to 25.04.2016, the very same microprocessors were covered under petitioners' warranty policy for India. However, under the amended policy, the microprocessors purchased only from an authorized Indian distributor of Intel within India are eligible for warranty service in India. In other words, if a purchase is made from anywhere else on the globe even from authorized distributors of the petitioners warranty on those products would not avail in India, but may be claimed from the place of purchase. This becomes evident from what is stated on Intel's website which begins with the heading '*How to obtain warranty service*'. It specifically reads

"*…only Intel products sold by Intel Authorized Distributors in India and purchased in India are eligible for warranty sale within India. The list of Intel Authorized Distributors in India is located at https:/wwssl.intel.com/content/ww/xa/en/resellers/where to buy/overview.html...*"

IN RE KAPIL WADHWA CASE:

(iii) Petitioners' heavy reliance on the decision of Hon'ble Delhi High Court in *KAPIL WADHWA supra* would not come to their aid and reasons are not far to seek: the said case involved issues arising out of the Trademarks Act, 1999 and they were outside the penumbra of the 2002 Act. At paragraph 73, the Court said as under:

> *"What is pleaded is that the physical features of the printers sold abroad are different from the features of the printers sold in India. But this is irrelevant as long as the goods placed in the International market are not impaired or condition changed. It is pleaded that the respondents have no control pertaining to the sale, distribution and after sales services of its goods which are imported by the appellants and sold in India… With respect to after sales services, since the respondents do not warranty anything regarding their goods sold*

> *abroad, but imported into India and further sold, they not being responsible for the warranty of those goods, nothing turns thereon, as regards said plea. There may be some merit that the ordinary consumer, who is provided with warranties and after sales by the appellants, on not receiving satisfactory after sales service, may form a bad impression of the product of the respondents and thus to said extent one may recognize a possible damage to the reputation of the respondents… But, this can be taken care of by passing suitable directions requiring the appellants to prominently display in their shop that … printers sold by them are imported by the appellants and that after sales services and warranties are not guaranteed nor are they provided under the authority and control of the respondents and that the appellants do so at their own end and with their own efforts. This would obviate any consumer dissatisfaction adversely affecting the reputation of the respondents, and thus if this is done, the respondents can claim no legitimate reasons to oppose further dealing … in India."*

It is a well settled position of law that *a case is an authority for the proposition that it actually lays down in a given fact matrix and not for all that which logically follows from what is so laid down* as observed by Lord Halsbury in the celebrated case of *QUINN vs. LEATHEM*[7]. Therefore, much cannot be drawn from the said fact -

specific – decisions. For the same reason, the doctrine of legitimate expectation which the petitioners argued to falter the impugned order does not much come to their support, even if they had formulated their warranty service policy on their understanding of the observations in the said decisions.

C. AS TO CONTENTION OF RES JUDICATA IN VIEW OF ASHISH AHUJA AND KAPIL WADHWA CASES:

(i) Learned Senior Advocates appearing for the petitioners submitted that, their clients have restructured their warranty service policy on the basis of the what has been observed by the Commission in *ASHISH AHUJA* and by the Delhi High Court in *KAPIL WADHWA*, in the course of their business and that they can justify the same on the basis of what is decided in those cases; they plead *res judicata.* Before considering this contention, it is profitable to peruse what SIR WILLIAM DE GREY in *THE*

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[7] (1901) UKHL 2

DUCHESS OF KINGSTON'S CASE[8] had said about true meaning & scope of the doctrine. It is as under:

> *"…From the variety of cases relative to judgment being given in evidence in civil suits, these two deduction seem to follow generally true; first, that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court; secondly that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument of the judgment…"*

(ii) The above decisions which the petitioners heavily banked upon had different fact matrices and years have rolled since they were decided. They are not justified in contending for the progressive transformation of questions of fact involved in those cases into propositions of law favorable to them. The decisions in *ASHISH AHUJA* & *KAPIL WADHWA* are not the evidence

[8] (1776) 1 Leach 146

of any matter which come collaterally within the jurisdiction of Commission, nor of any matter incidentally cognizable or can be inferred by the arguments from the said decisions. Added, in ever changing matters of commerce & industry of the kind, the doctrine of *res judicata* ill suits. What the Division Bench observed at paragraph 42 of the decision *FLIPKART*, assumes importance:

> *"In the considered opinion of this Court, the order passed in the case of AIOVA does not help the present appellants. The order was passed by the CCI on 6.11.2018 directing closure of the case under Section 26(2) of the Act of 2002. The present order has been passed by the CCI under Section 26(1) of the Act of 2002 on 13.1.2021, meaning thereby after a lapse of considerable long time it has been passed and in a competitive market various agreements are executed, new practices are adopted every day and merely because some other issue has been looked into by the CCI earlier, it does not mean that on the ground of res judicata the CCI cannot look into any information subsequently against the appellants.* ***The principle of res judicata has no application in the matter under the Act of 2002 in the peculiar facts and circumstances of the case****. The market place is by its very nature a constantly evolving and dynamic space. The market forces can evolve even in the course of a few*

> *months and therefore, by no stretch of imagination, it can be held that the appellants should be out of bound for all times and no action can be taken against them only because at some point of time the matter has been looked into by the CCI.…"*

This decision attained finality after further a challenge thereto in SLP (C) No.11615/2021, has been negatived vide order dated 09.08.2021.

(iii) The purpose of filing information before the Commission is only to set the ball rolling as per the provisions of 2002 Act. As already mentioned above, the scheme of section 26 envisages layered proceedings and the impugned order is only a step in aid of that. The scope of inquiry is much broader and not restricted to the material placed on record by the parties only. The directions issued by the Commission in its order under section 26(1) of the Act are not parties specific but address the alleged *'anti – competitive practices'* in the industry in general, the punitive or corrective action being confined only to the parties, notwithstanding. Added, the Commission too having satisfactorily treated

this *'differential aspect'* of the matter at paragraph 38 of the impugned order observed as under:

> *"…The Commission however, observes that the facts of the said case are entirely different from the present case. In that case, it was not the situation that SanDisk would not produce warranty services on products purchased from authorized distributors of SanDisk merely because the purchases are made from outside India. Further, in that case, SanDisk did not limit its warranty policy in any particular country/ies …"*

D. AS TO PROCEEDINGS UNDER 2002 ACT BEING '*IN REM*':

(i) The submission of learned Senior Advocate, Mr.Sajan Poovayya appearing for the petitioners that pursuant to the observations of the Apex Court at paragraph 15 of *SAMIR AGRAWAL vs. COMPETITION COMMISSION OF INDIA*[9], *'the proceedings under the Act are proceedings in rem which affect the public interest…'* and therefore, his clients are entitled to take the benefit of observations made in *ASHISH AHUJA* & *KAPIL WADHWA* cases and therefore, the impugned order is vulnerable for challenge, is bit difficult to agree with. The

[9] (2021) 3 SCC 136

term *'in rem'* as defined by Bower[10] is one which '*declares, defines or otherwise determines the status of a person, or of a thing; that is to say, the jural relations of the person or thing to the world generally*. The jurisprudential basis for a judgment being one *'in rem'* is that in matters of public policy, where a large number of people would ordinarily be affected, the entire world may be regard as a party to the suit which was pronounced, i.e., the judgment settles the destiny of the *res* itself. In other words, even those who were not parties *eo nomine* to the earlier proceedings are *res judicated.*

(ii) With the above background, the term '*in rem*' occurring in paragraph 15 of the said decision needs to be viewed. It was only intended to highlight the wide impact of the proceedings under the Act, on *'public interest'* as distinguished from their impact on individual interest of the parties concerned. This becomes evident from the language of paragraph 21 of *SAMIR AGRAWAL* which reads as under:

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[10] Bower, Res Judicata, p. 132

> *Clearly, therefore, given the context of the Act in which the CCI and the NCLAT deal with practices which have an adverse effect on competition in derogation of the interest of consumers, it is clear that the Act vests powers in the CCI and enables it to act in rem, in public interest. This would make it clear that a "person aggrieved" must, in the context of the Act, be understood widely and not be constructed narrowly, as was done in Adi Pherozshah Gandhi, supra…"*

In this light, what Justice B.S. Chauhan[11], wrote as to the foundational nature of competition law, is worth adverting to:

> *"…As Lord Denning rightly observed, 'People who combine to keep up prices, do not shout it from the house tops. They keep it quiet; they make their own arrangement in cellars where no one can see. They will not put anything in writing not even into words. A nod or wink will do.' Competition law targets these forms of economic conduct which interfere with the effective operation of competitive markets, which are aimed to deceive the unaware, innocent buyers. At the same time, competition law eliminates obstacles to innovation, expansion and promotes competition as a value. Competition law tries to ensure that the interest of an individual or a group of individuals should not subvert the broader community interest…"*

[11] B.S. Chauhan, '*Indian Competition Law: Global Context*', Journal of the Indian Law Institute, Vol. 54, No. 3 (July – September 2012)

(iii) The principal intent and policy content of 2002 Act, i.e., '*consumer well being'* & '*public interest*' have to be borne in mind while construing the observations at paragraph 15 of *SAMIR AGRAWAL* which employ the term *in rem*. Further, it is profitable to see what Justice Oliver Wendell Holmes had said in *TOWNE vs. EISNER*[12]: "*A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used...*". It would also be pertinent to peruse the observations at paragraph 17 of *EXCEL CORPORATION CARE LTD. vs. COMPETITION COMMISSION OF INDIA*[13] which have been profitably reproduced as under:

> *"…the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure*

[12] 245 U.S. 418 (1918)
[13] (2017) 8 SCC 47

> *'level playing field' for all market players that helps markets to be competitive. It sets 'rules of the game' that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare…"*

(iv) In the common law tradition, proceedings & the orders made therein are treated as '*in rem*' in contradistinction to '*in personam*', only in four jurisdictions viz., probate, matrimonial, insolvency & admiralty, which aspect is discussed by learned authors *WOODROFFE* and *AMEER ALI* in their famous treatise[14]. Where a statute or the like is struck down by the constitutional courts, the same may operate '*in rem*' though it is not done in any of these four jurisdictions, is true. However, that is not the case here. Even the adjudication of electoral disputes in which the constituency concerned is vitally interested in the outcome of adjudication, judgments are not *in rem.*[15]

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[14] Woodroffe & Ameer Ali, *'Law of Evidence'*, 21st Edition, Volume 2, pp 1807 – 1809 (2021)
[15] *G.M. ARUMUGAM vs. S. RAJGOPAL* AIR 1976 SC 939

Therefore, it does not follow from the public character of the controversy that the proceedings or the outcome thereof, can be termed as being *in rem.* Thus, the subject observations in *SAMIR AGRAWAL* have to be viewed in this way.

(v) After all, a judgment of the court cannot be construed as a statute. The rules for construing judgments are different from the interpretative techniques used for construing a statute vide *HERRINGTON vs. BRITISH RAILWAYS BOARD*[16]. The Apex Court in *SAMIR AGARWAL*, had used the term *'in rem'* while explaining the broadened *locus standi* and expanse of the powers of the Commission in proceedings under section 19(1) of the Act in the light of 2007 Amendment which becomes clear by the observations at paragraph 15 of the said decision:

> *"A look at section 19(1) of the Act would show that the Act originally provided for the "receipt of a complaint" from any person, consumer or their association, or trade association. This expression was then*

[16] [1972] A.C. 877

substituted with the expression "receipt of any information in such manner and" by the 2007 Amendment. This substitution is not without significance. Whereas, a complaint could be filed only from a person who was aggrieved by a particular action, information may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings in rem which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion is also laid down in section 19(1) of the Act. Further, even while exercising suo motu powers, the CCI may receive information from any person and not merely from a person who is aggrieved by the conduct that is alleged to have occurred. This also follows from a reading of section 35 of the Act, in which the earlier expression "complainant or defendant" has been substituted by the expression, "person or an enterprise," setting out that the informant may appear either in person, or through one or more agents, before the CCI to present the information that he has gathered."

(vi) There is yet another aspect of the matter, namely, the nature of orders made under section 26(1) of 2002 Act. The decision of the Apex Court in SAIL *supra* lays down the threshold/scheme of this section as under:

"At the stage of Section 26(1) of the Act, the CCI is expected to examine the information

> *and other material on record; On the basis of such examination, the CCI must form an opinion whether there exists a prima facie case of contravention of the provisions of the Act; Such opinion must be recorded in the prima facie order of directing an investigation, which order must show expression of an opinion in "no uncertain terms"; The opinion must be "substantiated" in the order with reasons. Though the CCI may not record detailed reasons, it is required to give "minimum reasons" and yet most importantly, such reasons should substantiate the "formation of an opinion" and should do so in "no uncertain terms". These requirements make it apparent that the need for substantiation and the determination in no uncertain terms are peremptory. Minimal reasons is only a matter of length and never of weight of reasons; Such an opinion must be made with reference to the material on record; The CCI is required to give reasons on every issue raised before it whilst passing an order under Section 26(1) of the Act."*

A perusal of the impugned order shows that it perfectly accords with the above observations.

(vii) As already discussed above, the argument of petitioners' that what has been observed in *ASHISH AHUJA* by the Commission and *KAPIL WADHWA* by the Delhi High Court do operate as *res judicata* and they have precedential value, supportive of their case, is not

convincing to say the least: In matters like this, that too at the preliminary stage, the doctrine of *res judicata* or of precedent, cannot be invoked, no '*case*' having been decided by the Commission in virtue of impugned order. What is observed in *BALDEVDAS SHIVLAL vs. FILMISTAN DISTRIBUTORS (INDIA) PVT. LTD.*[17] at paragraph 20 becomes instructive in this regard:

> " *A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of s. 115 of the Code of Civil Procedure."*

That being the position, the reliance of Mr. Poovayya on Salmond's Jurisprudence, (4th Edition, § 66 & 67) which discusses the doctrine of precedent and a bit of *res judicata*, their scope & application, would not much come to the aid of his clients.

E. AS TO SECTION 26 BEING '*DRACONIAN*' AND DAMAGE TO PETITIONERS' REPUATTION:

(i) As already mentioned above, the scheme under section 26 of the 2002 Act envisages layered

[17] AIR 1970 SC 406

proceedings: What Professor Sudhanshu Kumar[18] writes about the scheme of section 26 is worth reproducing:

> *"…Commission for forming an opinion whether or not there exists a prima facie case which requires investigation…is required to take cognizance of the averments contained in the reference or information and the documents supplied…In an appropriate case, the Commission may also hold preliminary conference and ask the informant or the person against whom allegation of anti-competitive conduct has been leveled to produce the relevant documents. In a given case, the Commission might, after examining the contents of the reference or information…opine that there existed a prima facie case for investigation. In that event, the Commission may pass an order under section 26(1) of the Act.*
>
> *In another case…opine that no prima facie case has been made out warranting an investigation. In that event, the Commission may pass an order under section 26(2) and close the case. However, in either case the Commission cannot make detailed examination of the allegations contained in the information or reference, evaluate/analyse the evidence produced…and record its findings on the merits of the issue relating to violation of section 3 and/or 4 of the Act because that exercise can be done only after receiving the investigation report.*

[18] S.M.Dugar, *'GUIDE TO COMPETITION ACT, 2002'*, 8th Edition, Lexis Nexis, pp 856 – 860, (2021)

If the reference or the information contains an allegation relating to violation of the provisions of section 3 and the Commission does not feel satisfied that the material placed before it gives a prima facie indication of violation of that provision, then it may close the case under section 26(2). Likewise, if the reference or information contains an allegation of abuse of dominant position within the meaning of section 4(2)…and the Commission finds that the material produced with the reference or information does not prima facie show the dominance of the person against whom allegation of abuse of dominance has been leveled, then too it may close the case under section 26(2) of the Competition Act, 2002. However, as mentioned above, the Commission cannot make adjudication on violation of section 3 and/or 4 of the Act…"

(ii) The argument of learned Senior Advocate Dr. A.M.Singhvi that the investigation now ordered under section 26(1) of the 2002 Act may have a *'detrimental effect'* on the business reputation of the petitioners, may be arguably true, to some extent. He also contended that the investigation to be undertaken by the Director General in terms of order under section 26(1) of the 2002 Act, (which he termed *'draconian law'*) involves an intrusive and free ranging inquiry into every aspect of his

clients' business. Hon'ble Delhi High Court in *GOOGLE vs. COMPETITION COMMISSION OF INDIA*[19] although did not use the word '*draconian'* observed that the powers of Director General to investigate under section 26(2) are far wider than the powers of the police under the Code of Criminal Procedure, 1973, is also true. However, similar contentions taken up by the very same counsel in FLIPKART *supra* were repelled by the Division Bench of this Court and the same has attained finality.

(iii) It would once again be fruitful to advert to the foundational philosophy of competition law. The *central concern…is that firm or firms can harm competition and inflict harm on customers and ultimately end consumers where they possess some degree of market power*[20]. This central concern arises from *'market power'* a particular firm holds*;* the concept of market power being "…*the ability to reduce output or capacity, to raise prices, to reduce the quality of products, to limit the choice*

[19] (2015) SCC OnLine Del 8992

available to customers and/or to suppress innovation without fear of a damaging competitive response by other firms…"[21] The aim of 2002 enactment is: preventing practices which have an *'adverse effect'* on the competition; promoting & sustaining competition in the markets, in order to protect the interest of the consumers; and ensuring that freedom of trade is maintained in the given *'relevant market'*. By extension, this freedom of trade also holds within it the freedom of choice, i.e., lower switching costs and proper information systems for the consumers to make the right choice.

(iv) Even otherwise, there are several checks & balances against the abuse of power vested in the Commission which comprises of experts and qualified persons as its constituent members. Commission's stature and track record as can be ascertained from several rulings of the Apex Court and various High Courts, is also a fair assurance against the abuse of

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[20] Richard Whish, David Bailey, '*Competition Law'*, Tenth Edition, Oxford University Press, pg. 1 – 24, (2021*)*
[21] *Id*.

power. An opportunity of hearing is also provided to the stakeholders at the stage of investigation and thereafter whilst punitive or corrective action are being considered. This apart, a right of appeal is provided under section 53 A of the Act, as amended in 2007, once the report of investigation is submitted by the Director General. The adverse consequences of proceedings taken in accordance with law ordinarily fall under the maxim, '*damnum sine injuria'*. There may be damage to person, property or reputation but there is no legal injury to complain of. If petitioners' contention of *'grave consequences'* is accepted, then almost invariably, no preliminary inquiry at the hands of Commission or the investigation at the hands of Director General can be undertaken and that would render the very scheme of section 26 would be rendered virtually *otiose*.

(v) The Respondents are more than justified in placing reliance on a recent judgment in *COMPETITION*

COMMISSION OF INDIA vs. STATE OF MIZORAM[22] wherein similar contentions raised by the Commission have been found favour with the Apex Court. The relevant extracts have been pertinently reproduced as under:

> *"26. Lastly, it was urged that the High Court ought not to have entertained a petition under Article 226/227 of the Constitution of India as an order passed under Section 26(1) of the Competition Act was in the nature of an administrative direction. There were no adverse civil consequences. The proceedings were akin to a show cause notice and even the DG's report did not amount to a final decision. The respondents were also stated to have the alternative efficacious remedy of an appeal under Section 53B of the Competition Act whereby it could approach the appellate tribunal aggrieved by any decision or direction or order inter alia under sub-section (2) of Section 26 of the Competition Act. The (2004) 11 SCC 26. commission is expected to form an opinion about the existence of a prima facie case for contravention of certain provisions of the Competition Act and then passes a direction for the DG to cause an investigation into the matter. Post the report of the DG it can proceed further or close the proceedings. (Competition Commission of India v. Steel Authority of India & Anr.7 confirmed in CCI v. Bharti Airtel case.) That stage had not even arisen. The final report of the CCI was yet*

[22] Civil Appeal No. 1797 of 2015 disposed off on 19.01.2022

to mature and the CCI was not even bound by the report of the DG…

37. *The aforesaid gave an opportunity to respondent Nos. 5 & 6 also to approach the Court and interdict the proceedings which ought to have been concluded a long time ago. It would, in our view, have been beneficial even to the State to have come to a conclusion one way or the other. The interdict post the investigation report by the DG and prohibiting the CCI from carrying out its mandate under the Competition Act is unsustainable."*

(vi) It is not that in no case in which Commission directs investigation under section 26(1) of the Act arbitrarily and unreasonably, the aggrieved cannot invoke writ jurisdiction. Such cases warranting indulgence of Court ordinarily involve '*manifest arbitrariness'* as discussed in *SHAYARA BANO vs. UNION OF INDIA*[23] and therefore, even in respect of proceedings at the preliminary stage, remedy can be had by the aggrieved. However, in this petition no such case is made out, despite lengthy arguments and bulky pleadings of the petitioners that justified indulgence of this Court. The petitioners hastily rushed to this Court

and unjustifiably secured an interim order that interdicted an inquiry of preliminary nature, for all these years, to the enormous prejudice of public interest. This Writ Petition, besides being premature and absolutely devoid of merits, is an abortive attempt by the petitioners to scuttle the innocuous statutory proceedings of the Commission. Therefore, this is a fit case for dismissal with exemplary costs.

In the above circumstances, this petition is liable to be dismissed and accordingly it is, with a cost of Rs.10,00,000/- (Rupees Ten Lakh) only, payable to the 1st respondent – Competition Commission of India within six weeks.

It is hoped and expected that the long pending inquiry/investigation shall be accomplished at the earliest. All contentions of the parties are kept open.

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[23] (2017) 9 SCC 1

This Court places on record its deep appreciation for the able research and assistance rendered by its official Law Clerk cum Research Assistant, Mr. Faiz Afsar Sait.

Sd/-
JUDGE

Snb/