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IN THE HIGH COURT OF DELHI AT NEW DELHI

Pronounced on: 13.07.2023

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LPA 247/2016

TELEFONAKTIEBOLAGET
LM ERICSSON (PUBL)

..... Appellant

Through: Mr. C.S. Vaidyanathan, Sr. Advocate with Ms. Saya Choudhary Kapur, Mr. Ashutosh Kumar, Mr. Vivek Ranjan Tiwary, Mr. Vinod Chauhan, Ms. Vrinda Bagaria, Mr. Palash Maheshwari, Mr. Radhika Pareva, Mr. Munesh Sharma, Mr. Anand S. Pathak, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Rajat Moudgil, Mr. Ravishekhar Nair, Mr. Sahil Khanna and Mr. Vinayak Goel, Advs.

versus

COMPETITION COMMISSION
OF INDIA & ANR.

.... Respondents

Through: Mr Balbir Singh, ASG with Mr Avinash Sharma, Ms Monica Benjamin, Ms. Anu Sura, Ms. Akanksha Kapoor and Mr. Siddhant Choudhary, Advs. for CCI.

Mr. J. Sai Deepak and Mr. Avinash K. Sharma, Advocate for R-2 (INTEX).

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LPA 150/2020

MONSANTO HOLDINGS PRIVATE LIMITED & ORS



..... Appellants
 Through: Dr. Abhishek Manu Singhvi, Mr. C.M. Lall and Mr. Raj Shekhar Rao, Sr. Advocates with Mr. Adarsh Ramanujan, Ms. Bitika Sharma, Mr Aman Sethi, Mr. Lakshay Kaushik, Mr. Luv Virmani, Mr. H.S. Sandhu, Ms. Mansi Sood, Mr. Skanda Shekhar and Mr. Areeb Amanullah, Advs.

versus

COMPETITION COMMISSION OF INDIA & ORS.

.... Respondents

Through: Mr. N. Venkatraman, ASG with Mr. Samar Bansal, Mr. Madhav Gupta and Mr. Vedant Kapur, Advs for CCI.

Mr. Ruchir Mishra and Mr. Mukesh Kr. Tiwari, Advs. for UOI.

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LPA 550/2016

COMPETITION COMMISSION OF INDIA Appellants

Through: Mr. Balbir Singh, ASG with Mr. Avinash Sharma, Ms. Monica Benjamin, Ms. Anu Sura, Ms. Akanksha Kapoor and Mr. Siddhant Chaudhary, Advs. for CCI.

versus

TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) & ANR

..... Respondents

Through: Mr. Neeraj Kishan Kaul, Sr. Advocate with Ms. Saya Choudhary Kapur, Mr. Ashutosh Kumar, Mr. Vivek Ranjan Tiwary,



Mr. Vinod Chauhan, Ms. Vrinda Bagaria, Mr. Palash Maheshwari, Mr. Radhika Pareva, Mr. Sajan Shankar Prasad, Mr. Munesh Sharma, Mr. Swarnil Dey, Mr. Shaurya Pandey, Mr. Anand S. Pathak, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Rajat Moudgil, Mr. Ravishekhar Nair and Mr. Sahil Khanna, Advs.

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LPA 246/2016

TELEFONAKTIEBOLAGET LM ERICSSON (PUBL).

.... Appellant

Through: Mr. Sajan Poovayya, Sr. Advocate with Ms. Saya Choudhary Kapur, Mr. Ashutosh Kumar, Mr. Vivek Ranjan Tiwary, Mr. Vinod Chauhan, Ms. Vrinda Bagaria, Mr. Palash Maheshwari, Mr. Radhika Pareva, Mr. Munesh Sharma, Mr. Anand S. Pathak, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Rajat Moudgil, Mr. Ravishekhar Nair, Mr. Sahil Khanna, Ms. Raksha Agarwal and Mr. Abhishek Kakker, Advs.

versus

COMPETITION COMMISSION OF INDIA & ANR.

.... Respondents

Through: Mr Balbir Singh, ASG with Mr Avinash Sharma, Ms Monica Benjamin, Ms. Anu Sura, Ms. Akanksha Kapoor and Mr. Siddhant Choudhary, Advs. for CCI.



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W.P.(C) 8379/2015

TELEFONAKTIEBOLAGET LM ERICSSON (PUBL).

.... Appellant

Through: Mr. Sajan Poovayya, Sr. Advocate with Ms. Saya Choudhary Kapur, Mr. Ashutosh Kumar, Mr. Vivek Ranjan Tiwary, Mr. Vinod Chauhan, Ms. Vrinda Bagaria, Mr. Palash Maheshwari, Mr. Radhika Pareva, Mr. Munesh Sharma, Mr. Anand S. Pathak, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Rajat Moudgil, Mr. Ravishekhar Nair, Mr. Sahil Khanna, Ms. Raksha Agarwal and Mr. Abhishek Kakker, Advs.

versus

COMPETITION COMMISSION OF INDIA Respondent

Through: Mr Balbir Singh, ASG with Mr Avinash Sharma, Ms Monica Benjamin, Ms. Anu Sura, Ms. Akanksha Kapoor and Mr. Siddhant Choudhary, Advs. for CCI.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

HON'BLE MR. JUSTICE VIKAS MAHAJAN

J U D G M E N T

NAJMI WAZIRI, J

1. These are four appeals and a Writ Petition that, in their essence, raise a common question of far-reaching implications – when a patent is issued in India, and the patentee asserts such rights, can



the Competition Commission of India (“CCI”) inquire into the actions of such patentee in exercise of its powers under the Competition Act, 2002 (“Competition Act”). One of the Appeals – LPA/550/2016 is by the CCI itself.

WHAT THE PROCEEDINGS IMPUGN

2. LPA/246/2016 and LPA/247/2016 are by Telefonaktiebolaget LM Ericsson (Publ) (“Ericsson”). They both impugn a common judgement dated 30.3.2016 (“2016 Judgement”) which dismissed two writ petitions¹ filed by Ericsson, one against CCI and Micromax Informatics Limited (“Micromax”), and another against Intex Technologies (India) Limited (“Intex”). Micromax and Intex had *inter alia* complained that Ericsson was imposing conditions for licensing certain standard essential patents (“SEP”) in the field of telecommunications that are not fair, reasonable or non-discriminatory, and thus in violation of sections 3 and/or 4 of the Competition Act. The 2016 judgement held that there is no legal bar in law to the CCI proceeding against Ericsson under the Competition Act for violation of sections 3 or 4 thereof, on the basis of information filed by Micromax and Intex respectively.
3. LPA/550/2016 by the CCI impugns the judgement dated 14.12.2015 (“2015 Judgement”) in a writ petition² filed by Ericsson against CCI and Best IT World (India) Private Limited (“iBall”). The 2015 judgement recorded that since there was a settlement arrived at between Ericsson and iBall, and iBall wishes

¹ WP(C) 464/2014 and WP(C) 1006/2014

² WP(C) 5604/2015



to withdraw its information, and disposed off the Petition, quashing the proceedings initiated by CCI under 26(1) of the Competition Act, though not on merit. It reserved liberty to CCI to take action *suo motu* or on the basis of information received against Ericsson for abuse of dominant position, and revive investigation from the same stage, subject to any other objections. iBall had made similar contentions against Ericsson as did Micromax and Intex.

4. LPA/150/2020 is by (“Monsanto”). It impugns the judgement dated 20.05.2020 (“2020 Judgement”) in WP(C) 1776/2016, which had been filed by Monsanto against CCI and various informants. The 2020 Judgement relied extensively on the 2016 judgement and dismissed the writ petition, holding that there is no bar in law to the CCI proceeding against Monsanto under the Competition Act for alleged violation of sections 3 or 4 thereof, on the basis of information filed by the informants. The contention of the informants against Monsanto was, as with that against Ericsson that Monsanto is charging excessive royalties and not making its patents available reasonably, which is a violation of sections 3 and/or 4 of the Competition Act.
5. WP(C) 8379/2015 is filed, again, by Ericsson against CCI. In this writ petition, Ericsson challenged letters dated 16.7.2015 and 14.8.2015 issued by the CCI, which letters Ericsson terms as “Notices/Summons”. This was in continuation of action being taken by CCI on the information of Micromax as to Ericsson not



being fair, reasonable and non-discriminatory in dealing with SEP, thus violation sections 3 and/or 4 of the Competition Act.

SUBMISSIONS MADE BY THE PARTIES

6. Extensive submissions have been made by the learned Additional Solicitors General, the Senior Advocates and various counsel appearing for the parties. The parties have filed their Written Submissions, and multiple compilations of authorities as well as Convenience Compilation.
7. The patentees, through their Senior Advocates Mr. C. S. Vaidyanathan, Dr. A. M. Singhvi, Mr. Neeraj Kishan Kaul and Mr. Sajan Poovayya and Mr. Ashutosh Kumar, Advocate contend that the 2016 Judgement and 2020 Judgement are unsustainable, since the CCI cannot exercise jurisdiction over matters pertaining to exercise of rights by patentees. They broadly contend:
 - a) The licensing of patents is neither a sale nor a purchase of goods/services because by mere license or use of a patent, no property, right or title in a patent gets transferred. Licensing of patents only make an action legal which would otherwise have been unlawful.³
 - b) If there is no sale or purchase of goods/services then the CCI would have no jurisdiction to enquire into the business of licensing of a patent because under section 2(f)(ii) of the Competition Act, CCI can look only into the complaints of a consumer who hires or avails of any services or if the matter

³ Allen & Hanburys Ltd. Vs. Generics (U.K.) Ltd. Ors. [1986] RPC 203



relates to performance of any services. As noted above, licensing of a patent is not a service nor is it a performance of an act for a consumer. It is only an agreement by the patent holder not to enforce rights against the licensee.

- c) The informants invoked section 4 of the Competition Act but the said provision deals only with sale or purchase of goods/services, which expression does not cover a license or a patent.
- d) Section 51(1) of the Patents Act, 1970 (“Patents Act”) contemplates three modes of dealing with a patent by the patentee. They are sale, lease and license of patents.
- e) The complaint of the informants essentially relates to licensing of patents and/or whether the same is anti-competitive. The power to enquire into this lies with the Controller or Civil Court under the provisions of section 84(7) (c) read with section 140(1)(iii)(c) of the Patents Act wherein remedies are available to the complainants for allegations of portfolio licensing and unfair rates. Indeed, the defence in any infringement suit is provided in section 140(3) of the Patents Act. Before a conclusion can be made that the patent holder has abused its dominance by asking for unfair rates, the fair rates have to be determined and this is done by the Civil Court by deciding their Fair, Reasonable and Non-Discriminatory (‘FRAND’) rates.
- f) The CCI neither has power or machinery nor expertise to decide the rates. Allegations of anti-competitive practice by



the patent holder are to be determined under section 84(6) and section 90(1)(ix) of the Patents Act. The CCI has no role to play in this regard.

- g) Once the field of anti-competitive practice has been occupied under the aforesaid provisions of the Patents Act, there is no scope for the CCI to enter into it. The impugned order of the CCI is without application of mind because it seeks to examine the 'relevant market'. However, the relevant market would be only when there is sale and purchase of goods/services. In this case, there is no sale or purchase but mere licensing of FRAND rates, therefore, it is argued that the CCI's order cannot be sustained.
- h) The CCI seeks to start an enquiry without even disclosing as to how the market has been affected. It is merely a fishing enquiry into the water that may be too deep for it and, is taboo being beyond its jurisdiction to enter.
- i) CCI has not disclosed any material nor has any such material been presented to show that there was distortion of relevant market for sale or purchase of goods/services. It is argued that the CCI's findings in the impugned orders dated 12.11.2013 and 16.11.2014 are in conflict to the findings of the learned Single Judge in the suit filed against the Intex.
- j) Alternatively and without prejudice to the above, it is argued that the CCI has no power to issue license or decide royalty based on the patentees' FRAND assurances. The jurisdiction



of CCI, if any, can only commence after proceedings for infringement/revocation is considered and decided.

- k) The informants against Ericsson are nearly out of the market, whereas players such as Samsung and Xiaomi, who have accepted the FRAND terms offered by Ericsson, have significantly enhanced their market share in India. Relying on the judgement in *CCI v. Bharti Airtel*, (2019) 2 SCC 521, they contend that the first authority that ought to exercise jurisdiction in matters pertaining to telecommunication, is the TRAI and till then, CCI cannot exercise jurisdiction; that the 2020 judgement has interpreted the judgement in *Bharti Airtel*, erroneously. In effect, *Bharti Airtel* has impliedly overruled the 2016 judgement.
- l) The CCI is attempting to enter a field that is already covered by jurisdiction of Civil Courts and the Controller of Patents by way of issuing licenses, including compulsory licenses on FRAND terms.
- m) Chapter XVI of the Patents Act fully covers the field and the CCI cannot inquire into these aspects. Section 84(4) of the Patents Act provides for ascertaining reasonably affordable price, which exercise is to be carried out by the Controller. What is reasonable is to be ascertained in the context of the various factors enumerated in the said provisions. These include factors such as the existing trade or industry, established and developed commercial activities. All aspects



of anti-competitive practices have been covered under the said provisions.

- n) Once the power of inquiry is vested with the Controller as regards anti-competitive behaviour by patentees, there is no question of CCI inquiring into such matters. There is no overlap for a simultaneous or second inquiry into fair and reasonable rates or anti-competitive or abusive behaviour.
- o) There is no legislative intent to indicate that the Patents Act will be subservient to the Competition Act.
- p) If the CCI is permitted to proceed in the matter, it will render the patentees' rights nugatory. FRAND terms can only be determined by a Civil Court, or by the Controller in exercise of powers under Chapter XVI of the Patents Act, and to such extent, the power of CCI must necessarily be regarded as circumscribed.
- q) The informants have sufficient remedies available to them under the Patents act, both before Court as well as before the Controller. There is no reason to approach the CCI, other than to initiate vexatious litigation.
- r) Legislative history shows that the legislature always intended for the Patents Act to govern anti-competitive practices and abuse of patent rights.
- s) Matters pertaining to violation of FRAND assurances and obligations are not capable of being considered by the CCI. It is a purely contractual dispute between the patentee, licensee and the Standard Setting Organisation.



- t) If in a matter the Court sets a royalty rate as appropriate or FRAND rate, the CCI admittedly cannot interfere. That being the statutory landscape and legal topography, there can be no question of CCI being vested with such power merely because a Court has not yet rendered such a decision.
 - u) What is in issue is not the legislative competence of the Parliament to enact either the Patents Act or the Competition Act, but the legislative intent as regards which authority will have power to inquire into matters of anti-competitive practices relating to and abuse of patents, for which the test is not the pith and marrow doctrine or the aspects doctrine, but the legislative intendment doctrine.
 - v) The 2016 Judgement has wrongly applied tests of repugnancy and conflict in assessing the two statutes, when the test ought to have been of *jurisdictional ouster*, i.e., since the Patents Act has machinery to provide relief for anti-competitive and abusive conduct by a patentee, jurisdiction of the CCI is ousted in this regard.
8. Additionally, Dr. Singhvi, appearing for Monsanto, emphasised that there are significant differences between the case against Monsanto and that against Ericsson, given that Monsanto was not dealing with SEPs nor has Monsanto any FRAND obligations. He submitted that all allegations against Monsanto are completely subsumed within the Patents Act, and thus CCI cannot by any stretch of imagination claim jurisdiction over Monsanto.



9. The CCI, through the learned Additional Solicitors General Mr. N. Venkataraman and Mr. Balbir Singh, as also Mr. Samar Bansal, Advocate defended the 2016 Judgement and 2020 Judgement and contended that there is no bar in law to the CCI exercising its powers of inquiry, especially when the inquiry is at such a nascent stage. They, supported by the informants, broadly contended:
- a) Based on the Aspects Doctrine, it is apparent that the mere overlap between the Patents Act and the Competition Act does not detract from the power that is vested with the CCI under the Competition Act.
 - b) The CCI Act can be triggered by any person who is affected by anti-competitive and abusive behaviour of a patentee, and the decision of the CCI in such a situation will apply across the market to everyone, whereas the scope of the Patents Act is limited to assisting a licensee of a patent, and nothing more. Thus, it is in the interests of the general public and the nation as a whole that the CCI be permitted to continue its inquiry.
 - c) The mechanism under the Patents Act is insufficient to enable the Controller to effectively inquire into allegations of anti-competitive or abusive behaviour of patentees. This is an exercise that can effectively considered only by the CCI.
 - d) Legislative history demonstrates the intent of the legislature, that CCI must have power to inquire into allegations of anti-competitive and abusive behaviour of patentees.



- e) The Competition Act itself, by section 60, prohibits raising contentions of anti-competitive agreements and abuse of dominant position before any other statutory authority/court.
- f) *Bharti Airtel (supra)* is inapplicable in the present matters. Controller is not a regulator of an industry and thus *Bharti Airtel (supra)* will not be relevant for considering the issues in the these cases.
- g) CCI is the regulator of the market, whereas Controller of Patents is not a regulator but a mere authority to effectively implement the Patents Act. Thus, even by applying the judgement in *Bharti Airtel (supra)*, the CCI is the only authority that can look into questions of anti-competitive agreements and abuse of dominant position by patentees. Section 84(6) of the Patents Act demonstrates the legislative intent that the Controller can look into allegations of anti-competitive behaviour only after the question is determined by the CCI.
- h) There is considerable material produced by the informants to demonstrate *prima facie* that the patentees are abusing their dominant position and compelling licensees to enter into anti-competitive agreements. These are not issues that the Controller can consider.
- i) Private settlement between informants with patentees cannot oust jurisdiction of the CCI to inquire into anti-competitive and abusive behaviour by patentees.



10. Though we have applied our mind to the extensive submission made by the parties, we have chosen to refrain from burdening this judgement with our views on them *in extenso*. We feel it would be apt to set out our views on the contentions that are germane to the question that will be dispositive of the matters especially in the light of the eventual conclusion we are arriving at in these matters. The other issues, though contentious, are not relevant in view of the conclusion we have reached.
11. In our opinion, WP(C) 464/2014, 1006/2014, 1776/2016 and 8379/2015 should be allowed on a finding in law that the CCI cannot exercise jurisdiction over actions of an enterprise that are in exercise of their rights as a patentee. This is being discussed below.

FREE COMPETITION AND PATENTS

12. The contention of the patentees before this Court, i.e., Ericsson and Monsanto is that the exercise of a patentee of their rights under the Patents Act cannot be overridden by the CCI under the Competition Act.
13. They submit that as a patentee, the Patents Act assures them of the exclusive right to prevent third parties from using their process or product. They contend that the Patents Act itself has detailed provisions by way of Chapter XVI to ensure that there is adequate safeguard against anti-competitive agreements and abuse of dominant position.



14. They object to the CCI considering questions of the rate at which royalty is charged or the conditions that are imposed for grant of license. Such power, they contend, is not only proscribed by the express provisions of Section 5(i)(b) of the Competition Act and the very scheme of the Competition Act, but also impinges on the powers of the Controller under Chapter XVI of the Patents Act, is not sustainable.
15. They contend that Chapter XVI of the Patents Act is a complete code in itself as far as use of patents and anti-competitive practices are concerned. They submit that in any event, the legislative intent that the Competition Act should not deal with questions of patents is writ large on a comparison of the Patents Act with the Competition Act.
16. The CCI, supported by the informants, contends to the contrary. Drawing reference to section 62 of the Competition Act, it contends that the CCI is not claiming exclusive power over issues concerning patents and their being worked. It contends that the CCI is established to promote and sustain competition in markets to ensure economic development of the country, and it cannot be prevented from considering the question of whether the working of a patent will affect competition in the market.
17. CCI contends that the Competition Act, Competition is a special enactment as far as competition is concerned; that but for section 62 of the Competition Act, on questions of anti-competitive agreements and abuse of dominant position, the Competition Act will override the Patents Act. Since section 62 of the Competition



Act protects other enactments, the power being exercised by the CCI will not preclude the Controller under the Patents Act from continuing to exercise its powers.

THE RELEVANT PROVISIONS OF THE TWO LAWS

18. The relevant provisions of the Patents Act, which are to be considered are:

“48. Rights of patentees: Subject to the other provisions contained in this Act and the conditions specified in section 47, a patent granted under this Act shall confer upon the patentee:

(a) where the subject matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;

(b) where the subject matter of the patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India.

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83. General principles applicable to working of patented inventions:

Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely:

(a) that patents are granted to encourage inventions and to secure that the inventions are worked in India



on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;

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

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

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

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

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

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

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84. Compulsory licence:

...



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

85. Revocation of patents by the Controller for non-working:

(1) Where, in respect of a patent, a compulsory licence has been granted, the Central Government or any person interested may, after the expiration of two years from the date of the order granting the first compulsory licence, apply to the Controller for an order revoking the patent on the ground that the patented invention has not been worked in the territory of India or that reasonable requirements of the public with respect to the patented invention has not been satisfied or that the patented invention is not available to the public at a reasonably affordable price.

(2) Every application under sub-section (1) shall contain such particulars as may be prescribed, the facts upon which the application is based, and, in the case of an application other than by the Central Government, shall also set out the nature of the applicants interest.

(3) The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that patented invention have not been worked in the territory of India or that the patented invention is not available to the public at a reasonably affordable price, may make an order revoking the patent.

(4) Every application under sub-section (1) shall ordinarily be decided within one year of its being presented to the Controller.

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87. Procedure for dealing with applications under sections 84 and 85:

- (1) *Where the Controller is satisfied, upon consideration of an application under section 84, or section 85, that a prima facie case has been made out for the making of an order, he shall direct the applicant to serve copies of the application upon the patentee and any other person appearing from the register to be interested in the patent in respect of which the application is made, and ¹[shall publish the application in the official journal].*
- (2) *The patentee or any other person desiring to oppose the application may within such time as may be prescribed or within such further time as the Controller may on application (made either before or after the expiration of the prescribed time) allow, give to the Controller notice of opposition.*
- (3) *Any such notice of opposition shall contain a statement setting out the grounds on which the application is opposed.*
- (4) *Where any such notice of opposition is duly given, the Controller shall notify the applicant, and shall give to the applicant and the opponent an opportunity to be heard before deciding the case.*

88. Powers of Controller in granting compulsory licences:

- (1) *Where the Controller is satisfied on an application made under section 84 that the manufacture, use or sale of materials not protected by the patent is prejudiced by reason of conditions imposed by the patentee upon the grant of licences under the patent, or upon the purchase, hire or use of the patented article or process, he may, subject to the provisions of that section, order the grant of licences under the patent to such customers of the applicant as he thinks fit as well as to the applicant.*
- (2) *Where an application under section 84 is made by a person being the holder of a licence under the patent, the Controller may, if he makes an order for the grant of a*



licence to the applicant, order the existing licence to be cancelled, or may, if he thinks fit, instead of making an order for the grant of a licence to the applicant, order the existing licence to be amended.

(3) Where two or more patents are held by the same patentee and an applicant for a compulsory licence establishes that the reasonable requirements of the public have not been satisfied with respect to some only of the said patents, then, if the Controller is satisfied that the applicant cannot efficiently or satisfactorily work the licence granted to him under those patents without infringing the other patents held by the patentee and if those patents involve important technical advancement of considerable economic significance in relation to the other patents, he may, by order, direct the grant of a licence in respect of the other patents also to enable the licensee to work the patent or patents in regard to which a licence is granted under section 84.

(4) Where the terms and conditions of a licence have been settled by the Controller, the licensee may, at any time after he has worked the invention on a commercial scale for a period of not less than twelve months, make an application to the Controller for the revision of the terms and conditions on the ground that the terms and conditions settled have proved to be more onerous than originally expected and that in consequence thereof the licensee is unable to work the invention except at a loss:

Provided that no such application shall be entertained a second time.

89. General purposes for granting compulsory licences.

The powers of the Controller upon an application made under section 84 shall be exercised with a view to securing the following general purposes, that is to say,—



(a) that patented inventions are worked on a commercial scale in the territory of India without undue delay and to the fullest extent that is reasonably practicable;

(b) that the interests of any person for the time being working or developing an invention in the territory of India under the protection of a patent are not unfairly prejudiced.

90. Terms and conditions of compulsory licences:

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

(i) that the royalty and other remuneration, if any, reserved to the patentee or other person beneficially entitled to the patent, is reasonable, having regard to the nature of the invention, the expenditure incurred by the patentee in making the invention or in developing it and obtaining a patent and keeping it in force and other relevant factors;

(ii) that the patented invention is worked to the fullest extent by the person to whom the licence is granted and with reasonable profit to him;

(iii) that the patented articles are made available to the public at reasonably affordable prices;

(iv) that the licence granted is a non-exclusive licence;

(v) that the right of the licensee is non-assignable;

(vi) that the licence is for the balance term of the patent unless a shorter term is consistent with public interest;

(vii) that the licence is granted with a predominant purpose of supply in the Indian market and that the licensee may also export the patented product if need be in accordance with the



provisions of sub-clause (iii) of clause (a) of sub-section (7) of section 84;

(viii) that in the case of semi-conductor technology, the licence granted is to work the invention for public non-commercial use;

(ix) that in case the licence is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, the licensee shall be permitted to export the patented product, if need be.

(2) No licence granted by the Controller shall authorise the licensee to import the patented article or an article or substance made by a patented process from abroad where such importation would, but for such authorisation, constitute an infringement of the rights of the patentee.

(3) Notwithstanding anything contained in sub-section (2), the Central Government may, if in its opinion it is necessary so to do, in the public interest, direct the Controller at any time to authorise any licensee in respect of a patent to import the patented article or an article or substance made by a patented process from abroad (subject to such conditions as it considers necessary to impose relating among other matters to the royalty and other remuneration, if any, payable to the patentee, the quantum of import, the sale price of the imported article and the period of importation), and thereupon the Controller shall give effect to the directions.

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92. Special provision for compulsory licences on notifications by Central Government:

(1) If the Central Government is satisfied, in respect of any patent in force in circumstances of national emergency or in circumstances of extreme urgency or in case of public non-commercial use, that it is necessary that compulsory licences should be granted at any time after the sealing thereof to



work the invention, it may make a declaration to that effect, by notification in the Official Gazette, and thereupon the following provisions shall have effect, that is to say,--

(i) the Controller shall, on application made at any time after the notification by any person interested, grant to the applicant a licence under the patent on such terms and conditions as he thinks fit;

(ii) in settling the terms and conditions of a licence granted under this section, the Controller shall endeavour to secure that the articles manufactured under the patent shall be available to the public at the lowest prices consistent with the patentees deriving a reasonable advantage from their patent rights.

(2) The provisions of sections 83, 87, 88, 89 and 90 shall apply in relation to the grant of licences under this section as they apply in relation to the grant of licences under section 84.

(3) Notwithstanding anything contained in sub-section (2), where the Controller is satisfied on consideration of the application referred to in clause (i) of sub-section (1) that it is necessary in--

- (i) a circumstance of national emergency; or*
- (ii) a circumstance of extreme urgency; or*
- (iii) a case of public non-commercial use,*

which may arise or is required, as the case may be, including public health crises, relating to Acquired Immuno Deficiency Syndrome, human immunodeficiency virus, tuberculosis, malaria or other epidemics, he shall not apply any procedure specified in section 87 in relation to that application for grant of licence under this section:



Provided that the Controller shall, as soon as may be practicable, inform the patentee of the patent relating to the application for such non-application of section 87.

xxx xxx xxx

140. Avoidance of certain restrictive condition:.

(1)It shall not be lawful to insert--

(i) in any contract for or in relation to the sale or lease of a patented article or an article made by a patented process; or

(ii) in a licence to manufacture or use a patented article; or

(iii) in a licence to work any process protected by a patent, a condition the effect of which may be--

(a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor, or his nominees, or to prohibit him from acquiring or to restrict in any manner or to any extent his right to acquire from any person or to prohibit him from acquiring except from the vendor, lessor, or licensor or his nominees, any article other than the patented article or an article other than that made by the patented process; or

(b) to prohibit the purchaser, lessee or licensee from using, or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee, to use an article other than the patented article or an article other than that made by the patented process, which is not supplied by the vendor, lessor or licensor or his nominee; or

(c) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee to use any process other than the patented process; or



¹*[(d)to provide exclusive grant back, prevention to challenges to validity of patent and coercive package licensing,]*

and any such condition shall be void.

(2) A condition of the nature referred to in clause (a) or clause (b) or clause (c) of sub-section (1) shall not cease to be a condition falling within that sub-section merely by reason of the fact that the agreement containing it has been entered into separately, whether before or after the contract relating to the sale, lease or licence of the patented article or process.

(3) In proceedings against any person for the infringement of a patent, it shall be a defence to prove that at the time of the infringement there was in force a contract relating to the patent and containing a condition declared unlawful by this section:

Provided that this sub-section shall not apply if the plaintiff is not a party to the contract and proves to the satisfaction of the court that the restrictive condition was inserted in the contract without his knowledge and consent, express or implied.

(4) Nothing in this section shall--

(a. affect a condition in a contract by which a person is prohibited from selling goods other than those of a particular person;

(b) validate a contract which, but for this section, would be invalid;

(c) affect a condition in a contract for the lease of, or licence to use, a patented article, by which the lessor or licensor reserves to himself or his nominee the right to supply such new parts of the patented article as may be required or to put or keep it in repairs



19. The relevant provisions of the Competition Act are:

“Section 2

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;

1[2[(ba) "Appellate Tribunal" means the National Company Law Appellate Tribunal referred to in sub-section (1) of section 53A;]]

...

(f) "consumer" means any person who--

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the



approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

...

(h) "enterprise" means 4[a person or a department of the Government, including units, divisions, subsidiaries, who or which is, or has been, engaged in any economic activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space;]

Explanation.--For the purposes of this clause,--

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes--

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;

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.



Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement.]

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) Any other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons] at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including--

- (a) tie-in arrangement;*
- (b) exclusive 3[dealing] agreement;*
- (c) exclusive distribution agreement;*
- (d) refusal to deal;*
- (e) resale price maintenance,*

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

4[Provided that nothing contained in this sub-section shall apply to an agreement entered into between an enterprise and an end consumer.]

Explanation.--For the purposes of this sub-section,--

5[(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods or services, as a condition of such purchase, to purchase some other distinct goods or services;



(b) "exclusive dealing agreement" includes any agreement restricting in any manner the purchaser or the seller, as the case may be, in the course of his trade from acquiring or selling or otherwise dealing in any goods or services other than those of the seller or the purchaser or any other person, as the case may be;]

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods 6[or services] or allocate any area or market for the disposal or sale of the goods 6[or services];

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods 6[or services]; are sold or from whom goods 6[or services] are bought;

(e) "resale price maintenance" 7[includes, in case of any agreement to sell goods or provide services, any direct or indirect restriction] that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict--

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under--

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);



(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

8[(g) any other law for the time being in force relating to the protection of other intellectual property rights.]

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Section 4

Abuse of dominant position.

(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 2[under sub-section (1), if an enterprise or a group],--

(a) directly or indirectly, imposes unfair or discriminatory--

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service. Explanation.--For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such 3[condition or price] which may be adopted to meet the competition; or

(b) limits or restricts--

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or



(c) indulges in practice or practices resulting in denial of market access 4[in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation.--For the purposes of this section, the expression--

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to--

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors;

(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]

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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) 1[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[Provided that the Commission shall not entertain an information or a reference unless it is filed within three years from the date on which the cause of action has arisen:

Provided further that an information or a reference may be entertained after the period specified in the first proviso if the Commission is satisfied that there had been sufficient cause for not filing the information or the reference within such period after recording its reasons for condoning such delay.]

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:--

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

*(c) foreclosure of competition 3***;*

(d) 4[benefits or harm] to consumers;

(e) improvements in production or distribution of goods or provision of services;



(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:-

-

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;



(m) any other factor which the Commission may consider relevant for the inquiry.

(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:--

- (a) regulatory trade barriers;*
- (b) local specification requirements;*
- (c) national procurement policies;*
- (d) adequate distribution facilities;*
- (e) transport costs;*
- (f) language;*
- (g) consumer preferences;*
- (h) need for secure or regular supplies or rapid after-sales services.*
- 5[(i) characteristics of goods or nature of services;*
- (j) costs associated with switching supply or demand to other areas.]*

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:--

- (a) physical characteristics or end-use of goods 5[or the nature of services];*
- (b) price of goods or service;*
- (c) consumer preferences;*



- (d) exclusion of in-house production;*
- (e) existence of specialised producers;*
- (f) classification of industrial products.*
- 5(g) costs associated with switching demand or supply to other goods or services;*
- (h) categories of customers.*

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Section 26

Procedure for inquiry under section 19.

1[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.



2[(2A) The Commission may not inquire into agreement referred to in section 3 or conduct of an enterprise or group under section 4, if the same or substantially the same facts and issues raised in the information received under section 19 or reference from the Central Government or a State Government or a statutory authority has already been decided by the Commission in its previous order.]

(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.

2[(3A) If, after consideration of the report of the Director General referred to in sub-section (3), the Commission is of the opinion that further investigation is required, it may direct the Director General to investigate further into the matter.

(3B) The Director General shall, on receipt of direction under sub-section (3A), investigate the matter and submit a supplementary 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 3[sub-section (3) and (3B)] 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 3[sub-section (3) and (3B)] 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 3[sub-section (3) and (3B)] recommends 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 or 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 investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made 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 3[sub-section (3) and (3B)] 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 27

Orders by Commission after inquiry into agreements or abuse of dominant position.

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:--

(a) *direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;*



(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

1[Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.]

2 * * * **

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

3 * * * **

(g) pass such other 4[order or issue such directions] as it may deem fit:

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

Section 28

Division of enterprise enjoying dominant position.



The 1[Commission] may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

(2) In particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters, namely:--

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

(c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;

2 * * * **

(e) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;

(f) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;

(g) any other matter which may be necessary to give effect to the division of the enterprise.

(3) Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.

xxx xxx xxx



Section 60

Act to have overriding effect

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

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Section 62

Application of other laws not barred.

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.”

CONFLICT BETWEEN TWO LAWS, AND RESOLUTION THEREOF

20. Both the Patents Act and the Competition Act are special laws in their respective fields, i.e., patents, and competition respectively. The Patents Act is enacted by the Parliament pursuant to Entry 49 of the First List in the Seventh Schedule, whereas the Competition Act is enacted pursuant to Entry 21 of the Third List in the Seventh Schedule. Both laws being enacted by the Parliament, the provisions of Article 254 of the Constitution have no relevance in this case. The patentees assert that the Patents Act is a special Act, whereas the CCI and informants contend that the Competition Act is a special Act. Neither of them is wrong.
21. Chapter XVI of the Patents Act, which was introduced by way of an amendment in 2003 after the Competition Act was enacted, is a



subsequent enactment, and the contention of the patentees that by application of the maxim *lex posterior derogat priori*⁴, the Patents Act must override the Competition Act appears attractive at first blush.

22. However, the Court would be mindful of the law that has evolved on how perceived repugnancy between two statutes ought to be resolved when both laws appear to be special law, and both laws are made by the same legislature. The *locus classicus* on this subject, is the Constitution Bench dicta of the Supreme Court in *Ashoka Marketing Ltd & Anr. v. PNB & Ors.*, (1990) 4 SCC 406, where the Court held:

- a) When two statutes are made by the same legislature, the question of whether one overrides the other will have to be considered in the light of principles of statutory interpretation applicable to laws made by the same legislature (para. 49).
- b) One such principle is that later laws abrogate earlier laws. This is subject to the exception that general laws cannot override a special law. To use the language of the judgement, *[t]his means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in the earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather*

⁴ A subsequent litigation overrides the prior one.



than the later general one (Bennion, Statutory Interpretation pp. 433-34) (para. 50).

- c) As observed in *Life Insurance Corporation v. D.J. Bahadur*, (1981) 1 SCC 315, *[i]n determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law* (para. 53).
- d) *...[I]n case of inconsistency between provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein* (para. 61).
23. There is also extensive law on the question of ascertaining *when* a law can be considered as a special law. While discussing the question of the test of whether a statute is general or special, the Supreme Court held in *Gobind Sugar Mills Ltd. v. State of Bihar*, (1999) 7 SCC 76 that:

“... 10. While determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act....”



24. Citing the above, the Supreme Court, in *CTO, Rajasthan v. Binani*

Cements Ltd & Anr, (2014) 8 SCC 319 observed:

47. ...the Rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject-specific provision relating to a specific, defined and describable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject.

25. The indication, clearly, is that the Court must not automatically uphold the subsequent law as overriding the earlier law when two statutes are special. So too must the Court not hasten to declare laws as special merely because they deal, overall, with a specific issue/subject.

26. What must be considered is: (i) the subject matter in question, (ii) the intendment of the statutes in respect thereof, as well as (iii) whether the scheme and relevant provisions of the two statutes have any indication apropos which, the legislature felt must override the other, especially when both statutes have a non-obstante clause. We will attempt this exercise below in a three step process.

27. First, we will assess the laws to see what the schemes of the statutes are, and the nature of powers vested in the authorities they establish. Then we will assess the question that must be considered



by CCI to see what the subject matter of the inquiry by CCI is, which is being impugned by the patentees. Lastly, we must consider whether the legislature intended for this inquiry to be conducted exclusively either under the Patents Act or under the Competition Act, or whether neither overrides the other.

THE CCI AND ITS POWERS

28. The CCI is a statutory authority created under the Competition Act. Its sections 3 and 4, prohibit anti-competitive agreements and abuse of dominant position.
29. Section 19(1) empowers the CCI to inquire into allegations of violations of Sections 3 or 4 thereof. Section 19(2) clarifies that the power under Section 19(1) includes the powers and functions under Sections 19(3) to 19(7), which broadly require the Commission to:
- a) determine whether an agreement will have an appreciable adverse effect on competition, and in such process, have due regard to factors specified in Section 19(3);⁵
 - b) determine whether an enterprise enjoys a dominant position, and in such process, have due regard to factors specified in Section 19(4);⁶

⁵ (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition; (d) 2[benefits or harm] to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

⁶ (a) market share of the enterprise; (b) size and resources of the enterprise; (c) size and importance of the competitors; (d) economic power of the enterprise including commercial advantages over competitors; (e) vertical integration of the enterprises or sale or service network of such enterprises; (f) dependence of consumers on the enterprise; (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital



- c) determine the “relevant market”, and in such process, have due regard to “relevant geographic market” and “relevant product market;
 - d) determine the “relevant geographic market”, and in such process, have due regard to factors specified in section 19(6);⁷
 - e) determine the “relevant product market”, and in such process, have due regard to the factors specified in section 19(7);⁸
30. Section 26 of the Competition Act prescribes the procedure for inquiry under Section 19, which requires and empowers the CCI to:
- a) ascertain if there is a *prima facie* case, and if yes, to direct the Director General to cause an investigation in the matter,⁹ and if no *prima facie* case is found, to close the matter;
 - b) consider the report furnished by the Director General and direct further investigation and seek a supplementary report, if needed, forward the report/s received to the parties; and

cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (i) countervailing buying power; (j) market structure and size of market; (k) social obligations and social costs; (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; (m) any other factor which the Commission may consider relevant for the inquiry.

⁷ (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services. (i) characteristics of goods or nature of services; (j) costs associated with switching supply or demand to other areas.

⁸ (a) physical characteristics or end-use of goods or the nature of services; (b) price of goods or service; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products. (g) costs associated with switching demand or supply to other goods or services; (h) categories of customers.

⁹ The Director General has powers specified under Section 41 in this regard.



- c) hear objections if required, and conduct further inquiry in the matter based on the findings and objections.
31. The CCI, after inquiry in the above terms, is empowered by sections 27 and 28 of the Competition Act to:
- a) discontinue such agreement/s and/or abuse of dominant position, and to not re-enter such agreement/s;
 - b) impose a penalty;
 - c) modify the agreement by its order;
 - d) direct compliance with any other orders passed, including as to costs;
 - e) direct division of an enterprise enjoying dominant position to obviate the possibility of abuse of such position; and
 - f) pass such further and other orders as it deems fit.
32. Of some significance, also, are the provisions of section 3(5)(i)(b) of the Competition Act, which will be discussed at a more appropriate juncture in this judgement.

THE CONTROLLER AND HIS/HER POWERS

33. Chapter XVI of the Patents Act, which was introduced in 2003 by way of an amendment, pertains to, as its title indicates, *working of patents, compulsory licenses and revocation*. Section 83 sets out certain general principles to which regard must be had in exercising powers conferred by the Chapter, of which some significant principles are:
- a) patents are granted to encourage inventions and to secure that inventions are worked in India on a *commercial scale*;



- b) patents are not granted merely to enable patentees to *enjoy a monopoly* for the importation of the patented article;
 - c) patent rights are protected to contribute *to the promotion of technological innovation, to transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare and a balance of rights and obligations*;
 - d) patents granted do not impede protection of public health and nutrition, and *should promote public interest specially in sectors of vital importance for socio-economic and technological development of India*;
 - e) that *patent right is not abused by patentee*, and patentee does not resort to practices which *unreasonably restrain trade or adversely affect the international transfer of technology*; and
 - f) patents are granted to make the benefit of the patented invention *available at reasonably affordable prices to the public*.
34. Section 84(1) read with Section 84(4) of the Patents Act empowers the Controller to grant compulsory license if the reasonable requirements of the public are not satisfied or the patented invention is not available to the public at a reasonable price, or that the patented invention is not worked in India. In exercising this power, section 84(5) empowers the Controller to exercise powers under Section 88 as well.



35. Section 84(2) of the Patents Act permits even holder of a license to seek such compulsory license. Section 84(6) requires the Controller, in considering grant of compulsory license, to take into account certain specified factors.¹⁰ Significant in this is whether the applicant has made efforts to obtain license from the patentee *on reasonable terms and conditions*.
36. Section 84(7) of the Patents Act declares that the reasonable requirements of the public are deemed to have not been satisfied in certain circumstances specified therein, which includes:
- a) if refusal of license results in existing trade or industry, or development thereof, or establishment of a new trade or industry in India, or the trade or industry of any person or class of persons or manufacturing in India is prejudiced;
 - b) if refusal of license results in establishment or development of commercial activities in India being prejudiced;
 - c) if conditions imposed by patentee results in use of patented articles, or manufacture, use or sale of material not protected by the patent, or establishment or development of any trade or industry in India is prejudiced;
 - d) if conditions such as exclusive grant back, or prevention to challenges to the validity of patent, or coercive package licensing are imposed by the patentee;

¹⁰ (i) the nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensee to make full use of the invention; (ii) the ability of the applicant to work the invention to the public advantage; (iii) the capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted; (iv) as to whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit.



- e) if working of patented invention in India on a commercial scale is being prevented or hindered by importation of the patented article;
37. Section 87 of the Patents Act prescribes the procedure to be followed in considering applications for grant of compulsory license, which require the Controller to give adequate notice to the parties and an opportunity of being heard before deciding the case.
38. Section 88(2) of the Patents Act empowers the Controller, in matters of application by a license-holder, to, when granting compulsory license, either order the existing license to be cancelled, or simply amend the existing license instead of granting a compulsory license.
39. Section 88(3) of the Patents Act empowers the Controller to, when granting a compulsory license for a particular patent, also grant license in respect of other patents held by the same patentee, if the license granted cannot be worked without infringing such other patents. Section 88(4) of the Patents Act empowers review of the terms and conditions of the compulsory license in certain conditions, if the terms and conditions settled prove more onerous than originally expected, and the licensee is unable to work the invention except at a loss.
40. Section 89 of the Patents Act declares the general purposes for grant of compulsory license, i.e., that the patented inventions are worked on a commercial scale in India, and that the interests of persons currently working the patented invention are not unfairly prejudiced.



41. Section 90 prescribes that in settling the terms and conditions of a compulsory license, the Controller shall endeavour to secure certain conditions such as:
- a) the royalty and other remuneration reserved to the patentee is reasonable, having regard to the nature of the invention, the expenditure incurred by the patentee in making or developing it, and in obtaining a patent and keeping it in force, and other relevant factors;
 - b) the patented invention is worked to the fullest extent by and with reasonable profit to the person to whom compulsory license is granted;
 - c) the patented articles are made available to the public at reasonable affordable prices; and
 - d) if the license is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, the licensee shall be permitted to export the product if need be.
42. Section 92 of the Patents Act enables grant of compulsory licenses in certain emergent circumstances, and prescribes provisions therefor.
43. Additionally, certain powers are reserved to Courts as well under Section 140 of the Act, pertaining to restrictive covenants in sale, lease or license of a patent. Such restrictive conditions are declared as void, and Courts are empowered to consider the same as a valid defence to allegations of infringement.



THE NATURE OF THE INQUIRY BEING CONDUCTED BY CCI, IMPUGNED IN THESE PROCEEDINGS

44. The stand of the patentees has been that the Patents Act is a special law dealing specifically with patents, and issues of imposition of conditions for licensing patents are provided for under Chapter XVI of the Patents Act, which includes anti-competitive agreements and abuse of dominant position explicitly. They contend that in view thereof, there is no reason for the Competition Act, which deals with anti-competitive agreements and abuse of dominant position generally, to override the special law.
45. The converse is the stand of the CCI and the informants, to the effect that the Competition Act is a special law dealing with anti-competitive agreements and abuse of dominant position, and thus some stray provisions in the Patents Act, which deals otherwise with patents generally, cannot be understood as overriding the Competition Act, which is, in any event, a subsequent statute.
46. Particular emphasis has been placed on the provisions of Section 3(5)(i)(b) of the Competition Act by both parties. On behalf of the CCI, the provision is cited, to emphasise that what is permitted is only imposition of *reasonable conditions* as may be necessary to protect rights that may be conferred under the Patents Act.
47. Defending the 2016 Judgement, the CCI contended that the provisions of Section 3(5)(i)(b) and Section 4 of the Competition Act make it abundantly clear that the CCI, and that *only* the CCI can consider whether a condition imposed in an agreement



licensing a patent is unreasonable, i.e., such as would cause an appreciable adverse effect on competition within India, or an abuse of dominant position. We disagree.

48. The question of whether an agreement under which a patent is licensed will cause an appreciable adverse effect on competition within India or will amount to an abuse of dominant position is not one that is reserved for the CCI. To the contrary, the factors that the CCI is required to consider under Sections 19(3) and 19(4) when assessing a potential violation of Sections 3 or 4 of the Competition Act are not very different from those that the Controller, in exercise of power to grant a compulsory license, will consider in terms of Sections 84(6) and 84(7), especially when read with Sections 83 and 89 of the Patents Act.
49. In our view, the inquiry that the CCI proposes to conduct in respect of an assertion of patent rights is nearly identical to that which the Controller will conduct under Chapter XVI of the Patents Act. The legislative intent is apparent in that the Patents Act—especially as amended by the 2003 Amendment that introduced Chapter XVI after the Competition Act was enacted. It is especially for the field pertaining to patents, unreasonable conditions in agreements of licensing, abuse of status as a patentee, inquiry in respect thereof and relief that is to be granted therefor are all to be governed by the Patents Act.
50. In our view, the Competition Act is a general legislation pertaining to anti-competitive agreements and abuse of dominant position



generally. The inclusion of Section 84(6)(iv)¹¹ in the Patents Act by way of an amendment after the Competition Act was passed with Section 3(5)(i)(b)¹² is particularly instructive of the above legislative intent as regards anti-competitive agreements.

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

¹¹ 84. ***

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

(iv) as to whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit:

Provided that this clause shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anticompetitive practices adopted by the patentee, but shall not be required to take into account matters subsequent to the making of the application.

¹² 3. ***

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(b) the Patents Act, 1970 (39 of 1970)



83(f) of the Patents Act as compared with that of Section 4 of the Competition Act.

52. In our opinion, Chapter XVI of the Patents Act is a complete code in itself on all issues pertaining to unreasonable conditions in agreements of licensing of patents, abuse of status as a patentee, inquiry in respect thereof and relief that is to be granted therefor.
53. In reconciling the two statutes, the subject matter that is in focus is not merely anti-competitive agreements and abuse of dominant position, which both the Patents Act (in Chapter XVI) and the Competition Act (in Sections 3 and 4) deal with. The subject matter that is relevant for this assessment is anti-competitive agreements and abuse of dominant position by a patentee in exercise of their rights under the Patents Act.
54. On this issue, there is no scope of doubt beyond the pale of doubt that the Patents Act is the special statute, and not the Competition Act. It is also a fact that Chapter XVI of the Patents Act is a subsequent legislation as compared to the Competition Act.
55. Therefore, when assessed, by the maxim *generalia specialibus non derogant*¹³ or by the maxim *lex posterior derogat priori*, the Patents Act must prevail over the Competition Act on the issue of exercise of rights by a patentee under the Patents Act. Even assessed by the rigours of *Ashoka Marketing (supra)*, which require the conflict to be resolved by reference to the *purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein*, the

¹³ General law will not override special law.



Patents Act must necessarily prevail over that of the Competition Act.

56. For this reason, in our view, LPA 246/2016, 247/2016, 150/2020, 550/2016 and WP(C) 8379/2015 ought to be and are allowed. The 2016 judgment and 2020 judgment are set aside. The proceedings initiated by the CCI, that are impugned in the said appeals/petitions are hereby quashed.
57. This judgement, of course, must not be understood as expressing any opinion on the merits of the claims of any of the parties as to whether Ericsson or Monsanto have, in fact, imposed anti-competitive conditions, or abused their dominant position.
58. For the above reasons, the 2015 Judgement is sustained. The CCI's proceedings deserve to be quashed for want of power. The Court is of the view that once a settlement has been reached between the informant and person against whom the information is filed, the very substratum of the proceedings by CCI is lost and the 2015 Judgement has rightly quashed the same. The question of liberties granted by the 2015 Judgement being sustainable do not arise, given as this Court has already held that CCI has no power to conduct the investigation that was impugned.

FINDINGS IN THE IMPUGNED JUDGEMENT IN COMPARING THE TWO STATUTES

59. Although we have already allowed the writ petitions, there are certain findings rendered in the 2016 Judgement and 2020 Judgement that we must deal with.



60. The conclusion drawn by the 2016 Judgement at para. 172, that there is no overlap between the two enactments and that the CCI has powers that the Controller does not have is not sustainable. Indeed, even the conclusion at para. 173 of the 2016 Judgement to the effect that the Patents Act is only defining the contours of patent rights, whereas the Competition Act deals with abuse of rights, including patents rights, can also not be sustained. This is because of not just the provisions of Chapter XVI, but also the opening words of section 48 of the Patents Act, which makes the rights of a patentee subject to the other provisions of the Act.
61. In our view, the 2016 Judgement erred in its assessment of the provisions of sections 21 and 21A of the Competition Act. Section 21A whether read on its own or in conjunction with section 62 cannot necessarily empower the CCI to exercise powers that the Controller would otherwise exercise under Chapter XVI of the Patents Act. Once there is clear legislative intent that the Patents Act will override the Competition Act, the same cannot be saved by the provisions of Section 21A of the Competition (Competition) Act. Its sections 21 and 21A are intended to deal with situations where the powers of the Commission are not excluded by other statutes.
62. Mr. N. Venkataraman, the learned Additional Solicitor General placed particular emphasis on the fact that the decisions of the CCI are *in rem*, while those of the Controller are *in personam*, to defend the finding of the 2016 Judgement at para. 169 that the



operative widths of the two enactments are different, and thus there can be no overlap. We find ourselves unable to concur.

63. The legislative intent and the subject matter that the two statutes deal with is the test in ascertaining whether two statutes can coexist. The starting point of the assessment necessarily has to be the subject matter of the statutes. In the present matter, as set out above, the subject matter is an inquiry being conducted by a statutory authority, into allegations of anti-competitive agreements and allegations of abuse of dominant position.
64. While the Competition Act deals with these subjects generally, the Patents Act deals with these subjects specifically in the context of patents. The legislature, in its wisdom, after enacting the Competition Act, amended the Patents Act to introduce Chapter XVI and has chosen to keep the effect of the orders of the Controller *in personam*¹⁴. It is not for this Court to comment on the propriety thereof, nor does this persuade us to permit exercise of powers by CCI contrary to legislative intent.
65. The Appeals and the Petition are disposed off in the above terms. The parties shall bear their own costs.

NAJMI WAZIRI, J

VIKAS MAHAJAN, J

JULY 13, 2023

¹⁴ Under chapter XVI of the 1970 Act