(2020) 08 GUJ CK 0298

In the Gujarat High Court

Case No : R/Special Civil Application No. 8101 Of 2020

M/S. Vardayani Offset Through Its Sole Proprietor Mr. Madhvesh Bhikhabhai Patel	APPELLANT
Vs	
Competition Commission Of India & 2 Other(s)	RESPONDENT

Date of Decision : 18-08-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Dumped Articles And For Determination Of Injury) Rules, 1995 — Rule 4(1), 5(5), 6(1), 35
Competition Commission Of India (General) Regulations 2009 — Regulation 14(7), 14(7)(f), 17(2), 18, 18(2), 18(4), 20, 20(4), 21, 21(8), 22, 24, 25, 29, 30, 30(2), 31(2), 33(4), 35, 35(14), 37, 40, 41, 41(1), 41(4), 41(5), 41(4)(5), 43, 46A, 48, 50, 52
Competition Act, 2002 — Section 3, 3(1), 3(3)(a), 3(3)(b), 3(3)(c), 3(3)(d), 3(4), 4, 4(1), 7, 17(1), 17(3), 18, 19, 19(1)(a), 20, 21, 21A, 26, 26(1), 26)(2), 26(3), 26(4), 26(5), 26(6), 26(7), 26(8), 27, 27(d), 28, 29, 29(1A), 30, 31, 31(3), 33, 34, 35, 36, 36(1), 36(2), 36(3), 36(4), 41, 41(2), 41(3), 42(3), 43, 49(1), 51, 51(3), 53A, 53A(1), 53A(1)(a), 53B, 57
Evidence Act, 1872 — Section 123, 124
Companies Act, 1956 — Section 240, 240(2), 240A
Code Of Criminal Procedure, 1973 — Section 154(1), 157(1)

Citation : (2020) 08 GUJ CK 0298

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : Mihir Thakore, Amrita M Thakore, Devang Vyas, Km Antani, Garima Malhotra

Final Decision : Partly Allowed

Judgement

Biren Vaishnav, J

1. RULE. Mr. Devang Vyas, learned Additional Solicitor General with waives service of notice of rule on behalf of respondent nos.1 to 3. With the consent of the learned advocates appearing for the parties, matter is taken up for final hearing today.

1.1 This petition is filed by the petitioner for the following prayers:

"(i) Holding and declaring that the action of the respondents of initiating proceedings against the petitioner by way of Case No.32 of 2018 before the respondent no.1 and order dated 9.11.2018 passed therein and of carrying out investigation and issuing Investigation Report dated 20.3.2020 therein is ex facie arbitrary, unreasonable, unconstitutional, violative of principles of natural justice without jurisdiction, highhanded, perverse, unjust, harsh, illegal and void."

2. The brief facts of the petitioner's case are as under:

2.1 The petitioner is carrying on the business of printing and has a web offset printing machine. In April, 2018, the Gujarat State Board of School Text Book (for short 'GSBSTB') issued a tender for job- work of offset printing of textbooks. The tender was for two categories. (1) Sheet - Fed offset printing and (2) Web offset printing. Both were for 5000 copies and more than 5000 copies. A rate card was provided along with the tender by the GSBSTB and the bidders were required to quote percentage increase / decrease against GSBSTB offered rates. According to the petitioner therefore, the tender contemplated allotment of work to more than one technically qualified bidder.

2.2 The case of the petitioner is that after the issuance of the tender the Gujarat State School Text Book Printers' Association called a meeting on 27.04.2018 to give information about the tender. According to the Petitioner it appears that during the meeting the office bearers of the association suggested quoting 25% above the rate offered in the rate card. One Mr. Nitin Vyas addressed an E- mail providing calculations in regard to 35% increase in offered rates.

2.3 A pre-bid meeting was held on 15.05.2018 where according to the petitioner, representatives of about 72 printing presses including those from outside were present. The case of the petitioner is that the outside State printing presses were over heard discussing quoting -25% to -40% of the GSBSTB offered rates.

2.4 A total of 115 printing presses including several outside State printing presses participated in the tender and about 100 or so bidders including several outside State bidders were declared technically qualified. The petitioner had submitted a bid in respect of categories B1 and B2 i.e. for Web Offset Printing along with binding upto 5000 copies and 5001 copies and more. The petitioner was one of the 21 bidders who was declared in L1 in category B2 Web offset printing. The petitioner's bid was -31% of the offered rate. The Petitioner's case is that since it was public knowledge that the outside state bidders were likely to quote upto-31% of the offered rates, it is possible that the other bidders also acted in the similar manner while quoting rates in their bids resulting in multiple bids with quotes -31%. It appears that out of the 42 bidders, 28 bidders gave confirmation to work at L1 price. However, the petitioner was not allotted work by GSBSTB.

2.5 According to the petitioner the respondent no.3, sole proprietor of M/s.

Gujarat Book Stores who participated and was unsuccessful, approached the Competition Commission of India (hereinafter to be referred to as 'CCI') by filing Information Petition being Case No.32 of 2018 against successful bidders. According to the petitioner there were allegations of cartelization and violation of Section 3(1) read with Section 3(3)(d) of the Competition Act, 2002 (hereinafter to be referred to as 'the Act' for short).

The Petitioner states that on the Information Petition so filed, the CCI passed an order dated 09.11.2018 under Section 26(1) of the Act directing the Director General to conduct an investigation and submit a report. This was done as the Commission was of the opinion that there exists a prima facie case against the petitioner.

2.6 The petitioner was issued a summons on 29.11.2019 from the respondent no.2 - Office of the Director General and 04.12.2019 respectively directing personal appearance of the petitioner on 11.12.2019 which was subsequently changed to 12.12.2019 and at the Petitioner's request the hearing was then kept on 26.12.2019.

2.7 According to the petitioner, on receiving such summons the petitioner addressed a letter dated 05.12.2019 asking for case papers pertaining to the case. The petitioner appeared on 26.12.2019, on which date the statement of the sole proprietor of the petitioner was recorded. According to the petitioner this was done without providing a copy of information petition or order passed thereon or any other documents or evidences. The Petitioner did not know and was unaware of the case against him. It is the case of the petitioner that the petitioner received a letter dated 03.06.2020 from the CCI with a copy of the order dated 20.05.2020 forwarding a copy of the investigation report dated 20.03.2020. According to the petitioner, the respondent no.2 called upon the petitioner to file its objections / suggestions to the same latest by 10.07.2020. The letter further directed the petitioner to file copies of audited balance sheets and profit and loss accounts for FY 2016- 17, FY 2017-18 and FY 2018-19.

2.8 Aggrieved by Order dated 9.11.2018 passed by the CCI under Section 26(1) of the Act, the Investigation Report dated 20.3.2010 and the Order dated 20.5.2020 together with the communication dated 3.06.2020 by which the Petitioner was asked to appear and file his suggestions and objections, the petitioner has approached this Court with the prayer as above.

3. Mr.Mihir Thakore, learned Senior Advocate with Ms.Amrita Thakore appeared for the petitioner. Mr.Thakore made the following submissions.

3.1 At the outset a preliminary objection was raised by Mr. Devang Vyas, Additional Solicitor General that the Petition suffers from the vice of supresio-veri and suggestio falsi and the Petition must be dismissed on this ground alone. Mr Vyas would submit that it is incorrect for the Petitioner to state that the Order dated 9.11.2018 was not served at all. The Order was sent to the Petitioner at his request by an email. A redacted copy of the order was sent to the Petitioner when he made such request by an e-mail dated 5.12.2019.

Therefore, answering this preliminary objection Mr. Thakore would submit that it was for the first time after one year when the summons was issued on 29.11.2019 that the petitioner became aware of the order dated 09.11.2018.

3.2 Mr. Thakore would submit that on reading the E-mails, to which he invited the Court's attention, it is clear that what was received was a trail mail and it was the categorical assertion of the petitioner in an E-mail of 16.12.2019 that the petitioner had lost all mails. The contention of the respondents that the order was served on the petitioner through E-mail is incorrect. He submitted that many emails of the Petitioner during the period were deleted which was pointed out to the CCI by a mail dated 16.12.2019.The Petitioner was genuinely not aware of the redacted copy of the order having been sent by an email dated 6.12.2019.

3.3 Mr. Mihir Thakore, learned Senior Advocate would submit that as per Section 26(1) of the Act the order is required to contain an opinion that there exists a prima-facie case before directing investigation to be made by the Director General. Since the order is not appealable and if on reading the order no cogent reasons for forming a prima-facie opinion exist, such an order is subject to judicial review under Article 226 of the Constitution of India.

3.4 Mr.Thakore would submit that the order dated 9.11.2018 was not supplied after it was passed. It was only after one year on 29.11.2019 when the summons were served on the Petitioner that he was made aware of some proceedings pending, without any copy of the Information Petition or case papers being provided. Even on reading the redacted copy of the Order supplied with the Affidavit In Reply, the order is not a complete order. Perusal of the order dated 09.11.2018 suggests that a heavily redacted order with large portions including reasoning were redacted. This is not acceptable. Taking the Court through the order, Mr.Thakore would submit that no name of the informant is disclosed. On further reading of the order nothing is available to show how the prima-facie view and on what basis has it been arrived at.

3.5 According to Mr Thakore, under Section 19 of the Act an Information Petition came to be filed pursuant to which under Section 26(1) of the Act, on the basis of the Information Petition and the material supplied an opinion is formed by the CCI and a direction is given to the DG to investigate. No copy of the information petition or documents accompanying such petition are supplied and therefore, the entire exercise consequential thereto violates the principles of natural justice. In absence of any material available, including the order and the reasons on the order of 9.11.2018 and the Information Petition and copies of other documents, the Petitioner is totally unaware of what the case against him is and therefore before forming a prima facie opinion the Petitioner ought to have been supplied with the Information Petition, the documents and an opportunity to make out his case.

3.6 Mr.Thakore would further submit that order dated 9.11.2018 is bereft of reasons. Some reasons ought to have been emerging as to on what basis has the CCI taken a prima facie view. Assuming that powers under Section 26(1) of the Act are not adjudicatory, it is expected that the same would be supported by some reasoning recording how the prima-facie view is arrived at. Absence of such reasons would make the order subject to judicial review under Article 226 of the Constitution of India.

3.7 Mr.Thakore in the course of his submission invited the attention of this Court to the provisions of Section 3(1) and 3(3)(d) of the Act and would submit that the case cannot be said to be one of bid rigging or collusive bidding. The Tender itself gave a rate card and the bidders were invited to bid at an increased or a decreased percentage. Elaborating his submissions and the procedural breach, Mr.Thakore invited the attention of the Court to the tender document to submit that GSBSTB has specifically offered a rate card and the bidders were expected to quote percentage increase/decrease against these offered rates. He would invite the attention of the Court to Clause 4.8 of the tender and sub-clause (xxiv) of Clause 4.16 to submit that there was no case by which the process could be said to be indirectly or directly resulting in bid-rigging or collusive bidding.

3.8 Assailing the procedural defect, Mr.Thakore would submit that pursuant to the summons received, the petitioner appeared and his deposition was recorded on 26.12.2019. Together with the Investigation Report, documents and evidences of co-bidders have been supplied with. The evidence of the informant was recorded on 16.01.2019. No copy of the deposition of the informant was provided. Even the purported evidence in the form of a letter (page 674) of the informant and the E-mail of 07.03.2019, by which the informant supplied certain material was given to the petitioner. Had the petitioner been supplied with these documents with the Order of 9.11.2018, the Petitioner would have had the opportunity of cross examining the Informant. Such a flaw in the procedure tantamounts to complete violation of principles of natural justice.

3.9 Mr.Thakore would then rely on the provisions of Section 41(2) read with the provision of Section 36(2) read with the Regulations viz. Regulation 41 of the Competition Commission of India (General) Regulations 2009 to submit that the Director General has vast powers to investigate contraventions. Section 41(2) vests powers to the Director General as are conferred upon to the Commission under Section 36(2) of the Act. Inviting the attention of the Court to Section 36(2) of the Act, Mr.Thakore would submit that the Director General has vast powers as a Civil Court. This would make it more important for the Director General to carry out investigation in accordance with principles of natural justice. Not providing information petition and documents relied upon, violates principles of natural justice inasmuch as the petitioner would not know the nature of allegations made and effectively deal with them and respond to such allegations and evidence.

3.10 According to Mr. Thakore the procedure adopted by the authorities violates the principles of natural justice as the petitioner is kept in the dark about the nature of allegations and the case and the evidence against him until after completion of the investigation and issuance of Investigation Report. The petitioner has lost his valuable right of cross- examination and adducing evidence when the informant's statement was recorded prior to the petitioner's statement. This grossly violates the principles of natural justice.

3.11 Mr. Mihir Thakore invited the attention of this Court to the provisions of Section 36(1) of the Act and submitted that in the discharge of its functions the Commission shall be guided by the principles of natural justice. Reading Section 41 with Section 36(2) of the Act, Mr. Thakore would submit that the Director General has all the powers vested in the Civil Court. Reading regulation 41(1) with regulation 41(4), Mr.Thakore would submit that the Commission or the Director General may determine the manner in which evidence may be adduced. The Director General may call for parties to lead evidence by way of affidavit or lead oral evidence in the matter. Reading regulation 41(5) of the Act, Mr.Thakore would submit that the Director General may grant an opportunity to the party or parties to cross-examine the person giving evidence. He would therefore submit that it was mandatory for the Director General to permit cross- examination of Shri Ashok Mehta who was examined on 16.01.2019. The prima-facie opinion without anything to show as to how the cartel was formed cannot be proved without permission to lead evidence. Nothing is on record to show that such a procedure is followed especially when the powers of the Director General to carry out investigation under Section 41 are wider than those of the police under the Code of Criminal Procedure.

3.12 Mr.Thakore places reliance on Regulation 43 to submit that the parties are not entitled to produce additional evidence which was in the possession or knowledge of the parties that was not produced once the proceedings are at the Commission post the Investigation Report and therefore a valuable right is lost. He would therefore submit that once this opportunity was denied while coming to a prima-facie opinion, Regulation 43 would impinge the right of the party to produce such evidence.

3.13 Relying on various provisions of the Competition Commission Of India (General) Regulations, 2009, Mr Thakore would submit that the opportunity to lead evidence must precede the Investigation Report and by providing reasons and a copy of the Order under Section 26(1) of the Act should be given showing some reasons together with the copy of the Information Petition and documents so that the Petitioner is aware of the case against him. In absence of this, the order dated 9.11.2018 would be palpably unsustainable as being procedurally defective and without reasons and therefore amenable to a Writ under Article 226 of the Constitution of India.

3.14 In support of his submissions, Mr.Thakore invited attention of this Court to several decisions of the Supreme Court and the Delhi High Court reading out various paragraphs in support of these decisions. The decisions are as under:

1. Competition Commission of India vs. Steel Authority of India Ltd. [2010 (10) SCC 744]. (Para 31(5);97;98)

2. Mahindra Electric Mobility Limited and Another vs Competition Commission Of India [2019 SCC Online Del 8032] (Para 85)

3. Google Inc and Ors. vs Competition Commission Of India [2015 SCC Online Del 8992. (Para 18A;18B;18K;18L;18M;18O and 18R)]

4. Competition Commission Of India and Anr vs Oriental Rubber Industries Private Limited. [2018 SCC Online Del 9192.] (Para 24)

5. Natwar Singh v. Director Of Enforcement. [(2010) 13 SCC 255] (Para 31)

The judgements in the cases of SAIL (Supra), Google Inc (Supra), Mahindra (supra) and Oriental Rubber (supra) were relied upon in support of his submission that the order under Section 26(1) must contain some reasons: Even if Section 26(1) is an administrative order it must have reasons; The CCI is amenable to judicial review in absence of a fair procedure being followed. The petitioner had a right to be heard before a prima facie opinion is formed. The entire basis of the investigation report is the Information Petition and a copy thereof is not supplied. The Judgement in Google Inc (supra) was relied upon also in the context of the powers of the Director General to carry out investigation being wider than the Police under the Code of Criminal Procedure and therefore there was implied inbuilt procedure of following the principles of natural justice at the time when the Director General initiates investigation and before he submits the Investigation Report.

4. Mr.Devang Vyas, learned Additional Solicitor General appearing with Mr.Kanva Antani and Ms Garima Malhotra made the following submissions:

4.1 Mr.Vyas would submit that even if the Court was not inclined to non-suit the petitioner on the ground of suppression of material facts or false representation of facts, he would submit that the conduct of the Petitioner after receipt of the summons would indicate that only after the Investigation Report of the DG, CCI did the petitioner think of initiating proceedings. For this submission Mr.Vyas invited the attention of the Court to certain relevant dates. He would submit that the Information Petition was filed on 01.08.2018. The CCI directed the Director General to cause an investigation by an order dated 09.11.2018 under Section 26(1) of the CCI Act. The summons was issued to the petitioner by the DG on 29.11.2019 to remain present on 11.12.2019. The summons was served on 04.12.2019. On 05.12.2019 the petitioner addressed an E-mail to the CCI saying that he did not know anything about the case and therefore requested to provide detailed case papers. The Commission on 06.12.2019 responded by providing a copy of the order dated 09.11.2018. After 10 days on 16.12.2019 the petitioner responds and chooses to say that he has lost all mails so kindly mail the appointment letter. On 11.12.2019, he wrote to the CCI saying that he will not be able to appear on 12.12.2019. On that date also he does not inform the

Commission that the trail mails are lost, that he had made a request on 05.12.2019 for documents and nothing was heard from the Commission. No effort was made to retrieve trash mail. On 17.12.2019, in reference to the mail of the petitioner, the Commission wrote that the petitioner may find the trail mail sent to him. No effort was made to retrieve trash mail. He appeared before the Director General on 26.12.2019. He was satisfied with the service of the order sent to him by e-mail on 06.12.2019. He did not choose to say that he had received a redacted / truncated version of the order.

This conduct would indicate that the petitioner chose not to pursue further and it was only for the first time, after more than 7 months that he filed the present petition after having appeared before the DG and only after the report of investigation was served. From 02.12.2019 till 20.03.2020, the petitioner did nothing. Only when he received a communication dated 03.06.2020 when the investigation report was forwarded inviting his suggestions and objections, did the petitioner think of approaching the Court.

4.2 Mr.Vyas would then submit that the petition is premature. The Director General is an extended arm of the Commission. Reading Section 41 of the Act, Mr.Vyas would submit that the DG only assists the Commission in investigation. The letter dated 03.06.2020 has invited the petitioner to submit his objection and suggestions. Reading Section 26(3) of the Act, Mr.Vyas would submit that the Director General in accordance with Sub-Section (4) of Section 26 has only forwarded a copy of the report. Reading sub-section (6) of Section 26 he would submit that there is a stage where there shall be a consideration of the objections or suggestions and only thereafter, the Commission will pass such order. Therefore, the proceedings as of now are akin to a show cause notice and therefore, the petition is premature as the proceedings have not commenced. Reliance was also placed on Regulation 43 to submit that even if there was no opportunity to produce any document or oral evidence and if the Commission feels that the Director General has not given sufficient opportunity, the Commission may allow such documents or witnesses to be produced or examined. In absence of any prejudice to the petitioner, the petition is clearly premature.

Mr.Vyas in this context inviting the attention of the Court to the provisions of Sections 3(3)(d), 19, 20, 21, 21A and 26 of the Act would submit that what is provided to the Commission under Section 19 is 'information' and not a 'complaint'. In the event after considering the objections of the petitioner, the report of the Director General recommends contravention, there is an opportunity for the petitioner to appear before the CCI.

4.3 Inviting the attention of this Court to the provisions of Sections 36 and 41 of the Act, Mr.Vyas would submit that, it is the Commission that shall be guided by the principles of natural justice. The Director General only assists the Commission and therefore, though his powers under Section

41 are the same as conferred upon the Commission, the power is only with respect to assisting the Commission which will be guided in following the principles of natural justice when the stage appears for the petitioner to approach the Commission on furnishing the report by the Director General.

4.4 Mr.Vyas invited the attention of the Court to various regulations as under:

(I) Regulation 20(4) according to Mr.Vyas would suggest that during the investigation by the Director General, the Director General shall give his report containing findings on each of the allegations made in the information. The proviso of Regulation 20(4) read with Regulation 35 would indicate that confidentiality of the information is the spirit of the proceeding and therefore, there is nothing wrong in providing a redacted order under Section 26(1) of the Act. There is sufficient guarantee in accordance with Regulations 24 and 25 which provide for adding substitution of parties. Relying on Regulation 29 and 40, Mr.Vyas would submit that the parties are given an opportunity to make oral submissions or file written argument.

(II) Relying on Regulation 37, Mr.Vyas would submit that the petitioner has not made any application in writing for inspection or for obtaining copies of the documents and therefore, cannot make a grievance that no copies of any proceedings have been supplied.

(III) Regulation 41(4) of the Act provides that the Director General may call for the parties to lead evidence by way of affidavit or oral evidence. This guarantees procedural fairness during the course of the proceedings before the Commission.

(IV) The entire focus of the submission that the Commission has to be guided by principles of natural justice is only at the stage at Section 26(5) of the Act and not in context of formation of prima-facie opinion under Section 26(1) of the Act and/or during the Investigation.

(V) Inviting the attention of the Court to Regulation 46A of the Act, Mr.Vyas would submit that it is even open for the petitioner to make an application to permit an advocate to accompany the person summoned.

4.5 Referring to the redacted order and extensively inviting the attention of the Court to the order, Mr.Vyas would submit that information essential for the purposes of the Act has been provided. He would refer to paragraphs 2, 3, 6 and 11 to 23 of the order and submit that the case of the informant has been very well explained in the order even if it is redacted one and therefore, not only can it be said to be a reasoned order but in consonance with law.

4.6 To the submission of Mr.Thakore that the order under Section 26(1) of the Act is in violation of principles of natural justice and that it is unreasoned, Mr.Vyas would submit that the issue is now settled by the decision of the Supreme Court in the case of CCI v. SAIL [(2010) 10 SCC 744]. He relied on the various paragraphs of this judgment in the context of his submission. Mr.Vyas also relied on the following decisions:

Sr. No

Judgement

1.

Competition Commission of India vs. Steel Authority of India Ltd. and Anr. (2010) 10 SCC 744

2.

Competition Commission of India vs Bharti Airtel and Ors. (2019) 2 SCC 521

3.

Somi Convenyor Beltings and Ors MANU/DE/0940/2017

4.

Mahindra Electric Mobility Ltd. Competition Commission of India 2019 SCCOnline DEL 8032

5.

Competition Commission of India vs Grasim Industries Ltd. MANU/DE/2977/2019

6.

Nain Sukh Das and Ors. Vs State of UP and Ors 1953 SCR 1184 AIR 1953 SC384

7.

State Bank of Patiala and Others vs SK Sharma (1996) 3 SCC 364

4.7 Mr.Vyas would submit that the entire bone of contention raised in the present petition and the grounds made herein would be available when an opportunity is given before the CCI and the Petitioner appears before the Commission by virtue of the Order dated 20.5.2020.

4.8 Mr.Vyas would therefore submit that the petition which has threefold prayers that is to the challenge the order dated 09.11.2018 under Section 26 (1), the report of the DG dated 20.03.2020 and the order dated 20.5.2020 read with the communication dated 3.6.2020 is clearly misconceived, premature and based on the conduct of the petitioner also, the petition deserves to be dismissed.

5. Before we appreciate the issues raised in this petition, a brief recapitulation of facts would be necessary. On record is an Investigation Report dated 20.03. 2020. Reading the summary of report would indicate that information was filed before the Competition Commission of India under Section 19 of the Act by one Ashokbhai Mehta. The case of the informant-petitioner is that the opposite parties, 21 in number including the petitioner were involved in anti-competitive behavior which included with filling up bids which the GSBSTB had invited for empanelment of printers. The Commission examined the matter and observed

that there seemed to be a concerted action and meeting of minds on the part of the opposite parties in quoting the bid prices. Based on the Information Petition that the opposite parties had indulged in bid- rigging and collusive bidding in contravention of the provisions of Section 3(1) read with Section 3(3)(d) of the Act, in the prima- facie opinion of the Commission the act amounted to bid rigging and collusive bidding which was therefore likely to cause an appreciable adverse effect.

5.1 The order dated 9.11.2018 forming this prima-facie opinion is a subject-matter of the initial controversy. Much argument has gone into by both the parties on the question of whether the order dated 09.11.2018 was actually served on the petitioner or not. A preliminary objection was raised by the learned Additional Solicitor General Mr.Devang Vyas that the petition suffers from the vice of suppressio veri and suggestio falsi. As though the order dated 09.11.2018 was served, a ground was made out in the petition that it was never served. Mr.Thakore in response came out with a submission that if the order was sent by the Commission by an E-mail of 06.12.2019, the petitioner had lost all its mail and had unequivocally conveyed to the Commission by its' E-mail dated 16.12.2019.

5.2 Be that as it may, the Court had at its very inception made it clear that it was not inclined to get into the preliminary objection of suppression and would rather proceed to decide the issue on merits. Investigation of facts whether the order was served or not and whether the petitioner's mail got deleted by mistake is not something that Court would like to get into, particularly when now the order dated 09.11.2018 has been placed on record on an affidavit by the Respondents. However, a caveat was added that in examining the merits of the issues involved, the Court would take into consideration the conduct of the Petitioner without non-suiting the petitioner on such ground, since the learned Additional Solicitor General has requested the Court that even while examining the merits of the issue the conduct of the petitioner be looked into. Hence the question of the petitioner's conduct shall be examined at a later stage.

5.3 In short therefore, it is the case of the petitioner that Information Petition was moved by the informant before the Commission under Section 19 alleging collusive bidding at the hands of the Opposite Parties, including the Petitioner. Pursuant to that information petition, the Commission has come to a prima-facie opinion which was so formed by an order dated 09.11.2018. That order was communicated to the petitioner. Even otherwise it is now on record. The petitioner was summoned. He remained present on 26.12.2019. His statement was recorded. The Director General made an investigation report on 20.03.2020. By a communication dated 3.6.2020, order dated 20.05.2020 was served on the petitioner with a copy of the Investigation Report by which the Petitioner was directed to file audited balance-sheets and profit and loss accounts for the 3 financial years 2016-17, 2017-18 and 2018- 19 by 10.07.2020. The Order of the Commission invited suggestions/objections from the Petitioner and the order stated that the date of final hearing of the parties on the Investigation Report shall be communicated in due course.

5.4 These proceedings i.e. the order of 09.11.2018 forming a prima- facie opinion, Investigation Report dated 20.03.2020 and order dated 20.05.2020 together with the letter dated 3.06.2020 are under challenge. The submissions of the respective parties have already been recorded herein above.

6. As per the record of Written Submissions filed by Shri Mihir Thakore the submission at point no.2 reads as under.

I(A) Submissions in regard to the order dated 9.11.2018 under Section 26(1) of the Act:

1. An order under Section 26(1) of the Competition Act, 2002 (extracted herein below) is required to contain an opinion that there exists a prima facie case before directing investigation to be made by the Director General. Such opinion must be based on the information received by the respondent no. 1 and the respondent no. 1 is duty bound to provide cogent reasons for its opinion. An order under Section 26(1) is not appealable but if it does not comply with this requirement or where such prima facie opinion though purportedly formed is palpably unsustainable and/or is not with reference to the information furnished, i.e. where there is link between the information furnished and the opinion, it would be amenable to judicial review under Article 226 of the Constitution.

2. The order dated 9.11.2018 under Section 26(1) of the Act was not provided / available to the petitioner after it was passed. The first time the petitioner came to know that there are some proceedings was when it received a vague and cryptic summons dated 29.11.2019 and letter dated 4.12.2019 postponing the date from the respondent no. 2, by which also the order or a copy of the case papers were not provided. It appears that, in reply to the petitioner's letter dated 5.12.2019 asking for case papers, the respondent no. 2 addressed an email dated 6.12.2019 providing a heavily redacted copy of the said order but many emails during this period got deleted by mistake of the petitioner's employee and the said email may have got thus deleted and hence the petitioner was not aware of and did not have such email or order. It was the report dated 20.3.2020, which was served upon the petitioner in June 2020, which brought to light the nature of the proceedings and the order dated 9.11.2018.

3. The heavily redacted order dated 9.11.2018 (pg. 800-817) is produced along with the reply of the respondent no. 1. A bare perusal of the same establishes that the name and information/evidence provided by the Informant Party, the information/evidence provided by GSBSTB and the purported reasons for the opinion under Section 26(1) are completely redacted, thus violating the requirement that the opinion of the respondent no. 1 should be "with reference to the information furnished to the Commission" and should be "formed on the basis of the records, including the information furnished and reference made to the Commission" as held in para 97 of CCI v. SAIL, 2010 (10) SCC 744. The

order dated 9.11.2018 therefore stands vitiated.

4. The respondent authorities have sought to contend that providing a redacted order under Section 26(1) of the Act is in line with Section 57 of the Act and Regulation 35 of the Competition Commission of India (General) Regulations, 2009. In response to this, the petitioner submits as under:

(i) Section 57 of the Act, pertains to information relating to any enterprise and does not pertain to an order under 26(1). Any information provided by the Informant Party which leads to passing of an order under 26(1) is not information relating to any enterprise but is information which imputes violation of Section 3 of the Act. Even assuming there to be any information relating to an enterprise in the order, only such information could possibly have been redacted and not all information, evidence and reasons.

(ii) Regulation 35 of the Competition Commission of India (General) Regulations, 2009,does not simply permit the respondent authorities to refuse to provide an order or to provide a redacted order as is contended by the respondents. Firstly, this regulation can only apply if there is a request by the Informant Party under sub-clause (1) or (2) thereof in regard to maintaining confidentiality of identity and/or document/s or part/s thereof. Such request in regard to documents can only lie if the conditions/parameters mentioned in sub- clause (3) thereof are fulfilled and must be accompanied by a statement setting out cogent reasons for such request and the date upto which such document/s are to be treated as confidential [see sub- clause (4)]. Moreover, sub-clause (5), (6) and (13) thereof indicate that even when there is such a request, there has to be a public version of submissions which contain document/s or part/s thereof which are not thus redacted. Moreover, sub-clauses (8) and (9) require the respondent authorities to permit the request for confidentiality only after satisfaction in regard to the same and after considering the factors as stated therein. The proviso to sub-clause (8) would not permit the respondent authorities an ipse dixit of treating every document or information as confidential and such a power would have to be exercised looking to the parameters of confidentiality as provided in sub- clause (3). Treating every information/document/deposition as "confidential" is nothing but a gross violation of natural justice and fairness in procedure and an abuse of Regulation 35. Most importantly, under sub-clause (14) thereof, an order or decision or opinion, if it contains any information which has been granted confidentiality, such order or decision or opinion must be filed in two versions and the public version, which omits such confidential information, must be marked "subject to confidentiality requirements under regulation 35" on the first page thereof and must be served upon the parties in this manner. None of the aforesaid requirements of Regulation 35 have been complied with in this case and there is not even a whisper in regard to confidentiality having been sought or granted in this case, nor is the copy of the order dated 9.11.2018 marked in the manner stipulated in sub- clause (14) of Regulation 35.

5. Furthermore, the informant's name, opposite parties' names and most of the

information / evidence has been provided along with the investigation report and hence, the respondents' allegations of having to maintain confidentiality in the order dated 9.11.2018 are belied by this. There is no objective purpose in treating all information/evidence as confidential until issuance of investigation report and thereafter asking parties to comment on it, instead of following fairness in procedure by allowing parties to know and understand the allegations against them and to ascertain whether or not the information could have led to formation of prima facie opinion under Section 26(1) and also to rebut such information/documents at the stage of investigation by leading their own evidence and/or cross-examining others.

7. The first submission of Mr.Mihir Thakore learned Senior Advocate that the entire exercise of forming a prima-facie opinion under Section 26(1) of the Competition Act is flawed. Basically the order of 09.11.2018 is challenged on two grounds. (a) That even if it is assumed that the copy of the order dated 09.11.2018 is served, the reading of the order would indicate that it required to contain an opinion prima facie suggesting that the commission has come to the conclusion in accordance with Section 3(3)(d) of the Act. The order was not served and it is only when the summons was served on 29.11.2019 was the petitioner informed of the order. The order dated 09.11.2018 is unsustainable because it is in violation of principles of natural justice inasmuch as no opportunity of hearing is given to the petitioner. In addition thereto Mr.Thakore has submitted that what is produced is a redacted version of the order. Reading of the order would indicate that no reasons are coming- forth to suggest that a prima facie opinion was formed on an application of mind. Since no reasons are assigned on what basis such a prima-facie opinion was formed, the order is palpably unsustainable.

(AA). Analysis of the Submission.

The relevant provisions of the Act in context of these submissions are set out hereunder:

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

3(3)(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

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

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

19.Inquiry into certain agreements and dominant position of enterprise.-

(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub- section (1) of section 4 either on its own motion or on-

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

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

(2) 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 by hindering entry into the market;

(d) accrual of benefits to consumers;

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

(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.

(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;

(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.

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

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

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

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

(4) The Commission may forward a copy of the report referred to in sub section(3) to the parties concerned:

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

(5) If the report of the Director General referred to in sub- section (3) 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 and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State

Government or the statutory authority or the parties concerned, as the case may be.

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

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

57. Restriction on disclosure of information.- No information relating to any enterprise, being an information which has been obtained by or on behalf of [the Commission or the Appellate Tribunal] for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

REGULATIONS:

10. Contents of information or the reference. -

(1) The information or reference (except a reference under sub- section (1) of section 49 of the Act) shall, inter alia, separately and categorically state the following seriatum-

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

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

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

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

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

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

(2) The information or reference referred to in sub-regulation

(1) shall contain -

(a) a statement of facts;

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

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

(d) relief sought, if any;

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

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

14. Powers and functions of the Secretary. -

(1) The Secretary shall have the custody of records of the Commission and shall exercise such other functions as may be assigned by the Chairperson.

(2) Subject to the Competition Commission of India (Meetings for Transaction of Business) Regulations, 2009, the Secretary shall circulate to all concerned, the date, time and place of each meeting, as per the directions of the Chairperson.

(3) The Secretary shall be the nodal officer on behalf of the Commission for, -

(a) making or receiving all statutory communications;

(b) entering into any formal relationships, including signing of any memorandum or arrangement, with competition authority or any agency of any foreign country, with the prior approval of the Commission and the Central Government, as per section 18 of the Act.

(4) The Commission may sue or be sued in the name of the Secretary and the Commission shall be represented in the name of the Secretary in all legal proceedings, including appeals before the Tribunal.

(5) Subject to the provisions of section 51 of the Act, the Secretary shall assist the Committee of Members constituted under sub-section (3) of section 51 of the Act for, -

(a) preparation and approval of the annual budget of the Commission;

(b) administration of the competition fund.

(6) The Secretary shall keep in custody the official seal of the Commission. The official seal of the Commission shall not be affixed to any document including the certified copies of the orders of the Commission, save and under the authority in writing of the Secretary.

(7) Subject to sub-regulation (1), to ensure a timely and efficient disposal of the matters brought before the Commission and for achieving the objectives of the Act, the Secretary shall have the following powers and functions, -

(a) to receive, endorse and categorize all the information, references, applications or documents including miscellaneous applications and other documents for transfer of proceedings and application for adjournment, etc.;

(b) to check the amount of fee received where applicable and to ensure the timely deposit of the same in the bank account of the Commission;

(c) to scrutinize all information, references, applications or documents so received to find out whether they are in conformity with the rules and regulations;

(d) to point out defects in such information(s), references, applications or documents to the parties requiring them to rectify such defects;

(e) to serve copy of the information, reference, application or document along with the enclosures to the concerned parties including the Director General, within a reasonable time;

(f) to serve the notice of the date of the ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a prima facie case and to convey directions of the Commission for investigation or to issue notice of inquiry after receipt and consideration of the report of the Director General;

(g) to bring on record executors, administrators or other legal representatives, in case of death of any party or adjudication of a party as insolvent, upon an application by any party to the proceedings;

(h) to verify the service of notice or other processes and to ensure that the parties are properly served;

(i) to requisition records on the direction of the Commission from the custody of any authority;

(j) to allow inspection of records of the Commission;

(k) to return the documents filed by any party or authority on orders of the Commission;

(l) to certify and issue copies of the orders of the Commission to the parties;

(m) to grant certified copies of documents filed in the proceedings to the parties, in accordance with these regulations;

(n) to grant certified copies of the orders of the Commission for publication, in accordance with these regulations;

(o) to dispose of all matters relating to the service of notices or other related processes, applications for issue of fresh notice or for extending the time for or ordering a particular method of service on a party including a substituted service by publication of notice by way of advertisement in the newspaper or putting it on the website, as the case may be;

(p) To compile and preserve record of any proceeding during an ordinary meeting including:-

(i) the chronology of events;

(ii) the initiating document;

(iii) the notice of the meeting;

(iv) report of the Director General, if any; (v) opinion of expert, if any;

(vi) any interim order made;

(vii) all documentary evidence filed;

(viii) the transcript, if any, of the oral evidence given;

(ix) the final order or decision of the Commission;

(q) to disclose information subject to section 57 of the Act;

(r) to ensure confidentiality of documents or evidences or statements or any analysis as per these regulations, by keeping them in safe custody;

(s) to undertake maintenance of records including weeding out of records in accordance with retention schedule in force and in accordance with directions of the Chairperson issued from time to time;

(t) to file complaint before the Chief Metropolitan Magistrate, Delhi for non-compliance with the orders or directions of the Commission under sub- section (3) of section 42 of the Act , if so directed by the Commission.

17. Preliminary conference. -

(1) The Commission may, if it deems necessary, call for a preliminary conference to form an opinion whether a prima facie case exists.

(2) The Commission may invite the information provider and such other person as is necessary for the preliminary conference.

(3) A preliminary conference need not follow formal rules of procedure.

18. Issue of direction to cause investigation on prima facie case. -

(1) Where the Commission is of the opinion that a prima facie case exists, the Secretary shall convey the directions of the Commission within seven days to the Director General to investigate the matter

(2) A direction of investigation to the Director General shall be deemed to be the commencement of an inquiry under section 26 of the Act.

19. Communication of order when no prima facie case found. -

If the Commission is of the opinion that there exists no prima facie case, the Secretary shall send a copy of the order of the Commission regarding closure of the matter forthwith to the Central Government or the State Government or the Statutory Authority or the parties concerned, as the case may be, as provided in sub-section (2) of section 26 of the Act.

35. Confidentiality. -

(1) The Commission shall maintain confidentiality of the identity of an informant on a request made to it in writing.

(2) Any party may submit a request in writing to the Commission or the Director General, as the case may be, that a document or documents, or a part or parts thereof, be treated confidential.

(3) A request under sub-regulation (2) may be made only if making the document or documents or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury.

(4) A request under sub-regulation (2) shall be accompanied with a statement setting out cogent reasons for such treatment and to the extent possible the date on which such confidential treatment shall expire.

(5) Where such document or documents, or a part or parts thereof, form part of the party's written submissions, the party shall file a complete version with the words "restriction of publication claimed" in red ink on top of the first page and the word 'confidential' clearly and legibly marked in red ink near the top on each page together with a public version, which shall not contain such document or documents or part or parts thereof.

(6) The public version of such written submissions shall be an exact copy of the confidential version with the omissions of the confidential information being indicated in a conspicuous manner, as stipulated in sub-regulation (5).

(7) [***]

(8) On receipt of a request under sub-regulation (2), the Commission or the Director General, as the case may be, if satisfied, shall direct that the document or documents or a part or parts thereof shall be kept confidential for the time period to be specified.

Provided that the Commission or the Director General, as the case may be, if satisfied, may give such confidential treatment to any other information or document or part thereof also in respect of which no request has been made by the party which has furnished such information or the document.

(9) The Commission or the Director General, as the case may be, may also consider the following while arriving at a decision regarding confidentiality: -

(a) the extent to which the information is known to outside public;

(b) the extent to which the information is known to the employees, suppliers, distributors and others involved in the party's business;

(c) the measures taken by the party to guard the secrecy of the information;

(d) the ease or difficulty with which the information could be acquired or duplicated by others.

(10) In case the Director General has rejected the request of the party made under sub-regulation (2), the party may approach the Commission for a decision regarding confidential treatment [within a period not exceeding 30 days from the receipt of the order passed by the Director General].

(11) Where the Director General or the Commission has rejected the request for confidential treatment of a document or documents or a part or parts thereof and has informed the party of its intention, such document or documents or part or parts thereof shall, subject to sub-regulation (13), not be treated as confidential.

(12) [***]

(13) The document or documents or a part or parts thereof that have been granted confidential treatment under this regulation shall be segregated from the public record and secured in a sealed envelope or any other appropriate container, bearing the title, the docket number of the proceeding, the notation "confidential record under regulation 35" and the date on which confidential treatment expires.

(14) If the Commission includes in any order or decision or opinion, information that has been granted confidential treatment under this regulation, the Commission shall file two versions of the order or decision or opinion. The public version shall omit the confidential information that appears in the complete version, be marked "subject to confidentiality requirements under regulation 35" on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding. The complete version shall be placed in the confidential record of the proceeding as provided in sub- regulation (13).

(15) Any person or party, including any officer or employee appointed by the Commission under sub-section (1) of section 17 of the Act and any expert or professional engaged by the Commission under sub -section (3) of section 17 of the Act or any expert called upon to assist the Commission under sub- section (3) of section 36 of the Act privy to the contents of the document or documents or a part or parts thereof that have been granted confidential treatment under this regulation shall maintain confidentiality of the same and shall not use or disclose or deal with such confidential information for any other purpose other than the purposes of the Act or any other law for the time being in force:

Provided that breach of confidentiality by any officer or employee of the Commission appointed under sub-section (1) of section 17 of the Act shall constitute a ground for initiation of disciplinary proceedings under the relevant rules or regulations, as the case may be:

Provided further that breach of confidentiality by any expert or professional engaged by the Commission under sub-section (3) of section 17of the Act or any expert called upon to assist the Commission under sub- section (3) of section 36 of the Act shall be sufficient ground for termination of the engagement or contract, as the case may be."

7.1 Section 26(1) of the Act provides that on a receipt of reference from the Central Government or a State Government or a statutory authority or on its own motion or information received under Section 19, as is the case in the present set of facts, 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 in the matter.

7.2 The submission of Mr.Thakore is that the order dated 09.11.2018 is palpably unsustainable as no cogent reasons are forthcoming on reading the redacted version of the order. As per the judgement in the case of SAIL (supra) the order must record some reasons while forming an opinion, though it was conceded that at the stage of recording the opinion the Commission was exercising an administrative function and not a quasi-judicial function. That since no reasons were recorded the order was subject to judicial review under Article 226 of the Constitution Of India. A redacted version of the order cannot be appropriate and a full copy of the order has to be supplied without redaction as provisions of confidentiality of orders cannot be pressed into service.

7.3 The judgement in the case of SAIL(supra) has been relied upon by both the sides and therefore is appropriate to extensively reproduce the relevant paras thereof.

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

22. The Commission, wherever, is of the opinion that no prima facie case exists justifying issuance of a direction under Section 26(1) of the Act, can close the case and send a copy of that order to the Central Government, State

Government, Statutory Authority or the parties concerned in terms of Section 26(2) of the Act. It may be noticed that this course of action can be adopted by the Commission in cases of receipt of reference from sources other than of its own knowledge and without calling for the report from Director General.

23. In terms of Section 26(3), the Director General is supposed to take up the investigation and submit the report in accordance with law and within the time stated by the Commission in the directive issued under Section 26(1). After the report is submitted, there is a requirement and in fact specific duty on the Commission to issue notice to the affected parties to reply with regard to the details of the information and the report submitted by the Director General and thereafter permit the parties to submit objections and suggestions to such documents.

24. After consideration of objections and suggestions, if the Commission agrees with the recommendations of the Director General that there is no offence disclosed, it shall close the matter forthwith, communicating the said order to the person/authority as specified in terms of Section 26(6) of the Act. If there is contravention of any of the provisions of the Act and in the opinion of the Commission, further inquiry is needed, then it shall conduct such further inquiry into the matter itself or direct the Director General to do so in accordance with the provisions of the Act. In terms of Section 26(7), the Commission is vested with the power to refer the matter to the Director General for further investigation, or even conduct further inquiry itself, if it so chooses.

25. The Commission, depending upon the nature of the contravention, shall, after inquiry, adopt the course specified under Sections 27 and 28 of the Act in the case of abuse of dominant position and the procedure under Sections 29 to 31 of the Act in the case of combinations. The Commission is vested with powers of wide magnitude and serious repercussions as is evident from the provisions of Sections 27(d), 28 and 31(3) of the Act. The Commission is empowered to direct modification of agreements insofar as they are in contravention of Section 3, division of an enterprise enjoying dominant position, modification of combinations wherever it deems necessary and to ensure that there is no abuse or contravention of the statutory provisions. We may notice that the provisions relating to combinations have been duly notified vide Notifications dated 12th October 2007 and 15th May, 2009 respectively. However, in the facts of the present case, these provisions do not fall for consideration of the Court.

26. For conducting inquiry and passing orders, as contemplated under the provisions of the Act, the Commission is entitled to evolve its own procedure under Section 36(1) of the Act. However, the Commission is also vested with the powers of a Civil Court in terms of Section 36(2) of the Act, though for a limited purpose. After completing the inquiry in accordance with law, the Commission is required to pass such orders as it may deem appropriate in the facts and circumstances of a given case in terms of Sections 26 to 31 of the Act.

27. Having referred to the background leading to the enactment of competition law in India and the procedure that the Commission is expected to follow while deciding the matters before it and facts of the case, now it will be appropriate for this Court to refer to the submissions made in light of the facts of this case.

28. According to the Commission (the appellant herein), the directions passed in the order dated 8th December, 2009 under Section 26(1) of the Act are not appealable and further there is no requirement in law to afford an opportunity of hearing to the parties at the stage of formulating an opinion as to the existence of a prima facie case. It is also the contention of the Commission that in an appeal before the Tribunal it is the necessary party and that the Commission is not expected to state reasons for forming an opinion at the prima facie stage. On the contrary, according to SAIL (the respondent herein), the principles of natural justice have been violated by the Commission while declining to grant extension of time to file its reply and that the direction in referring the matter to Director General was passed in undue haste. The informant placed reliance upon Regulation 30(2) of the Regulations which empowers the Commission to pass such orders as it may deem fit on the basis of the facts available, where a party refuses to assist or otherwise does not provide necessary information within the stipulated time. Further, according to the informant there was no valid reason submitted by the SAIL which would justify grant of extension and as such the order passed by the Commission on merits was not liable to be interfered.

29. We may also notice that learned counsel appearing for the parties had addressed the Court on certain allied issues which may not have strictly arisen from the memorandum of appeal, but the questions raised were of public importance and are bound to arise before the Commission, as well as the Tribunal in all matters in which the proceedings are initiated before the Commission. Thus, we had permitted the parties to argue those allied issues and, therefore, we would proceed to record the reasons while dealing with such arguments as well.

30. In order to examine the merit or otherwise of the contentions raised by the respective parties, it will be appropriate for us to formulate the following points for determination:--

1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a prima facie opinion would be appealable in terms of Section 53A(1) of the Act?

2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case?

3) Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

4) At what stage and in what manner the Commission can exercise powers vested in it under Section 33 of the Act to pass temporary restraint orders?

5) Whether it is obligatory for the Commission to record reasons for formation of a prima facie opinion in terms of Section 26(1) of the Act?

6) What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the procedural intricacies do not hamper in achieving the object of the Act, i.e., free market and competition.

31. We would prefer to state our answers to the points of law argued before us at the very threshold. Upon pervasive analysis of the submissions made before us by the learned counsel appearing for the parties, we would provide our conclusions on the points noticed supra as follows:

1) In terms of Section 53A(1)(a) of the Act appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53A(1)(a). The orders, which have not been specifically made appealable, cannot be treated appealable by implication. For example taking a prima facie view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53A.

2) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter.

However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17 (2) of the Regulations to invite not only the information provider but even `such other person' which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be `preliminary conference', for whose conduct of business the Commission is entitled to evolve its own procedure.

3) The Commission, in cases where the inquiry has been initiated by the Commission suo moto, shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the Competition Tribunal. The presence of the Commission before the Tribunal would help in

complete adjudication and effective and expeditious disposal of matters. Being an expert body, its views would be of appropriate assistance to the Tribunal. Thus, the Commission in the proceedings before the Tribunal would be a necessary or a proper party, as the case may be.

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

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

(b) It is necessary to issue order of restraint

and

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

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

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

...

...

38. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a

right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

...

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70. At the very outset, we must make it clear that we are considering the application of these principles only in light of the provisions of Section 26(1) and the finding recorded by the Tribunal in this regard.

71. The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into the motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a prima facie case for issuance of direction to the Director General to conduct an investigation. This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received by it. Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or any other person is required to be issued at this stage. In contra- distinction to this, when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Section 26(7) or 26(8) of the Act, as the case may be. This obviously means that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and we see no compelling reason to read into the provisions of Section 26(1) the requirement of notice, when it is conspicuous by its very absence. Once the proceedings before the Commission are completed, the parties have a right to appeal under Section 53A(1)(a) in regard to the orders termed as appealable under that provision. Section 53B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or setting aside the direction, decision or order appealed against.

72. Some of the Regulations also throw light as to when and how notice is required to be served upon the parties including the affected party. Regulation 14(7) states the powers and functions, which are vested with the Secretary of the Commission to ensure timely and efficient disposal of the matter and for

achieving the objectives of the Act. Under Regulation 14(7)(f) the Secretary of the Commission is required to serve notice of the date of ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a prima facie case and to convey the directions of the Commission for investigation, or to issue notice of an inquiry after receipt and consideration of the report of the Director General. In other words, this provision talks of issuing a notice for holding an ordinary meeting of the Commission. This notice is intended to be issued only to the members of the Commission who constitute `preliminary conference' as they alone have to decide about the existence of a prima facie case. Then, it has to convey the direction of the Commission to the Director General. After the receipt of the report of the Director General, it has to issue notice to the parties concerned.

73. Regulation 17(2) empowers the Commission to invite the information provider and such other person, as is necessary, for the preliminary conference to aid in formation of a prima facie opinion, but this power to invite cannot be equated with requirement of statutory notice or hearing. Regulation 17(2), read in conjunction with other provisions of the Act and the Regulations, clearly demonstrates that this provision contemplates to invite the parties for collecting such information, as the Commission may feel necessary, for formation of an opinion by the preliminary conference. Thereafter, an inquiry commences in terms of Regulation 18(2) when the Commission directs the Director General to make the investigation, as desired.

74. Regulation 21(8) also indicates that there is an obligation upon the Commission to consider the objections or suggestions from the Central Government or the State Government or the Statutory Authority or the parties concerned and then Secretary is required to give a notice to fix the meeting of the Commission, if it is of the opinion that further inquiry is called for. In that provision notice is contemplated not only to the respective Governments but even to the parties concerned. The notices are to be served in terms of Regulation 22 which specifies the mode of service of summons upon the concerned persons and the manner in which such service should be effected. The expression `such other person', obviously, would include all persons, such as experts, as stated in Regulation 52 of the Regulations. There is no scope for the Court to arrive at the conclusion that such other person would exclude anybody including the informant or the affected parties, summoning of which or notice to whom, is considered to be appropriate by the Commission.

75. With some significance, we may also notice the provision of Regulation 33(4) of the Regulations, which requires that on being satisfied that the reference is complete, the Secretary shall place it during an ordinary meeting of the Commission and seek necessary instructions regarding the parties to whom the notice of the meeting has to be issued. This provision read with Sections 26(1) and 26(5) shows that the Commission is expected to apply its mind as to whom the notice should be sent before the Secretary of the Commission can send

notice to the parties concerned. In other words, issuance of notice is not an automatic or obvious consequence, but it is only upon application of mind by the authorities concerned that notice is expected to be issued.

76. Regulation 48, which deals with the procedure for imposition of penalty, requires under Sub-Regulation (2) that show cause notice is to be issued to any person or enterprise or a party to the proceedings, as the case may be, under Sub-Regulation (1), giving him not less than 15 days time to explain the conduct and even grant an oral hearing, then alone to pass an appropriate order imposing penalty or otherwise.

77. Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than 25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

78. Cumulative reading of these provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion.

79. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that non- compliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of compliance to the principles of natural justice in light of the above noticed principles."

...

...

83. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass ex parte ad interim injunction orders immediately in terms of Section 33 of the Act, while granting post decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice.

...

87. Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami vs. Union of India [(1992) 4 SCC 605] explained the expression

`inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but sui generis.

...

89. The exceptions to the doctrine of audi alteram partem are not unknown either to civil or criminal jurisprudence in our country where under the Code of Civil Procedure ex- parte injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries.

...

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91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it

does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act.

92. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously.

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

...

...

97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the

same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

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

[Emphasis Supplied]

8. Reading the aforesaid decision, the following propositions of law can be summed up:

(A) The question before the Supreme Court was regarding the scope and ambit of the power vested in the Commission under Section 26(1) of the Act and whether a party is entitled to be heard while formulating a prima-facie opinion.

(B) And whether it was obligatory for the Commission to record reasons for the formation of opinion in terms of Section 26(1) of the Act.

(C) Para 31 answers both these questions. As far as following of principles of natural justice, the Court has held that no statutory duty is cast on the Commission to issue notice or grant hearing to the party concerned before the Commission forms a prima facie opinion on the facts of the case. The Court has held that the Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. Based on Regulation 17(2) the Supreme Court in para 31(2) held that the Commission has the power to invite not only the information provider but even "such other person" which would include all persons, even the affected parties, as it may deem necessary.

(D). That in consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view.

(E). The functions of the Commission performed under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. Reading Para 97 of the decision of the Supreme Court in SAIL (supra) would indicate that even if the direction to cause a report on the basis of the prima facie opinion is not a decision or an order on merits it is expected that the same would be supported by some reasoning. At the stage of forming a prima-facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of directions for investigation to the Director General. Such view should be recorded with reference to the information furnished. The Commission is expected to record prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion.

9. It is in this context that the order dated 9.11.2018 needs to be read. A redacted copy of the order is placed on record of the case in the affidavit-in reply filed by the respondents. Reading of the entire order indicates that from Paras 1 to 22.8, the Commission has made reference to the case of the Informant regarding and deals with the averments in the petition. The order para 23 onwards reads as under:

"23. The Commission carefully perused the allegations as stated in the information and documents filed in support thereof, in the light of the submissions made by the Informant and GSBSTB (the procurer)."

9.1 Reading of paras 24 to 28 isn't possible as they are redacted. Part of Para 30-32 except the redacted portion reads as under:

"30. The Commission observes that the matter under examination is the conduct of the OPs in the Impugned Tender. The Commission notes that the provisions of Section 3(3)(d) of the Act relate to such conduct of the parties, in the bid process, which has the effect of eliminating or reducing 'competition for bids or adversely affecting or manipulating the process of bidding' as provided in Explanation to Section 3(3)(d). .... Thus the Commission is of the view that it is the collusive fixation of prices which comes under the purview of Section 3(3)(d) of the Act, as this can adversely affect competition of bids, which is apparent in the present matter."

31. ...

32. In view of the above and considering the totality of facts and circumstances, the Commission is of a prima facie view that the present case merits an investigation into contravention of the provisions of Section 3(3)(d) read with

Section 3(1) of the Act, by the OPs."

9.2 Reading para 30 indicates that after noting the provisions of Section 3(3)(d) of the Act, the order after some redacting portion of Para 30, reads as under:

..... "Thus, the Commission is of the view that it is the collusive fixation of prices which comes under the purview of Section 3(3)(d) of the Act, as this can adversely affect the competition bids, which is apparent in the present matter."

10. The question that begs to be answered is that can this be said to be recording of some reason, expressing its mind in no uncertain terms that it is of the view that prima facie case exists by minimum reasons? The recording of minimum reasons becomes more important as because this opinion paves the way for a final decision. "Apparent in the matter'' in the opinion of this Court no expression of some reason or minimum reasons even by the yardstick of the decision being administrative and not being adjudicatory is given. The decision is heavily redacted and even if it is read as it is without deciding the issue of the arguments of the learned counsels on the aspect of the Commission maintaining confidentiality under Section 57 of the Act read with Rule 35 thereof, the decision cannot satisfy the test of being a decision expressing the basic minimum of a prima-facie opinion which expresses the mind of the Commission. The Commission is a quasi-judicial body albeit at that stage exercising administrative powers. The opinion is therefore to be rendered by the Members on the basis of a decision arrived at a preliminary conference to form an opinion. Mere expression that ingredients of Section 3(3)(d) are apparent even if the facts are vocal may not satisfy extension of the application of mind by the body. It is the Commission which heard the informant and the GSTSB as is evident from the body of the unredacted order. That part records that both the Informant and GSTSB submitted additional documents and amended information. In para 22 the Order records.

"Primary submissions made by the GSTSB, related to the Impugned Tender have been briefly summarized as under:"

10.1 The submissions are redacted. Therefore, the case that was presented before the Commission in its preliminary conference by the Commission in its Ordinary Meeting on 5.09.2018 and with the Informant on 17.10.2018 and with the informant on amended information on 25.10.2018 and GSTSB on 26.10.2018 and the decision making process that underwent before the Commission albeit in the formation of a prima facie opinion that the action comes under purview of Section 3(3)(d) may have been "apparent" to the Commission as it so expresses itself in Para 30 of the Order. Para 32 just records "In view of the above and considering the totality of the facts and circumstances, the Commission is of the prima-facie view that the present case merits an investigation.......". There is no reflection of what was "apparent" to the Commission.

10.2 At this stage, it would be worthwhile to reproduce the relevant paras of the judgement relied upon by Shri Thakore in the case of Google Inc (supra) and

Mahindra Electric (supra):

Google Inc. v. CCI, 2015 SCC Online Del 8992

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

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

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

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

"18(M) Just like an investigation by the Police has been held in Bhajan Lal (supra) to be affecting the rights of the person being investigated against and not immune from interference, similarly an investigation by the DG, CCI, if falling in any of the aforesaid categories, cannot be permitted and it is no answer that no prejudice would be caused to the person/enterprise being investigated into/ against or that such person/enterprise, in the event of the report of investigation being against him/it, will have an opportunity to defend." August 2, 2020 13

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

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

Mahindra Electric v. CCI, 2019 SCC Online Del 8032,

"85. ...CCI is also amenable to judicial review under Article 226 of the Constitution of India as regards the directions it makes procedurally. For instance, if it can be shown that investigation has been launched without a reasoned order prima facie expression of its opinion, under Section 26(2), the CCI's orders can be corrected in writ proceedings. Similarly, in regard to conduct of proceedings during investigation (i.e. the fact gathering exercise) the jurisdiction of the High Courts to August 2, 2020 12 ensure fair procedure and compliance with natural justice is assured..."

10.3 The Order dated 9.11.2018 therefore ought to fail on the ground that it does not satisfy the minimum test of having recorded some reasons as laid out in the judgement of SAIL (supra).

11. The Court, while doing so is conscious of the conduct of the Petitioner as so pointed out by the Respondents. The Order is dated 9.11.2018. The Director General has carried out investigation on the basis of the Report. The statements of the parties including that of the Petitioner have been recorded on 26.12.2019. The statements of other opposite parties have also been recorded, the investigation is over and the report has been ready on 20.3.2020 and the order of the Commission is at the stage where the suggestions and objections are invited from the parties and therefore whether at this late a stage does it warrant for the Court to put the clock back, especially when the petitioner participated and gave his statement without demur, accepting the order of 9.11.2018, which according to the Petitioner, it had just seen that order when served through the Affidavit-In-Reply.

12. Assuming in favour of the Respondents the Court cannot shut its eyes to the fact that the basis of the entire investigation and the direction given to the Director General to carry out such investigation is on the basis of the prima facie

opinion. If the Court comes to a conclusion that the order does not reflect the opinion even showing some reasons, the order has to fail the test of legality and therefore deserves to be quashed and set aside only on this ground.

13. The extent of powers of the Director General and whether the petitioner was entitled to the copies of the Information Petition, documents etc is the later submission of Shri Mihir Thakore. His written submission in this regard in an edited version would read as under:

I(B). Submissions in regard to not informing the petitioner of the allegations and not providing Information and evidence:

(a) At no point of time prior to the letter dated 3.6.2020 (by which the investigation report dated 20.3.2020 and order dated 20.5.2020 issued by the respondent no. 1 were served upon the petitioner) was the petitioner informed of the allegations against it nor was it informed of or provided with the information and material evidence against him being: (i) the Information Petition, (ii) the documents filed and submissions made by the Informant Party, (iii) the deposition of the Informant Party, (iv) the documents / information provided by GSBSTB, (v) any other evidence, whether oral or documentary, which may have an adverse effect against the petitioner. It was only after conclusion of investigation August 2, 2020 18 and issuance of investigation report that the petitioner was provided with the investigation report (pg. 108-768) which contains most of the aforesaid.

(b) Not providing the aforesaid constitutes a clear and total violation of the principles of natural justice and fairness in procedure. While such complete violation of natural justice would vitiate the proceedings without even a requirement of establishing prejudice to the petitioner, in this case, it has caused serious prejudice to the petitioner since the petitioner has been deprived of its right: (i) to know whether the Information Petition complies with the requirements of law in regard to Information and whether it could have formed the basis of arriving at an opinion as to whether there exists a prima facie case for investigation, (ii) to know and understand the allegations made against the petitioner, (iii) to effectively address and respond to such allegations and evidence during the course of investigation by adducing its own evidence, by cross examining the Informant and by being able to engage a lawyer during investigation. These are rights of a fundamental nature which are not dependent upon provisions of the Act or any regulations, and violation thereof would vitiate the entire investigation and investigation report, especially when investigation is in the nature of a trial and has drastic, far reaching and serious consequences. The conduct of proceedings during investigation being grossly violative of principles of natural justice and even de hors the provisions of law, the entire investigation and Investigation Report therefore stands vitiated and is required to be set aside.

(c). Even the Act contemplates adherence to principles of natural justice, which have in this case been completely violated.

(d) The scheme of the Act and regulations made thereunder clearly contemplates that the respondent no. 2 is to investigate into the allegations and provide his findings in respect of each of the allegation and for this purpose, he is required and duty bound to take evidence. The powers of the respondent no. 2 are very wide and consequences of an investigation report are drastic and extremely serious. Such investigation is in the nature of a trial and hence the rights of the petitioner ought not to have been thus taken away. The very nature of the powers of the respondent no. 2 make it incumbent upon him to conduct the investigation in a manner akin to a trial where all parties are informed of the allegations and evidence against them and are provided opportunity to adduce their own evidence, cross examine others, etc. The scheme of the Act and regulations made thereunder make it evident that the law contemplates adducing of evidence from all sides at the stage of investigation and not at the stage of hearing before the respondent no. 1 (unless sufficient opportunity was not granted by the respondent no. 2). Investigation cannot be a one-sided affair by keeping the party against whom investigation is being carried out in the dark and in effect denying the party its right to adduce its evidence and by issuing a report containing purported "findings" of the respondent no. 2 which are based on one-side evidence. Such investigation and report suffer from serious infirmity as to fairness, fair procedure and compliance with natural justice and would be a fraud on the statute, and moreover the conclusion / findings contained in such a report would be no finding in law. The investigation and report would therefore stand vitiated.

14. Let us therefore analyse these submissions in the light of the relevant sections and regulations. Sections 36 and 41 of the Act read as under:

"36. Power of Commission to regulate its own procedure- (1) In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

(2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses or documents;

(e) requisitioning, subject to the provisions of sections 123 and 124

of the Indian Evidence Act, 1872 (1 of 1872), any public record or

document or copy of such record or document from any office.

(3) The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.

(4) The Commission may direct any person:

(a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;

(b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.]

41. Director General to investigate contravention

(1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36.

(3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

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

(a) the words "the Central Government" under section 240 of the Companies Act,1956 (1 of 1956) shall be construed as "the Commission";

(b) the word "Magistrate" under section 240A of the Companies Act, 1956 (1 of1956) shall be construed as "the Chief Metropolitan Magistrate, Delhi".]

Regulations 20, 21, 29, 37, 41 and 43 read as under:

20. Investigation by Director General. -

(1) The Secretary shall, while conveying the directions of the Commission under regulation 18, send a copy of the information or reference, as the case may be, with all other documents or materials or affidavits or statements which have

been filed either along with the said information or reference or at the time of preliminary conference, to the Director General.

(2) The Commission shall direct the Director General to submit a report within such time as may be specified by the Commission which ordinarily shall not exceed sixty days from the date of receipt of the directions of the Commission.

(3) The Commission may, on an application made by the Director General, giving sufficient reason s extend the time for submission of the report by such period as it may consider reasonable.

(4) The report of the Director General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation.

Provided that when considered necessary, the Director General may, for maintaining confidentiality, submit his report in two parts. One of the parts shall contain the documents to which access to the parties may be accorded and another part shall contain confidential and commercially sensitive information and documents to which access may be partially or totally restricted."

(5) Ten copies of the report of the Director General, along with a soft copy in document format, shall be forwarded to the Secretary within the time specified by the Commission:

Provided that the Secretary may ask for more copies of the report as and when required.

(6) If the Commission, on consideration of the report, is of the opinion that further investigation is called for, it may direct the Director General to make further investigation and submit a supplementary report on specific issues within such time as may be specified by the Commission but not later than forty five days.

21. Procedure for inquiry under section 26 of the Act. -

(1) On receipt of the report of the Director General, the Secretary shall place the said report before the Commission within seven days for further orders and, in accordance with the direction of the Commission, forward copies of non confidential version thereof to the Central Government or the State Government or statutory authority or the parties concerned, as the case may be.

(2) If the report of the Director General finds no contravention of the provisions of the Act, the Secretary shall within seven days convey the directions of the Commission for inviting objections or suggestions to be filed within seven days from the Central Government or the State Government or the statutory authority, or from the parties concerned, as the case may be on such report of the Director General.

(3) If the Commission orders closure of the matter on consideration of the objections or suggestions, if any, referred to in sub-regulation (2), and agrees with the findings of the Director General, the Secretary shall convey the orders of the Commission to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(4) If the Commission, on consideration of the objections or suggestions, referred to in sub-regulation (2), directs further investigations in the matter by the Director General or further inquiries in the matter to be made by an officer of the Commission so authorized by it, the Secretary shall convey within seven days the directions of the Commission to the Director General or the officer so authorized, as the case may be.

(5) On an application made by the officer authorized by the Commission justifying the production of specified books or other documents, as may be required to make further inquiries under sub- regulation (4), the Commission may direct any person to produce such specified books or other documents relating to any trade carried out by such person or enterprise, as per the provisions of sub-section (4) of section 36 of the Act.

Explanation. - For the purpose of this sub- regulation, the word "officer" shall include the experts and professionals mentioned under sub-section (3) of section 17 or sub-section (3) of section 36 of the Act.

(6) On receipt of the report of the Director General on further investigation or report of the authorized officer on further inquiries, as the case may be, the Secretary shall with the approval of the Chairperson fix the meeting of the Commission within seven days for consideration thereof.

(7) If the report of the Director General mentioned under sub-regulation (1) finds contravention of any of the provisions of the Act, the Secretary shall obtain the orders of the Commission for inviting objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(8) On consideration of the objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, or the report of further investigation or further inquiries, as the case may be, if the Commission is of the opinion that further inquiry is called for, the Secretary shall fix the meeting of the Commission for consideration thereof, after issue of notice as per regulation 22, to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(9) The Secretary shall keep the Director General informed of the dates of the meetings of the Commission for inquiry under sub-section (7) or sub- section (8) of section 26 of the Act for appearing in person or through any of his officers in accordance with the provisions of section 35 of the Act.

29. Manner of making submissions or arguments by parties before Commission.

(1) Without prejudice to sub-section (1) of section 36 of the Act, the parties to the proceedings or their authorized representatives, as the case may be, shall declare to the Commission at the earliest opportunity whether they would make oral submissions or file written arguments during the course of an inquiry under section 26 of the Act:

(2) Subject to sub-regulation (1), the Commission may fix or limit the time during which the oral submissions or written arguments shall be addressed or filed by the parties or their authorized representatives, as the case may be, before it and may proceed to decide a matter in the absence of the party which does not abide by such timings as per regulation 30.

37. Inspection and certified copies of documents. -

(1) Subject to the provisions of Section 57 and regulation 35, a party to any proceeding of an ordinary meeting of the Commission may on an application in writing in that behalf, addressed to the Secretary, be allowed to inspect or obtain copies of the documents or records submitted during proceedings on payment of fee as specified in regulation 50.

Provided further that no request for inspection or certified copies of internal documents shall be allowed.

(2) The Commission may, on an application of a person, who is not a party to the proceedings, on sufficient cause demonstrated, allow such person inspection of documents or records mentioned in sub- regulation (1) on payment of fee as specified in regulation 50.

(3) An inspection shall be allowed only in the presence of an officer so authorized by the Secretary:

Provided that the inspection of documents or copying thereof as per sub-regulation (1) or sub- regulation (2) shall be allowed under the supervision of and subject to the time limits to be specified by the Secretary or an officer authorized by him in this behalf.

(4) An officer of the Central or State Government or the Director General or a statutory authority shall be allowed inspection and obtain copies of documents or records mentioned in sub-regulation (1) on making written request to the Secretary for the purpose.

41. Taking of evidence. -

(1) Subject to the provisions of the Act, the Commission or the Director General, as the case may be, may determine the manner in which evidence may be adduced in the proceedings before them.

(2) Without prejudice to sub-regulation (1), the Commission or the Director General, for the purpose of inquiry or investigation, as the case may be, may -

(a) admit evidence taken in the form of verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail, telephone records including authenticated mobile telephone records, written signed unsworn statements of individuals or signed responses to written questionnaires or interviews or comments or opinions or analyses of experts based upon market surveys or economic studies or other authoritative texts or otherwise, as material evidence;

(b) admit on record every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact provided it is duly certified by a gazetted officer of the Central Government or by a State Government or a statutory authority, as the case may be or a Magistrate or a Notary appointed under the Notaries Act, 1952 (53 of 1952) or the Secretary of the Commission;

(c) admit the entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business, including entries in any public or other official book, register or record or an electronic record, made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, as documentary evidence;

(d) admit the opinion of any person acquainted with the handwriting of the person by whom a document is supposed to have been written or signed, as relevant fact to prove the handwriting of the person by whom the document was written or signed;

(e) admit the opinion of the handwriting experts or the experts in identifying finger impressions or the persons specially skilled in interpretation of foreign law or of science or art;

(f) take notice of the facts of which notice can be taken by a court of law under section 57 of the Indian Evidence Act, 1872 (1 of 1872);

(g) accept the facts, which parties to the proceedings admit or agree in writing as proved;

(h) presume that any document purporting to be a certified copy of any record of any authority, court or government of any country not forming part of India as genuine and accurate, if the document purports to be certified in any manner which Is certified by any representative of the National Government of such country to be the manner commonly in use in that country for the certification of copies of such records, including certification by the Embassy or the High Commission of that country in India.

(i) admit such documents including electronic records in evidence as may be considered relevant and material for the proceedings.

(3) Subject to the provision of sub-regulation (2), the following sections of the Indian Evidence Act, 1872 (1 of 1872), in so far as they are applicable to the

matters relating to, -

(a) section 22-A -when oral admission as to contents of electronic records are relevant;

(b) section 47-A - opinion as to digital signature when relevant;

(c) section 65-B - admissibility of electronic records;

(d) section 67-A - proof as to digital signature;

(e) section 73-A - proof as to verification of digital signature;

(f) section 81-A - presumption as to Gazettes in electronic forms;

(g) section 85-A - presumption as to electronic agreements;

(h) section 85-B - presumption as to electronic records and electronic signatures;

(i) section 85-C - presumption as to digital signature certificates;

(j) section 88-A - presumption as to electronic messages;

(k) section 89 - presumption as to due execution etc., of documents not produced;

(l) section 90-A - presumption as to electronic records five years old;

may be applicable for the purpose of inquiry or investigation, by the Commission or the Director General, as the case may be.

(4) The Commission or the Director General, as the case may be, may call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter.

(5) If the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross examine the person giving the evidence.

(6) The Commission or the Director General, as the case may be, may, if considered necessary or expedient, direct that the evidence of any of the parties to be recorded by an officer or person designated for the said purpose.

(7) The Commission may direct the parties to file written note of arguments or submissions in the matter.

43. Production of additional evidence before Commission. -

(1) The parties to the proceedings shall not be entitled to produce before the Commission additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the Director General during investigation under section 26 or sub-section (1A) of section 29 of the

Act, but if the Commission requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the Director General has not given sufficient opportunity to the party to adduce evidence, the Commission, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

(2) Such document may be produced or such witness examined or such evidence adduced either before the Commission or before such authority as the Commission may direct.

(3) If the document is directed to be produced or witness examined or evidence adduced before any authority, he or she shall comply with the direction of the Commission and after compliance send the document, the record of the deposition of the witness or the record of the evidence adduced, to the Commission.

(4) Additional evidence/document shall be made available by the Commission to the parties to the proceedings other than the party adducing the evidence and they may be afforded an opportunity to rebut the contents of the said additional evidence.

15. Let us now proceed to analyse the above submissions in context of the facts and materials on record. Reading and re-reading of the decision in the case of SAIL (supra) has as far as this submission is concerned set out the law which still holds the field and that is-

(a). That the legislature has the competence to enact laws which specifically exclude the application of principles of natural justice in larger public interest and for valid reasons.

(b). Albeit the Supreme Court was considering this in light of the provisions of Section 26(1) of the Act, the entire scheme of the Act was considered and it was found that under the provisions of Section 26(7) and Section 26(8) the Commission would issue notice inviting objections and suggestions from the parties before arriving at a final conclusion under the provisions of Section 26(7) and Section 26(8) of the Act. Regulation 21 prescribes the procedure of inquiry under Section 26 and also contemplates hearing of objections and suggestions from the parties concerned before an order is made. The observations of the Supreme Court in the decision of SAIL(supra) though reproduced hereinabove, at the cost of repetition need reiteration as under. The relevant paragraphs of the judgment in case of SAIL (supra) read as under:

"52. A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is jusdicere, not jus dare. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

53. This Court in the case of Shiv Shakti Co-op. Housing Society, Nagpur vs. Swaraj Developers [(2003) 6 SCC 659], while referring to the principles for interpretation of statutory provisions, held as under:

"19. It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See Institute of Chartered Accountants of India v. Price Waterhouse.) The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner Courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See State of Gujarat v. Dilipbhai Nathjibhai Patel). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [See Stock v. Frank Jones (Tipton) Ltd.] Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of a doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in Vickers Sons and Maxim Ltd. v. Evans, quoted in Jumma Masjid v. Kodimaniandra Deviah."

...

56. Thus, the Court can safely apply rule of plain construction and legislative intent in light of the object sought to be achieved by the enactment. While interpreting the provisions of the Act, it is not necessary for the Court to implant, or to exclude the words, or over emphasize language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication.

...

...

77. Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever

the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than 25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

...

79. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that non- compliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of compliance to the principles of natural justice in light of the above noticed principles."

...

89. The exceptions to the doctrine of audi alteram partem are not unknown either to civil or criminal jurisprudence in our country where under the Code of Civil Procedure ex-parte injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries."

(c).The scheme of the Act provides adequate safeguards inasmuch as after the Investigation Report is submitted, the parties are invited to file their objections and suggestions and the Orders are passed then. Even Regulation 43 provides an added safeguard by which the parties can produce additional evidence which they could not produce before the Director General. Therefore, after the Investigation Report is filed the quasi-judicial body, the Commission is guided by the principles of natural justice and has powers under Section 36(2) to pass orders under Section 27 of the Act.

15.1 This will bring us to the somewhat related submission having a bearing on what is stated herein before. Mr Thakore has extensively relied on the relevant paras of the decision in the case of Google Inc (supra) which are reproduced hereunder to suggest that the powers of the Director General, in the course of Investigation are wide and sweeping and as held in Google Inc. (supra) more than the police under the Code of Criminal Procedure Code. The relevant paras read as under:

Google Inc. v. CCI, 2015 SCC Online Del 8992

"18(C) The DG, during the course of such investigation, by virtue of Section 41(2) read with Section 36(2) of the Act has the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit in respect of, (i) summoning and enforcing the attendance of any person and examining him on oath, (ii) requiring the discovery and production of documents, (iii) receiving evidence on affidavit, (iv) issuing commissions for the examination of witnesses and documents, and (v) requisitioning public records or documents from any public office. The DG is August 2, 2020 27 further empowered by Section 41(3) read with Sections 240 and 240A of the Companies Act, 1956 to keep in its custody any books and papers of the person/enterprise investigated against/into for a period of six months and to examine any person on oath relating to the affairs of the person/enterprise being investigated against/into and all officers, employees and agents of such person/enterprise are also obliged to preserve all books and papers which are in their custody and power."

"18(D) Failure to comply, without reasonable cause, with any direction of the DG, under Section 43 of the Act has been made punishable with fine extending to rupees one lakh for each day of failure, subject to a maximum of rupees one crore."

"18(E) It would thus be seen that the powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on the Police under the Code of Criminal Procedure. While the Police has no power to record evidence on oath, DG has been vested with such a power. Our experience of dealing with the matters under the Competition Act has shown that not only statement on oath of witnesses summoned during the course of investigation is being recorded but the said witnesses are being also permitted to be cross-examined including by the informant/claimant and which evidence as part of the report of the DG forms the basis of further proceedings before the CCI. Thus while in investigation by Police under the Cr.P.C., the rule of audi alteram partem does not apply, there is no such embargo on the DG, CCI."

"18(F) Thus, investigation by DG, CCI tantamount to commencement of trial/ inquiry on the basis of an ex parte prima facie opinion. Though the Supreme Court in Para 116 of SAIL (supra) has held that inquiry by CCI commences after the DG, CCI has submitted report of investigation but, in the facts of that case, had no occasion to consider that the DG, CCI in the course of investigation has powers far wider than of the Police of investigation. Para 29 of the judgment also notices that the counsels had addressed arguments on issues not strictly arising for adjudication in the facts of that case; however since it was felt that the said questions were bound to arise in future, the Supreme Court proceeded to deal with the said contentions also."

"18(G) The investigation by the DG ordered by the CCI thus stands on a different pedestal from a show cause notice, the scope of judicial review whereof, though lies, is very limited and from investigation/inquiry pursuant to an FIR by the Police which in some cases has been held to be not causing any prejudice and thus furnishing no cause of action for a challenge thereto."

"18(H) Before registration of an FIR the concerned Police Officer is not to embark upon an inquiry and is statutorily obliged (under Section 154(1) of the Cr.P.C.) to register a case and then, if has reason to suspect (within the meaning of Section 157(1) Cr.P.C.) to proceed with the investigation against such person. Per contra, as noticed above, investigation by the DG under the Competition Act commences not merely on the receipt of reference/information but August 2, 2020 28 only after CCI has formed a prima facie opinion of violation of the provisions of the Act having been committed."

CCI v. Oriental Rubber, 2018 SCC Online Del 9192

"24. The matter can be viewed from a different compass as well. A Division Bench of this Court in Google (supra) held that the powers of the DG are very wide and extensive under the Competition Act, and the consequences of an investigation by the DG are also drastic. It was held by the Court: "It would thus be seen that the powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on the Police under the Code of Criminal Procedure. While the Police has no power to record evidence on oath, DG has been vested with such a power. Our experience of dealing with the matters under the Competition Act has shown that not only statement on oath of witnesses summoned during the course of investigation is being recorded but the said witnesses are being also permitted to be cross examined including by the informant/claimant and which evidence as part of the report of the DG forms the basis of further proceedings before the CCI. Thus while in investigation by Police under the Cr.P.C., the rule of audi alteram partem does not apply, there is no such embargo on the DG, CCI. Thus, investigation by DG, CCI is tantamount to commencement of trial/inquiry on the basis of an ex parte prima facie opinion

25.Since the DG's powers are so far-reaching and the consequences of an investigation by the DG so drastic, it would necessary that the right of a party/ person to be accompanied by an advocate during the investigations by the DG, when the latter is collecting or recording evidence, not be taken away. This Court, therefore, finds that the Learned Single Judge's reliance on Google (supra) as well as the decision in Punjab National Bank (supra), to hold that when the consequences of an enquiry or investigation are severe and drastic, the right of a person to be accompanied or represented by an advocate cannot be extinguished, stands to reason and cannot be faulted with."

[Emphasis Supplied]

15.2 The emphasis on these judgements is pressed into service to put forth a submission that even while the Director General carries out Investigation he has wide powers when read in context of Section 41(2) of the Act which says that it will have the same powers as the Commission as under Section 36(2). True it is that the DG has also powers to summon witnesses as he did in case of the Petitioner. This was done in exercise of powers also in context of Regulation 41 of the Regulations of 2009. While the Director General carries out Investigation and prepares his report, under Regulation 37, the party has an option to apply for copies of the orders, documents, evidences, ask for cross-examination of witnesses at the stage when the investigation is in progress. So merely because the powers of the DG are projected to be wide and sweeping as opined in the judgement of Google Inc (supra) does not warrant the procedure or cross-examination of witnesses and procuring of documents to a party who does not opt for such an opportunity under Regulation 37 of the Regulations of 2009.

15.3 The powers of the Director General came in for consideration before the Delhi High Court in the case of Competition Commission Of India versus M/S Grasim Industries decided on 12/09/2019. The Division Bench was considering a challenge to quashing of the Report of the Director General in as much as the Report carried investigations also with regard to abuse of dominant position when in fact the Investigation as directed by the CCI was to investigate violations of Section 3(3)(a), (b), (c) and not Section 4. On submission of the report the Company challenged the report as being beyond the directions of the CCI which was rejected by the CCI, which compelled the Company to approach the High Court. The Learned Single Judge held as under:

"16. Ultimately, orders were reserved on 6th December, 2013 and the impugned judgment was passed by the learned Single Judge on 17th December, 2013. The learned Single Judge held as under:

(I) If the investigation by the DG is based upon information which the CCI did not consider while forming its opinion with respect to the existence of a prima facie case, the DG?s action would be contrary to the scheme of the Act.

(II) Regulation 18 (4) of the CCI Regulations requires the DG to give a report containing its findings on each of the allegations in the information or the reference, as the case may be. This was yet another indicator that the report of the DG was to be confined to the allegations in the information or the reference received by the CCI and he is "not competent to travel outside the said information or reference".

(III) Under the scheme of the Act, the enterprise against whom the information is given to the CCI is entitled to defend itself, first before the DG during the course of investigation, and in case the DG is not satisfied and reports a contravention of the provisions of the Act, then before the CCI, during the course of enquiry by the CCI.

(IV) Had the information, alleging contravention of Section 4 of the Act by GIL, been considered by CCI, for forming its opinion under Section 26(1) of the Act, and the DG been directed to cause an investigation to be made into the said information, GIL could have requested the DG, under Regulation 41 (4) of the CCI Regulations, to permit it to lead evidence to satisfy the DG that no contravention of Section 4 of the Act had been committed by it. Since the part of the information provided to the DG during the course of investigation alleging contravention by GIL of Section 4 of the Act was not available to the CCI, it was not the subject matter of the directions issued by the CCI to the DG. Consequently, GIL had no occasion to make an application to the DG under Regulation 41(4) and (5) of the CCI Regulations.

(V) Although there was no power given to the CCI under the Act to quash or set aside the report of the DG, if the DG carried out an investigation into an information, which was not considered by the CCI, while forming its opinion under Section 26 (1) of the Act, CCI was entitled to reject that part of the report, which pertained to such investigation.

(VI) The report of the DG, to the extent that it reported a contravention of Section 4 of the Act by GIL, could not be forwarded to GIL under Section 26

(4) of the Act, nor could the CCI hold a further enquiry into it under Section 26 (8) of the Act, or proceed to pass an order on its basis under Section 27 of the Act. However, CCI in its discretion could treat the said part of the report as 'information? under Section 19 of the Act (concerning prima facie contravention of Section 4 of the Act) and direct the DG to undertake an investigation into such information."

15.4 In other words, the learned Single Judge accepted the submissions of the petitioner holding that since part of the information provided by the DG during the course of investigation alleging contravention against the Company under Section 4 was not available to the CCI and it was not the subject matter of directions issued by the CCI to the DG under Section 26(1) of the Act, the Company had no occasion to make an application under Regulation 41(4)(5) i.e. to lead oral evidence and make oral submissions. On an Appeal by the CCI before the Division Bench, the Bench negated the contentions of the Company while considering Google Inc (supra) and held that the powers of the DG are not circumscribed. Relevant discussions of the judgement are in paragraph nos. 30 to 34 which read as under:

"30. Turning to the facts of the present case, the Court finds that while the information with the CCI did pertain to the alleged violation by GIL and others under Section 3(3) (a) and (b) of the Act, the direction given to the DG was to investigate ?the matter?, and this enabled the DG to examine violations not only of under Section 3 of the Act, but any other violation that may have come to his notice while undertaking the investigation.

31. It must be noticed here that when the learned Single Judge passed the impugned judgment, he did not have the benefit of the decision in Excel Crop Care Limited v. Competitive Commission of India (supra), and this Court is in no doubt that if such judgment was available at that point in time, the learned Single Judge would not have taken the view that he has taken in the impugned judgment.

32.1 The Division Bench of this Court in Cadila Healthcare Limited v. Competition Commission of India (supra) was called upon likewise to examine whether the DG in that case had exceeded its powers in finding a violation of the Act by Cadila which was not even named in the original complaint filed by the CCI.

32.2 There, the CCI took cognizance of information filed by the Reliance Medical Agency (?RMA?) complaining of denial of supply of medicines by certain pharmaceutical companies. Cadila's case was that there had to be separate orders under Sections 26 (1) of the Act by the CCI authorizing the DG to investigate Cadila, and that, in the absence of such order, the DG could not have proceeded against Cadila on the strength of a general order passed by the CCI on 17th November, 2015 where it stated as under: "in the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in such contravention".

32.3 After the DG?s report was submitted to the CCI, a copy thereof was provided to Cadila, which objected to the report. It also relied upon the decision of this Court in Google Inc. v. Competition Commission of India (supra). However, the CCI rejected these objections. After its appeal against the said order was dismissed by the COMPAT, Cadila filed a writ petition before the learned Single Judge. The said writ petition was dismissed by the learned Single Judge by an order dated 9th March, 2018 and against the said dismissal, Cadila approached the Division Bench.

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

"43. Cadila's argument, that in Excel Crop Care the issue was inclusion of more than one instance or incident within the ambit of investigation (given that the complaint was in respect of one tender only) is distinguishable, is in this court's opinion, insubstantial and needs to be rejected. Its reliance on Grasim Industries, is no longer apt. At the stage when the CCI takes cognizance of information, based on a complaint, and requires investigation, it does not necessarily have complete information or facts relating to the pattern of behavior that infects the marketplace. Its only window is the information given to it. Based on it, the DG is asked to look into the matter. During the course of that inquiry, based on that solitary complaint or information, facts leading to pervasive practises that amount to abuse of dominant position on the part of one or more individuals or entities might unfold. At this stage, the investigation is quasi inquisitorial, to the extent that the report given is inconclusive of the rights of the parties; however, to the extent that evidence is gathered, the material can be final. Neither is the DG's power limited by a remand or restricted to the matters that fall within the complaint and nothing else. Or else, the Excel Crop Care would not have explained the DG's powers in broad terms: (if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report....If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition). The trigger for assumption of jurisdiction of the CCI is receipt of complaint or information, (when the Commission is of the opinion that there exists a prima facie case exists (per Section 26 (1)). The succeeding order is administrative (per SAIL); however, that LPA order should disclose application of mind and should be reasoned (per SAIL). Up to this stage, with that enunciation of law, no doubt arguably Cadila could have said that absent a specific order as regards its role, by CCI, the DG could not have inquired into its conduct. However, with Excel Crop Care specifically dealing with the question of alleged "subject matter" expansion (in the absence of any specific order under Section 26 (1)) and the Supreme Court clarifying that the subject matter included not only the one alleged, but other allied and unremunerated ones, involving others (i.e. third parties), the issue is no longer untouched; Cadila, in the opinion of this court, is precluded from stating that a specific order authorizing transactions by it, was a necessary condition for DG's inquiry into its conduct. This court is further reinforced in its conclusion in this regard by the express terms of the statute: Section 26 (1) talks of action by CCI directing the DG to inquire into "the matter". At this stage, there is no individual; the scope of inquiry is the tendency of market behaviour, of the kind frowned upon in Sections 3 and 4. The stage at which it CCI can call upon parties to react is when it receives a report from DG stating there is no material calling for action, it has to issue notice to the concerned parties (i.e. the complainant) before it proceeds to close the case (Sections 26 (5) and (6)). On the other hand, if the DG's report recommends otherwise, it is obliged to proceed and investigate further (Sections 26 (7) and (8)). Again Section 27 talks of different "parties" [enterprise or association of enterprises or person or association of persons?- per Section 27 (a)]. Likewise, the steps outlined in Section 26 are amplified in the procedure mandated by Regulation 20 and 21, which requires participation by "the parties" in the event a report after DG's inquiry, which is likely to result in an adverse order, under Sections 27-34 of the Act. Consequently, Cadila's argument that a specific order by CCI applying its mind into the role played by it was essential before the DG could have proceeded with the inquiry, is rejected."

33. Mr Mehta sought to distinguish both Excel Crop Care Limited v. Competitive Commission of India (supra) and Cadila Healthcare Limited v. Competition Commission of India (supra) on the ground that they did not involve a situation where the initial complaint was for violation of Section 3 of the Act, but what was found by the DG was a violation of another provision. This submission is unconvincing when the binding ratio decidendi of both decisions is distilled. The decision in Excel Crop Care Limited v. Competitive Commission of India (supra) makes it abundantly clear that while the initial complaint may be on a limited aspect, the DG can investigate into other violations that emerged during the investigation of such complaint. For instance, in Excel Crop Care Limited v. Competitive Commission of India (supra), the validity of the DG?s report which pointed to the existence of a cartel in relation to a tender which was not even mentioned in the first complaint was upheld by the Supreme Court. Likewise, a party which was not even named in the complaint could be investigated into by the DG, as held by this Court in Cadila Healthcare Limited v. Competition Commission of India (supra).

34. The aforementioned decisions clarify that an order of the CCI under Section 26 (1) of the Act ?triggers? investigation by the DG, and that the powers of the DG are not necessarily circumscribed to examine only such matters that formed the subject matter of the original complaint. No doubt, the language of the order passed by the CCI issuing directions to the DG will also have a bearing on the scope of such investigation by the DG. In the present case, however, the language of the order passed by the CCI on 26th February, 2011, is broad enough to cover an investigation by the DG into what appeared to be prima facie violation of Section 4 of the Act by GIL."

16. In context of the submission that there is violation of principles of natural justice inasmuch as the entire investigation has been carried out without providing information petition and documents relied upon and therefore there is no need even to prove prejudice, Mr Thakore had relied on the decision in the case of Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255, relevant extract of which is reproduced hereunder:

"31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute.

16.1 Per contra Mr Vyas had relied on the decision in the case of S.K.Sharma (supra). This point need not detain us any longer. As extensively discussed while dealing with the submissions and in context of SAIL (supra) the Supreme Court has held that there can be legislations which make an exception to the principles of natural justice. The Competition Act is one such legislation. The Act specifically provides that once a Report is submitted and copies are forwarded to the concerned parties, objections and suggestions are invited and only then the Competition Commission takes a decision after granting all the opportunities of hearing including giving the party an opportunity to lead evidence when it has not been so led. Regulation 43 provides for such an opportunity to produce additional evidence.

16.2 Regulation 46A also envisages that if permission is sought to engage an Advocate the same is granted. In the case on hand no such permission was sought. The alternative submission that the Investigation Report is perverse is also a fact that can be considered at the hands of the CCI after inviting objections and suggestions. Even otherwise the Investigation Report is to assist the Commission in context of passing orders under Section 27 of the Act. Such an exercise can be undergone when the Orders are subject matter of an Appeal before the competent Tribunal. In exercise of the powers under Article 226 of the Constitution Of India, this Court would not sit in appeal over the Report. It has also been set out in the judgement of Google Inc (supra) that the High Court has restricted powers to examine the report as in the case of State Of Haryana vs Bhajan Lal 1992 Suppl(1) SCC 335.

17. Taking into consideration the entire conspectus of the controversy, in the facts of this case, the Court deems it fit to quash and set aside the Order of the Competition Commission Of India passed under Section 26(1) of the Act, only on the ground that the order does not record reasons for forming a prima-facie opinion while directing the Director General to cause investigation. The Order dated 09.11.2018 is therefore quashed and set aside. It shall be open for the authorities to however record reasons for forming a prima facie opinion and pass a fresh order accordingly within a period of four weeks from the date of receipt of the order. The petition is partly allowed. Rule is made absolutely accordingly.

