

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 06.12.2013
Date of Decision: 17.12.2013

+ WP(C) No.4159 of 2013

GRASIM INDUSTRIES LTD. Petitioner
Through: Mr. Gopal Surbramaniam, Mr. Rajiv
Nayar, Sr. Advs. with Mr. Ajit Warriar,
Mr. Harman Sandhu, Mr. Ashish Gupta &
Mr. Aditya Nayar, Advs.

versus

COMPETITION COMMISSION OF INDIA Respondent
Through: Mr. Balbir Singh, Mr. Abhishek Singh
Baghel, Mr. Avinash Sharma, and Ms.
Monica, Advs. for CCI and Mr. S.P.
Khatana, Director (Law)

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGEMENT

V.K.JAIN, J.

An Information was received by the Competition Commission of India (hereinafter referred to as the 'Commission') that the manufacturers of Man Made Fibres (for short 'MMF') i.e. Polyester Staple Fibre (PSF), Acrylic Staple Fibre (ASF), Viscose Staple Fibre (VSF) & Nylon Staple Fibre (NSF) had imposed several restrictions on Indian Textile Industry, which are their customers for purchase of MMF, and such restrictions constitute anti-competitive actions. The Commission, vide order dated 22.6.2011, on consideration of the information submitted by the informant, formed a *prima facie* opinion that there existed a case to direct the Director General to cause

an investigation into the matter. The Director General was accordingly instructed to conduct an investigation into the matter. The allegations against MMF manufacturers, who were alleged to be contravening the provisions of Section 3(3)(a)(b)(c) of the Competition Act, 2002 (hereinafter referred to as the 'Act') in a nutshell were as follows:

- (a) Price fixation of MMF products in the domestic markets;
- (b) The domestic manufacturer of MMF basing their price on import landed cost;
- (c) Selling cheaper in overseas market than domestic market;
- (d) Allocation of customers for specific suppliers and other suppliers not supplying to these customers/regions.
- (e) Consumer based division on the basis of region, quantity, quality and supplier preference.
- (f) Cutting down production jointly to avoid competition.
- (g) Due to the imposition of ADD the prices becoming higher in the domestic market.
- (h) Export incentives provided to the exporters of MMF manufacturers giving them the extra benefit.

2. During the course of investigation by the Director General, the informant alleged that Grasim Industries Limited (GIL), which is the petitioner before this Court and is the only manufacturer of Viscose Staple Fibre (VSF) in the country on account of its dominant position in the market of VSF, was indulging into various anti-competitive practices. The anti-competitive practices attributed to GIL were as follows:

- 1. Unfair, ambiguous, monopolistic and dominating policies on pricing, discounts and dispatches;

2. Refusal to disclose sales and discount policies in writing. The same was communicated orally and on some occasions the committed discounts were not provided;
3. After imposition of ADD in May, 2010, GIL had been able to increase its price and improved its margins;
4. Discount policies of GIL were oriented completely to their benefit without taking into consideration of the natural market fluctuation. GIL was giving discount on lifting or consumption whichever was lower whereas as a fair practice they should provide discounts on all lifted quantities, irrespective of the consumption;
5. Discounts against export of yarn made of VSF were not given outrightly to the spinners. Spinners were supposed to furnish an evidence of exports and then GRASIM credits equivalent quantity of VSF eligible for discounts during subsequent lifting of VSF for manufacturing yarn for exports. In this way there is always an outstanding discounts quantity pending with GRASIM. In case spinner wanted to exit from viscose spinning, he had to forgo the outstanding discounts. Therefore spinner was always in the loop and kept buying from them.
6. Policies with respect to loyalty discount, continuity discount, quantity discount and special discount of the GIL were discriminatory from buyer to buyer;
7. Limiting supplies to the domestic buyers by way of exporting more quantities and at times by cutting down the production;
8. Limiting quantity of specific quality of fibre (Kharach fibre), when there is a requirement of yarn made out of that fibre;
9. Not entertaining any complaint with respect to quality related issues emanating out of their products. If there was any loss of productivity or quality during spinning due to the poor or inferior quality of fibres supplied by GIL, they will not provide any financial compensation for the same;
10. GIL was selling fibre at commercial/invoice weight (13% moisture) whereas subsequent textile value chain does not entertain such a commercial invoicing. The payment of additional moisture

becomes the cost for the spinners. Payment of all the fibre discounts given by GIL to the spinners was calculated on net weight of yarn produced by us and not on commercial weight of fibre. Therefore, the waste generated during the process of spinning, spinners don't get any benefit of discounts on the same. A copy of invoice has been provided to show that the prices are charged on the invoice weight, whereas net weight is less than the invoice weight. This way the basic rate becomes more than the actual quoted rate.

11. It was also pointed out that the role of Association and Ministry of Commerce, Govt. of India was also required to be examined with respect to the ADD.”

3. The Director General, therefore, decided to investigate on the following issues as well:

“a. Whether the Opposite Party i.e. GIL (manufacturer of VSF) is directly or indirectly determining the sale prices through any agreement, understanding or action in concert with other MMF manufacturers thereby violating the provisions of section 3(3)(a) of the Competition Act, 2002;

b. Whether the Opposite Party i.e. GIL (manufacturer of VSF) is limiting or controlling production or carrying on any practice to impose restrictions on supply of MMF by entering into an agreement or by understanding or action in concert with other MMF manufacturers thereby violating the provisions of section 3(3)(b) of the Competition Act, 2002;

c. Whether the Opposite Party i.e. GIL (manufacturer of VSF) share the market/source of production by way of allocation of geographical area of market, or type of goods or customers through any agreement or action in concert with other MMF manufacturers thereby violating the provisions of Section 3(3)(c) of the Competition Act, 2002 or involved in any alleged conduct, which is contravening the provisions of the Act in any other manner?

d. Whether the OP i.e. GIL has abused its dominant position by directly or indirectly imposing any unfair or discriminatory conditions in purchase or sale of VSF or impose unfair or discriminatory price in purchase or sale, or by limiting production,

or by indulging in practices resulting in denial of market access in any manner?”

4. The Director General in the report submitted to the Commission reported that no violation of the provisions of Section 3(3)(a)(b)(c) either by GIL or by other MMF manufacturers was made out, but GIL being a dominant enterprise had abused its dominant position in the following manner:

“1. The GIL has kept dual basic price and differential discounts for the sale of VSF, by imposing unfair conditions relating to subsequent production and sale of yarn (either domestic or export) by virtue of its dominance and violated the provisions of section 4(2)(a) of the Act.

2. The GIL provides segmental discounts for export or domestic consumption on the conditions that a minimum of 25% content of VSF is necessary in yarn. In case the content of VSF is less than that, no discounts are offered. GIL obtains proof of production/export before providing discounts. Customers have no choice but to manufacture the yarn in the given manner to obtain such discount. Otherwise they have to pay higher prices for the same VSF. GIL being dominant in the relevant market have imposed such unfair condition and violated the provisions of section 4(2)(a) of the Act.

3. A continuity discount/rebate is given by GIL with a condition that the yarn manufacturer shall not purchase VSF from anybody (including imports) other than GIL. The policy of GIL in this regard is not transparent and through such conditions, the GIL prevents its customer from importing VSF. Putting such unfair conditions and limiting or restricting the market for yarn manufacturers for imports of VSF is violative of the provisions of section 4(2)(a) and 4(2)(b) of the Act.

4. The GIL sells VSF to the yarn manufacturers directly. It is not sold to the traders. The production, composition of yarn and its quantity is monitored by the GIL to see that VSF is not traded in the relevant market. The GIL stifles the competition by preventing trading of VSF in the relevant market and restricts the choice of customers to buy VSF from alternate source in India. Accordingly

putting such unfair conditions in sales and restricting the market, GIL is violating the provisions of section 4(2)(a) and 4(2)(b) of the Act.

5. GIL provides discounts on lifting or consumption of VSF, whichever is lower. Through this unfair condition on discount, GIL not only monitors the sale but also the production of yarn and prevents trading of VSF which is violative of the provisions of section 4(2)(a) of the Act.

6. The GIL also found to be maximizing its profits through imposing unfair conditions and abusing its dominant position. By taking the advantage of import landed price and imposing unfair conditions in pricing and sales, the high profit margins are earned, which is not passed onto the customers and thereby violating the provisions of section 4(2)(a) of the Act.”

Thus, according to the Director General, the petitioner was found to have abused its dominant position in the VSF market, thereby contravening Sections 4(2)(a) & 4(2)(b) of the Act.

5. The petitioner filed an application before the Commission seeking *inter alia* quashing and setting aside of the Director General’s report to the extent it pertains to the alleged violation of Section 4 of the Act and the orders passed by the Commission considering the said report, primarily on the ground that investigation into the alleged violation of Section 4 of the Act was beyond the scope of the powers of the Director General, who, in view of the order of the Commission dated 22.6.2011, could have carried out investigation only into the alleged contraventions of Section 3(3)(a)(b)(c) of the Act. The said application was dismissed by the Commission vide impugned order dated 30.5.2013. Being aggrieved from the aforesaid order, the petitioner is before this Court seeking quashing of the said order as also the report of the Director General dated 26.2.2013 to the extent it pertains to the alleged contravention of Section 4 of the Act.

6. As would be seen from its Objects and Reasons, the Competition Act seeks to ensure fair competition in India, by prohibiting trade practices which cause appreciable adverse effect on competitions, besides curbing negative aspects of competition. The Act provides for investigation by the Director General for the assistance of the Commission, but the Director General can act only if so directed by the Commission and does not have the *suo moto* powers for initiating investigation. The Act has also repealed the Monopolistic and Restrictive Trade Practices Act, 1969.

Section 3(1) of the Act prohibits agreements in respect of production, supply, distribution, shortage, acquisition or control of goods or provisions of services which cause or are likely to cause appreciable adverse effect on competition within India whereas section 4(1) of the Act prohibits use of its dominant position by an enterprise. Sub section (3) of Section 3 provides that the agreements of the nature specified therein shall be presumed to have an appreciable adverse effect on competition, whereas Sub section (4) of the said section provides that the agreements in respect of production, supply, distribution, shortage, sale or price of, or trade in goods or provisions of services shall be an agreement in contravention of sub section (1) of the said section if such agreement causes or is likely to cause appreciable adverse effect on competition in India.

The expression “dominant position” has been defined in Explanation to sub section (2) of section 4, whereas sub section (2) of the said section treats certain activities specified therein to be an abuse of dominant position.

7. Section 19 of the Act empowers the Commission to inquire into the allegations of contravention of the provisions of sub section (1) of Section 3 of the sub section (1) of section 4, *inter alia*, on receipt of any information. Sub section (1) of Section 26 provides that if on receipt of a reference or on its 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. The Act contains no provision empowering the Director General to investigate any contravention of sub section (1) of section 3 or sub section (1) of section 4 without a direction of the Commission in terms of sub section (1) of section 26. It would also be seen that once the Commission forms an opinion that there exists a prima facie case of contravention, it is duty bound to direct investigation by the Director General. If, however, the Commission is of the opinion that there exists no prima facie case, it is required to close the matter forthwith, as provided in sub section (2) of section 26. Thus, formation of an opinion that prima facie there is a contravention of the provisions of the Act, is a sine qua non, for investigation by the Director General. In other words, the investigation by the Director General depends upon the nature of the opinion formed by the Commission, on consideration of reference or information received by it.

8. Once the Director General submits his report to the Commission, a copy of the said report is required to be forwarded to the parties concerned including the Central Government/ concerned State Government/ concerned Statutory Authority in case the investigation was directed on a reference received from such Government/Authority. This exercise is required to be undertaken irrespective of whether the Director General reports a contravention of the provisions of the Act or otherwise. In case the Director General recommends that no contravention of the provisions of the Act is made out, the Commission is required to invite objections or suggestions, on the said report, from the Central Government, or the State Government or the Statutory Authority of the parties concerned, as the case may be. Such report then is required to be considered by the Commission in the light of the objections or suggestions received by it.

If the Commission, on consideration of the matter in the light of the objections or suggestions, if any, received by it, agrees with him, the matter is

required to be closed forthwith. However, the recommendation made by the Director General in this regard is not binding on the Commission and after considering the said report in the light of the objections or suggestions received by it if the Commission is of the opinion that further investigation is required, it may direct such further investigation in the matter by the Director General. The Commission, instead of directing further investigation by Director General, may also cause further inquiry to be made in the matter or it may itself hold further inquiry into the matter. If the Director General recommends that there is contravention of the provisions of the Act, the said recommendation also is not binding on the Commission and it may, inquire into the matter if in its opinion a further inquiry is called for or it may if it does not agree with the Director General, close the matter forthwith. If the Commission agrees with the Director General, it can proceed to pass one or more orders in terms of section 27 of the Act.

Thus, under the scheme of the Act, the recommendations made by the Director General do not bind the Commission which is entitled to take a contrary view and proceed accordingly. During the course of arguments, both the parties, when called upon to state their respective stand, as regards the power of the Commission, with respect to the report of the Director General, took a common stand that irrespective of whether the Director General reports a contravention of the provisions of the Act or reports that no contravention of the Act was found during investigation by him, the said report does not bind the Commission, and after complying with the procedure prescribed in sub-section (4) and wherever the Director General reports no contravention, then under sub-section (5) of Section 26, the Commission is entitled to take its own view in the matter, and proceed accordingly. This would mean that if the Director General reports no contravention of the provisions of the Act, the Commission has three options available to it. The first option available to the Commission is to close the matter forthwith, the second option is to direct

further investigation by the Director General or further inquiry or the Commission itself holding further inquiry in the matter. The third option available to the Commission in case it does not agree with the Director General and does not feel necessity of any further investigation or inquiry, is to pass appropriate order, as provided in Section 27 of the Act. If the Director General reports contravention of the provisions of the Act, the Commission has three options in the matter. It may close the proceedings forthwith if in its opinion, no contravention of the provisions of the Act is made out and no further inquiry was called. The second option available to the Commission, in such a case, is to hold further inquiry into the contravention reported by the Director General and the third option available to the Commission is to accept the report without directing any further inquiry and proceed to pass orders in accordance with the provisions of Section 27 of the Act.

9. Regulation 18 (2) of the Competition Commission of India (General) Regulations, 2009 (for short 'the Regulations') provides that a direction of investigation to the Director General shall be deemed to be the commencement of an Inquiry under Section 26 of the Act. Regulation 20(1) requires the Secretary to send a copy of the information or the reference, as the case may be, with all other documents or material or affidavit 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, while conveying to him, the directions of the Commission under Regulation 18. Clause (4) of the said Regulation requires the Director General to give report containing his findings on each of the allegations made in the information or the reference as the case may be. *(emphasis supplied)*

Clause (1) of Regulation 41 empowers the Commission and the Director General to determine the manner in which evidence may be adduced in the proceedings before them. Thus, the Director General is competent to record evidence while making investigation in terms of the directions of the

Commission given to him under Section 26 of the Act. Clause (4) of Regulation 41 *inter alia* empowers the Director General to call for the parties to lead evidence by way of affidavit or oral evidence. Under Clause (5) of the said Regulation, the Director General may if it directs evidence by a party to be led by way of oral submission, grant an opportunity to the other party or parties, as the case may be, to cross-examine the person giving the evidence. The expression ‘party’, as defined in Regulation 2(1)(i) includes an enterprise against whom any inquiry or proceedings is instituted. Thus, the Director General may either of his own or on the application of the enterprise against whom the inquiry is being conducted, may permit such enterprise to lead evidence. The Director General can also, permit such an enterprise to cross-examine the witnesses of the informant, including the informant himself.

10. The scheme of the Act thus, does not permit investigation by Director General into any information which was not considered by the Commission, while forming opinion under sub-section (1) of Section 26 of the Act. The formation of opinion by the Commission and direction to cause an investigation to be made by the Director General being a pre-requisite condition for initiation of investigation, the Director General would have no power to undertake investigation in respect of the complaint which the Commission did not consider while forming an opinion and directing investigation by the Director General. If the Director General investigates an information which the Commission did not consider in the first instance, while forming opinion with respect to existence of a prima facie case, such an act on his part shall be ultra vires his power under the Act and, therefore, clearly illegal. It is settled legal proposition that when the provisions of a Statute requires an act to be done in a particular manner, such an act can be done only in the prescribed manner and not otherwise. Since the Act requires the Director General to investigate only such information which was considered by the Commission, while forming its opinion with respect to

existence of a prima facie case, it cannot, of its own carry out investigation based upon an information which was not available to the Commission. It would be appropriate to note here that though MRTP Act, 1969 empowered the Director General to exercise *suo motu* power of investigation, the said power has been expressly denied to him under the Competition Act. In clause (5) of the State of Objects and Reasons for enacting the Competition Act, it is clearly stated that “the Director General would be able to act only if so directed by the Commission, but will not have any *suo motu* power for initiating investigation”. If the Director General, is directed by the Commission to cause an investigation to be made into information ‘X’ and he, besides investigating information ‘X’ also investigates information ‘Y’, which was not considered by the Commission, while directing investigation by him, that would amount to conferring *suo motu*, power of investigation upon the Director General which would clearly contravene the scheme of the Act, as far as investigation into complaint ‘Y’ is concerned.

In **Bhikhubhai Vithlabhai Patel vs. State of Gujarat** (2008) 4 SCC 144, Gujarat Town Planning and Urban Development Act, 1976, entitled the State Government to publish modification of the plan provided it was of the opinion that substantial modification in the draft plan were necessary. It was held that the State Government’s jurisdiction to make substantial modifications in the draft development was intertwined with the formation of its opinion that such substantial modifications are necessary in the said plan and without forming such an opinion, the State Government cannot publish the modifications considered necessary, along with notice inviting suggestions or objections. It was further held that such formation of opinion should reflect intense application of mind, with reference to the material available on record.

In **Commissioner of Wealth Tax vs. Ravi Cheloor** (1989) 178 ITR 640 (Ker), though the wealth tax assessment had been completed, the successor

Wealth Tax Officer not satisfied with the valuation of the assets, made a reference under Section 16A of the Act to the Valuation Officer for determining the value of the property. Section 16A of the said Act, to the extent it is relevant, provides that for the purpose of making an assessment under the Act, the Assessing Officer could refer the valuation of any asset to a Valuation Officer. It was held that the pendency of the assessment proceeding was a condition precedent for making a reference to the Valuation Officer under Section 16A of the Wealth Tax Act.

11. It is quite understandable if the Commission, on consideration of an information forms an opinion that there exists a prima facie contravention of Section 3 of the Act and the Director General, while investigating the said information, reports contravention of Section 4 or Section 3 as well as Section 4 of the Act. Such a report, in my opinion, will not be contrary to the provisions of the Act, since the information which is investigated by the Director General was considered by the Commission, before it formed an opinion in terms of sub-section (1) of Section 26 of the Act. If, however, the investigation by the Director General is based upon an altogether different information which the Commission did not consider, while forming its opinion with respect to existence of a prima facie case, his action would be contrary to the scheme of the Act and the powers conferred upon him.

As noted earlier, clause (4) of Regulation 18 requires the Director General to give report containing his findings on each of the allegations made in the information or the reference as the case may be. This is yet another indicator that the report of the Director General is to be confined to the allegations made in the information or the reference received by the Commission and he is not competent to travel outside the said information or reference.

12. It was contended by the learned counsel for the Commission that in terms of sub-section (8) of Section 26, the Commission would inquire further

into the matter and during such an inquiry, the petitioner would get ample opportunity to place its case before the Commission and satisfy it that no contravention of Section 4 of the Act is made out against it and, therefore, the Commission should not be precluded from considering the report of the Director General, to the extent he has reported contravention of the provisions of Section 4 of the Act. I, however, find no merit in this contention. Under the scheme of the Act, the enterprise against whom the information is given to the Commission is entitled to defend itself; firstly before the Director General, during the course of investigation by him and in case Director General is not satisfied and reports the contravention of the provisions of the Act, then before the Commission, during the course of inquiry by the Commission.

As noted earlier, clause (4) of Regulation 41 empowers the Director General to call for the parties to lead evidence by way of affidavit or oral evidence. Had the information, alleging contravention of the provisions of Section 4 of the Act by the petitioner been considered by the Commission for forming its opinion under sub-section (1) of Section 26 and the Director General was directed to cause an investigation to be made into the said information, the petitioner could have requested the Director General, in terms of clause (4) of Regulation 41 to permit it to lead evidence, which would satisfy the Director General that no contravention of the provisions of Section 4 was committed by it. Also, in such a case, the petitioner could have requested the Director General to permit it to cross-examine the informant and his witnesses with respect to the information alleging contravention of the provisions of Section 4 of the Act. Since the information provided to the Director General, during the course of investigation and alleging contravention of the provisions of Section 4 of the Act was not available to the Commission and consequently was not subject matter of the direction, issued by the Commission to the Director General, the petitioner had no occasion to make an application to the Director General under clause (4)

and/or clause (5) of Regulation 41. It is true that an opportunity to lead evidence as well as cross-examine the informant and his witnesses can be sought by the petitioner from the Commission if it holds a further inquiry in terms of sub-section (8) of Section 26, but, that by itself will not meet the requirement of law, since the petitioner was entitled to such an opportunity, firstly before the Director General and then, if felt necessary by it, before the Commission. Moreover, further inquiry by the Commission in terms of sub-section (8) of Section 26 is not mandatory and in a given case, the Commission may in its discretion proceed to pass an order in terms of Section 27 of the Act, without any further inquiry, if it is satisfied on the report of the Director General that there has been a contravention of any of the provisions of the Act. In such a case, the enterprise against whom a report of contravention of the provisions of the Act is submitted by the Director General, will get no opportunity to lead evidence and to cross-examine the witnesses of the opposite party, even before the Commission. In any case, it would be contrary to the scheme of the Act and ultra vires the powers of the Director General if he carries out investigation into an information which, in the first instance, was not considered by the Commission, while forming its opinion with respect to existence of a prima facie case of contravention of the provisions of the Act, by an enterprise.

In *Institute of Chartered Accountants vs. L.K. Ratna*, (1986) 4 SCC 537, the appellant before the Apex Court contended that since Section 22A of Chartered Accountants Act, 1949 provides an appeal to the High Court against an order of the Council imposing penalty and there was no limitation imposed on the scope of the appeal, any insufficiency in grant of hearing before the Council could be cured by resort to such appeal. Rejecting the contention, the Apex Court referred to the following observations made in Sir William Wade's work on "Administrative Law"^{5th} Edn.:

“If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial.”

The Hon’ble Supreme Court also referred the following observations made in *Leary v. National Union of Vehicle Builders* (1971) Ch 34, 39:

“If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.”

13. The learned counsel for the respondents has relied upon *Competition Commission of India vs. Steel Authority of India* (2010) 10 SCC 744, *Kingfisher Airlines Limited vs. Competition Commission of India*, W.P.(C) No. 1785 of 2009 of Bombay High Court, *South Asia LPG Company Private Limited vs. Competition Commission of India* W.P.(C) No. 4602/2013 of High Court of Delhi, *Pratibha Finvest P. Ltd. Vs. ITO Ward 14(3), New Delhi*, W.P.(C) No. 7538/2012 of High Court of Delhi.

In **Kingfisher Airlines Limited** (supra), Bombay High Court was examining the notices issued by the Commission in respect of an alliance

between Kingfisher Airlines Limited and Jet Airways (India) Ltd. On 17.10.2008, MRTTP Commission ordered an investigation into the said agreement. On 29.10.2008, the Director General issued a notice to Kingfisher Airlines Limited calling for certain information under Section 11 of the MRTTP Act. This was followed by exchange of letters between the Director General of Investigation and the petitioner. Respondent No. 3 in the petition, referring to newspaper reports in respect of the market shares and the strength of fleet etc. of the aforesaid airlines provided certain information to the Commission which formed an opinion that there existed a prima facie case and referred the matter to the Director General for investigation. Being aggrieved, the petitioners filed the aforesaid writ petition contending inter alia that since MRTTP Commission was already seized of the matter, the cognizance taken by the Commission was without jurisdiction. This was also the contention of the petitioners that Section 3 and 4 of the Act cannot have retrospective effect, since the Act contained penal provisions. CCI, however, contended that the petition was premature since only an enquiry had been ordered and no action had been taken against the petitioners. It was also submitted by the Commission that a final order can be passed by it only after the conclusion of the investigation and giving opportunities to the petitioners to present their case. Rejecting the writ petition, the High Court, inter alia, observed as under:-

“22. To us, it is clear from Section 19 that the Commission can act upon receipt of information and on a reference made to it by the Central or State Government or on its own motion. It is, therefore, clear that there has to be some information before the Commission about the alleged breaches of Sections 3 and 4. If the Commission receives an information, it is supposed under Section 19 to enquire into the complaint received. Under the Code of Criminal Procedure, a Police Officer is supposed to look into the

complaint and decide whether the information discloses a cognizable offence or not. If, upon reading the complaint, he finds that it does disclose a cognizable offence, he is bound to register the First Information Report and investigate into it. The word 'investigation' has been defined in the Criminal Procedure Code as follows:

“Investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.”

23. The investigation is only for the purpose of collection of evidence. The investigation starts only after there is a prima facie proof of commission of cognizable offence. The position of this Act appears to be almost identical. Section 19 clarifies as to on what count enquiry should be made and in what manner. For instance, subsection 6 says as to which factors need to be taken into consideration while determining the relevant geographic market. The enquiry is supposed to proceed bearing in mind those factors. If Section 26 is read with Section 19, it would be clear that the information received under Section 19 is to be placed before the Commission; and if the Commission finds a prima facie case, it can direct the investigation; and it has an option to drop the matter if there is no prima facie case. It is, therefore, not necessary that the investigation would be ordered in each and every case. Therefore, the information that is received can be treated as if it is an F.I.R. It will have to be found out by the Commission from that information whether there is any material in the said information which requires them to take cognizance of the complaint and then order an investigation. The investigation, the purpose of which, would be to collect evidence and would disclose if the group abused its dominant position. Therefore, it is clear that the investigation would reveal if there is sufficient evidence available to take further action. It is after the report of the Director General that the Commission proceeds to pass order

under Section 26(6) either to close the matter forthwith or under clause (7) may order further investigation. If the report discloses any breach, the Commission is supposed to enquire into such breaches. This enquiry report is again considered under Section 27 and then an action follows. It is, therefore, clear to us that the question as to whether there is a breach of provisions of Sections 3 and 4 is finally considered under Sections 19, 26 and 27(8). Sections 19 and 26(1) speak of existence of prima facie case only. Therefore, at the prima facie stage, it is never concluded whether there is breach or otherwise. Therefore, at preliminary stage, it is only to be seen if there is a reason to believe that there is a breach of Sections 3 and 4. The law is well settled that the court should not stifle the investigation at all, except for compelling reason or when F.I.R. does not disclose any offence at all. If the analogy is to be applied here it cannot be said that the information given by respondent no.3 does not disclose any breach nor can it be said that it is a case of lack of inherent jurisdiction to the Commission to investigate. It has a power to enquire and investigate into every complaint received under the Act, as is clear from the above provision.

The Supreme Court in a decision reported in 2007(13) SCC 165 (Sanaparedddy Maheedhar Seshagiri and anr. ..vs.. State of Andhra Pradesh and anr.) makes following observations-

“The High Court should be extremely cautious and slow to interfere with the investigation and/or prosecution except when it is convinced beyond any manner of doubt that FIR does not disclose commission of any offence or that the allegations contained in FIR do not constitute any cognizable offence or that the prosecution is barred by law or the High Court is convinced that it is necessary to interfere to prevent abuse of the process of the Court. In dealing with such cases, the High Court has to bear in mind that the judicial intervention at the threshold of the legal process initiated against a person accused

of committing offence is highly detrimental to the larger public and societal interest. The people and the society have a legitimate expectation that those committing offences either against an individual or the society are expeditiously brought to trial and, if found guilty, adequately punished. Therefore, while deciding a petition filed for quashing FIR or complaint or restraining the competent authority from investigating the allegations contained in FIR or complaint or for stalling the trial of the case, the High Court should be extremely careful and circumspect.

If the allegations contained in FIR or complaint disclose commission of some crime, then the High Court must keep its hands off and allow the investigating agency to complete the investigation without any fetter and also refrain from passing order which may impede the trial. The High Court should not go into the merits and demerits of the allegations imply because the petitioner alleges *malus animus* against the author of FIR or the complainant. The High Court must also refrain from making imaginary journey in the realm of possible harassment which may be caused to the petitioner on account of investigation of FIR or complaint. Such a course will result in miscarriage of justice and would encourage those accused of committing crimes to repeat the same.”

Although the decision is basically on criminal law, the ratio can be squarely applied. If the said ratio is to be applied, the enquiry / investigation cannot be stifled at all. We have not made reference to other decisions cited, since we find that the decisions referred to in this judgment were enough to arrive at a conclusion. We find that it was not necessary for the Commission to first find out the relevant geographic market, relevant products market or relevant market. Such things can be found or concluded upon investigation and not necessarily before that.

24. In the circumstances, we find that no writ as sought can be issued and petition should be dismissed. We, therefore, dismiss the petition with no order as to costs. Rule discharged.”

In my view, an investigation by the Director General, pursuant to the Commission forming an opinion that *prima facie* there exists a contravention of the provisions of the Act and directing investigation by the Director General, cannot be treated at par with the investigation by a police officer into a cognizable offence in exercise of the powers conferred upon him by the Code of Criminal Procedure, 1973. Section 156 of the Code of Criminal Procedure empowers any officer in charge of a police station to investigate any cognizable case, without the order of a Magistrate, wherever a cognizable offence is committed within the local area of jurisdiction. As regards non-cognizable offences, sub-section (2) of Section 155 of the Code of Criminal Procedure mandates that no police officer shall investigate a non-cognizable case, without the order of the Magistrate having power to try such case or commit the case for trial. On the other hand, the Competition Act gives no power, to carry out *suo motu* investigation to the Director General, irrespective of whether it be the contravention of the provisions of Section 3 or of Section 4 of the Act. Moreover, the Code of Criminal Procedure does not envisage application of the rule of *audi alteram partem* during the course of investigation by a police officer. There is no provision in the Code of Criminal Procedure for an accused to apply to the investigating officer to permit him to examine his witnesses. Under the scheme of the Code, a police officer investigating a criminal case cannot allow cross-examination of witness, during the course of investigation conducted by him. On the other hand, clause (4) of the Regulation 41 expressly permits the Director General to record evidence and the power conferred upon him includes the power to record evidence of the enterprise against whom the information is being

investigated by him. Unlike the provisions of the Code of Criminal Procedure, clause (5) of Regulation 41 empowers the Director General to allow cross-examination of a witness by the opposite party during the course of investigation conducted by him. Therefore, the scheme of investigation by a police officer, in terms of the provisions contained in the Code of Criminal Procedure and investigation by the Director General in terms of the Competition Act, are altogether different. In any case, nothing prevents the Commission from treating the evidence collected by the Director General as information under Section 19 of the Act and if on its consideration, the Commission forms an opinion that there exists a prima facie case showing contravention of the provisions of Section 4 of the Act by the petitioner, it would be well within the power of the Commission to direct the Director General to cause an investigation to be made into the said information.

If a police officer, while carrying out investigation into a cognizable offence, receives information or evidence relating to Commission of yet another offence, whether that be cognizable or non-cognizable, he is competent to carry out investigation into the said offence as well, the reason being that investigation in a cognizable case can be carried out without the order of the Magistrate and as provided in sub-section (4) of Section 155, where the case relates to two or more offences, of which at least one is cognizable, the case shall be deemed to be a cognizable one, notwithstanding that the other offences are non- cognizable. The Director General, on the other hand, does not have any *suo motu* power of investigation and, therefore, cannot be treated at par with a police officer, investigating a cognizable case.

In ***Pratibha Finvest P. Ltd. (supra)***, this Court interpreting the provisions of Section 147 of the Income-tax Act, inter alia, observed as under:-

“9. In the opinion of this Court, the law as it existed always was that if a valid notice under Section 147 was issued by the AO, the scope of scrutiny and final

assessment made in the reopening proceedings was not conditioned upon the material which impelled him to issue notice. To hold such a view would be to impinge on the concededly wide power conferred upon the Revenue in Section 147/148 and undermine its objective. Consequently, the appellant's contentions in this regard are rejected."

The reliance upon the aforesaid judgment, in my view, is wholly misplaced since notice under Section 147 of Income-tax Act is given by the same authority which undertakes the scrutiny and assessment, whereas under the scheme of the Act, the opinion is framed by one authority, whereas the investigation is conducted by another authority, in terms of the directions of the first authority.

In *South Asia LPG Company Private Limited* (supra), which is a judgment rendered by me. The issue involved was as to whether the Commission is required to give notice or hearing, to the person against whom an information is given or a reference is made, in terms of Section 19 of the Competition Act, 2002, before the Commission directs further investigation, in exercise of the powers conferred upon it by sub-section (7) of Section 26 of the Act. This judgment has no application to the issue involved in this case.

14. It was contended by the learned counsel for the respondent that since there is no provision in the Act for the Commission to quash the report of the Director General, the application filed by the petitioner seeking such a relief could not have been allowed by the Commission. The submission is correct to the extent that there is no power given to the Commission to quash or setting aside the report of the Director General, but at the same time, it is also an admitted position that the report of the Director General does not bind the Commission. Therefore, if the Director General carries out investigation into an information which was not considered by the Commission while forming opinion in terms of sub-section (1) of Section, 26, the Commission is entitled to either reject that part of the report which pertains to such an investigation

or it may in its discretion treat the said information as an information under Section 19 of the Act and if the Commission, on examining that part of the report, is of the opinion that there exists a prima facie case of contravention of the provisions of the Act, it has to direct the Director General to cause an investigation to be made into that opinion. In the case before this Court, admittedly, the information alleging abuse of its monopolistic position by the petitioner and thereby contravention of the provisions of Section 4 of the Act, was not considered by the Commission when it recorded a prima facie view that there existed a case to direct the Director General to cause an investigation into the matter. Therefore, the report of the Director General, to the extent he reported contravention of the provisions of Section 4 of the Act by the petitioner by abusing its dominant position as the manufacturer of Viscose Staple Fibre, cannot be forwarded to the parties in terms of sub-section (4) of Section 26 nor can the Commission hold further inquiry into it in terms of sub-section (8) of Section 26 or proceed to pass order on its basis in terms of Section 27 of the Act. The Commission may, however, is at liberty to treat the aforesaid part of the report of the Director General as information under Section 19 of the Act and proceed accordingly in terms of the procedure prescribed under Section 26 of the Act.

15. It is submitted in the written arguments filed by the respondent that the reference under Section 26(1) is an enabling provision and a *prima facie* opinion, which cannot be treated as binding on Director General or restrictive in nature, so as to clog the scope of investigation by him and the Director General may even give a report contrary to prima facie opinion. There is no quarrel with the proposition of law that the prima facie opinion recorded by the Commission does not bind the Director General which after investigation is at liberty to report that no contravention of the provisions of the Act is made out. That, however, does not enable the Director General to initiate investigation into the information which was not considered by the

Commission, while recording its prima facie opinion. As noted earlier, the Director General is at liberty to report contravention of Section 4 even if the prima facie opinion recording by the Commission makes out a case of contravention of Section 3, but this can be done only while investigating the information or reference which the Commission had considered while forming its prima facie case and not by entertaining and investigating an altogether different information during the course of investigation by the Director General.

16. It is also stated in the written submissions of the respondents that violations of provisions of Section 3 may also result in violation of Section 4 of the Act as well. In my view, what is material in this regard is as to what was the information which was considered by the Commission, while forming its opinion and not whether such an information constituted violation of the provisions of Section 3 or Section 4 of the Act.

17. It is submitted in the written submissions of the respondent that the proceedings before the Commission are akin to a departmental proceedings which culminate into a decision/order of the Commission after hearing the parties and that decision is appealable before the Competition Appellate Tribunal. The contention, in my view, is ill-conceived since. As noted earlier, the scheme of the Act and the regulations provide an opportunity to the enterprise against whom an information or a reference is received by the Commission to defend itself firstly before the Director General during the course of investigation and then before the Commission during the course of inquiry, if any, conducted by the Commission, whereas the petitioner before this Court got no opportunity to defend itself before the Director General as far as the information alleging contravention of the provisions of Section 4 of the Act is concerned.

18. For the reasons stated hereinabove, the writ petition is disposed of with the direction that the report of the Director General, to the extent he has

reported contravention of the provisions of Section 4 of the Act by the petitioner by misuse of its dominant position as a VSF manufacturer, shall not be subjected to the procedure prescribed in sub-section (8) of Section 26 nor shall the Commission be entitled to pass order on the said report, in terms of the provisions of Section 27 of the Act. The Commission, however, shall be entitled to treat the aforesaid part of the report of the Director General as an information in terms of Section 19 of the Act and proceed accordingly in terms of the provisions of the Act, if the Commission on consideration of the aforesaid part of the report of the Director General, is of the opinion that there exists a *prima facie* case of contravention of the provisions of Section 4 of the Act by the petitioner.

There shall be no orders as to costs.

DECEMBER 17, 2013

b'nesh/bg/rd

V.K. JAIN, J.