

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

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Date of decision: 3rd September, 2014

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LPA No. 857/2013

**SOUTH ASIA LPG COMPANY
PRIVATE LIMITED**

.... Appellant

Through: Mr. Amitabh Kumar with Ms. Divya
Chaturvedi and Mr. Sameer Agarwal,
Advs.

Versus

**COMPETITION COMMISSION OF INDIA
AND ORS.**

..... Respondents

Through: Mr. Rajeev Saxena Adv. for CCI.
Ms. Anuradha Mukherjee with Mr.
Abhijit Mittal, Advs. For R-3/EIPPL.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the judgment dated 2nd September, 2013 (as corrected on 3rd September, 2013) of the learned Single Judge of this Court of dismissal of W.P.(C) No.4602/2013 filed by the appellant. The said writ petition was filed, impugning the order dated 1st July, 2013 of the respondent no.1 Competition Commission of India (CCI) (passed in exercise

of powers under Section 26(7) of The Competition Act, 2002 and referring back the complaint / information filed by the respondent No.3 East India Petroleum Private Limited under Section 19(1) of the Act to the respondent no.2 Director General (DG), CCI for allowing the respondent no.3 / informant to cross examine the witnesses of the appellant) on the ground that the said order was passed without issuing notice to and without hearing the appellant. Summons issued to the witnesses of the appellant for cross examination, in pursuance to the said order of the CCI, were also impugned in the writ petition.

2. The learned Single Judge dismissed the writ petition holding that as per the judgment of the Supreme Court in *Competition Commission of India Vs. Steel Authority of India Limited* (2010) 10 SCC 744, no notice of hearing was required to be given and the appellant was not required to be heard by the respondent no.1 CCI before passing the order on 1st July, 2013.

3. Though this appeal came up first before this Court on 18th November, 2013 but was taken up for hearing on 4th March, 2014 when notice thereof was issued and the operation of the 'impugned order' was stayed. The respondent no.3 / informant on the next date of hearing i.e. 15th April, 2014

informed this Court that the appellant, while securing the interim order, had not brought to the notice of the Court that in the interregnum the cross examination etc. of the witnesses of the appellant in terms of the order dated 1st July, 2013 of the respondent no.1 CCI had already been carried out between 9th and 19th September, 2013 and that the appellant also, in CM No.19277/2013 filed along with this appeal, had categorically stated that it was not pressing for any stay of proceedings. In the face of this position, this Court on 15th April, 2014 vacated the interim order earlier granted on 4th March, 2014.

4. It was also the contention of the respondent no.3 / informant on 15th April, 2014 that since the cross examination ordered vide order dated 1st July, 2013 which was impugned in the writ petition had already been carried out, this appeal had become infructuous. The counsel for the appellant however opposed and the matter was posted for hearing on 21st August, 2014.

5. On 21st August, 2014, the counsel for the appellant informed that though the witnesses of the appellant had been cross examined by the respondent no.3 / informant in terms of the order dated 1st July, 2013 but the

respondent no.2 DG was yet to submit its report to the respondent no.1 CCI. The counsel further contended that since the Competition Act is still at its nascent stage, the issue as arises for consideration in this appeal be decided since it repeatedly arises before the respondent no.1 CCI. It was his further contention that the appeal cannot be said to have become infructuous because if the appellant succeeds and it is held that the appellant ought to have been heard before the respondent no.1 CCI, in exercise of powers under Section 26(7) referred back the matter to the respondent no.2 DG for allowing such cross examination, the entire proceedings conducted by the respondent no.2 DG thereafter would be non est and of no avail. Though we suggested to the counsel for the appellant that since, what was directed vide order dated 1st July, 2013 of the respondent no.1 CCI which is impugned in these proceedings has already happened, we can dispose of this appeal by observing that the appellant shall be entitled to raise the issue as raised in this appeal in the remedy if any taken by the appellant against the order of the respondent no.1 CCI on the report to be submitted by the respondent no.2 DG, if against the appellant, but the counsel for the appellant did not agree.

6. In the circumstances, we heard the counsels for the parties on the merits of the appeal also and reserved orders.

7. Having considered the matter, we are unable to hold the matter to have become infructuous so as to be able to dispose of this appeal on the said ground alone. There is merit in the contention of the counsel for the appellant that if indeed the appellant succeeds, what has happened in pursuance to the impugned order dated 1st July, 2013 would be non est; without the appellant agreeing to our suggestion aforesaid, the appeal cannot be dismissed as infructuous.

8. We have also considered whether the appellant is disentitled to be heard on the appeal itself on the ground for which the interim order was vacated as aforesaid. We are however unable to hold so also, firstly for the reason that the appellant has already been punished for the said lapse if any in as much as the interim order earlier granted was vacated and cannot be punished again therefor and secondly for the reason that the stay granted by this Court was only of the order of the learned Single Judge dismissing the writ petition of the appellant; this Court did not grant any interim order staying the proceedings being conducted by the respondent no.2 DG or the

proceedings before the respondent no.1 CCI. The counsel for the appellant in this regard has also contended that this Court, while issuing notice to the respondent no.3 / informant was so appalled by the order of the learned Single Judge that on its own granted the stay. Another fact which cannot be lost sight of is, that the counsel for the respondent no.1 CCI and the respondent no.2 DG was present before this Court on 4th March, 2014 when the interim order was granted.

9. That takes us to the merits of the appeal. The question entailed is purely legal, as to the interpretation particularly of Section 26 of the Act. The only facts necessary to appreciate the said legal question, are as under:-

- (a) The respondent no.3 / informant on 24th November, 2011 submitted information within the meaning of Section 19(1) of the Act to the respondent no.1 CCI, of the appellant having indulged in contravention of the provisions of Section 3(1) / 4(1) of the Act. The respondent no.1 CCI vide order dated 28th December, 2011, in exercise of powers under Section 26(1) of the Act, passed an order stating that on the basis of the information furnished by the respondent No.3/informant, there

existed a *prima facie* case against the appellant and accordingly directed investigation to be conducted by the respondent no.2 DG. Notice was also issued to the appellant, of the application of the respondent no.3 / informant under Section 33 of the Act for interim relief. The respondent no.2 DG also, in exercise of investigative powers under Section 41 and Section 36 (2) of the Act, sought certain information from the appellant.

- (b) The respondent no.1 CCI, vide order dated 8th February, 2012 dismissed the application of the respondent no.3 / informant for interim relief. The appellant, in the meanwhile submitted the information sought by the respondent no.2 DG.
- (c) The respondent no.2 DG submitted a report dated 3rd December, 2012 to the respondent no.1 CCI *inter alia* to the effect that the appellant was not found to be in contravention of Section 4(2) of the Act. A copy of the said report was ordered by the respondent no.1 CCI to be supplied to the respondent no.3 / informant. The respondent no.3 / informant filed an application before the respondent no.1 / CCI to cross examine the witnesses

whose evidence was recorded by the respondent no.2 DG during the investigation. The respondent no.1 CCI however vide order dated 12th February, 2013 asked the respondent no.3 / informant to specify the issues and areas of cross examination sought, by filing questions and interrogatories for the witnesses of the appellant and others. The respondent no.3 / informant so delivered the interrogatories for discovery and production of certain documents from the appellant and other witnesses examined by the respondent no.2 DG during investigation.

- (d) The respondent no.1 CCI vide impugned order dated 1st July, 2013 noted that the witnesses of the appellant examined by the respondent no.2 DG had given testimony in respect of several technical and safety concern aspects and the respondent no.3 / informant was not provided an opportunity to cross examine the said witnesses and therefore the testimonies of those witnesses and the contentions of the appellant regarding several aspects had gone unrebutted. The respondent no.1 CCI was of the opinion that the respondent no.2 DG should have allowed the respondent no.3 / informant to cross-examine the witnesses so

that a complete picture was there in respect of technical and safety concern aspects raised by the appellant in respect of certain matters. It was further observed that the cross examination would have brought out the genuineness of the concerns and would have also given an opportunity to the respondent no.3 / informant to show as to whether those concerns expressed by the appellant before the respondent no.2 DG and accepted by the respondent no.2 DG in the report, were real or false. The respondent no.1 CCI was further of the opinion that the respondent no.3 / informant should have got an opportunity to clear the air on other aspects and to test the veracity of the witnesses so as to bring out the truth.

The respondent no.1 CCI accordingly, in exercise of powers under Section 26(7) of the Act, referred the matter back to the respondent no.2 DG for allowing the respondent no.3 / informant to cross examine the witnesses of the appellant.

10. In accordance with the order dated 1st July, 2013, the respondent no.2 DG on 15th July, 2013 issued summons to the witnesses of the appellant for being cross examined by the respondent no.3 / informant.

11. The appellant then filed the writ petition from which this appeal arises, challenging the order dated 1st July, 2013 on the ground that the same had been passed without issuing notice to and without hearing the appellant.

12. For proper appreciation of the legal question which arises for consideration, it is apposite to set out herein below Section 19(1) and Section 26 in entirety, of the Act:-

“19. Inquiry into certain agreements and dominant position of enterprise - (1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

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

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

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 investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director General referred to in 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.”

13. The learned Single Judge dismissed the writ petition, finding / observing / holding:-

- (a) that neither Section 26(1) provides for any opportunity of hearing to the person against whom information in terms of Section 19 is received nor Section 26(7) provides for any such

hearing to such a person before further investigation is directed by the CCI;

- (b) that Section 26(5) also does not envisage any notice to the person against whom information is provided to the CCI, before the CCI considers the report of the DG recommending that there was no contravention of the provisions of the Act;
- (c) had the legislature intended inviting objections or suggestions even from the person against whom the complaint is made, Section 26(5), instead of using the word 'or' would have used the word 'and' between the words "...statutory authority...." and the words "...the parties concerned, as the case may be..." in Section 26(5);
- (d) incase investigation is ordered on receipt of a reference from the Central Government/State Government/Statutory Authority and the DG recommends that there is no contravention of provisions of the Act, CCI will have to invite objections or suggestions from the Central Government/State Government /Statutory Authority as the case may be before it takes a view on

such report; had the intention of the legislature been that in such a case, besides hearing the Central Government/State Government/ Statutory Authority which had made the reference under Section 19(1), the CCI should also hear the person against whom the reference is made, it would not have used the word 'or' and would have used the word 'and' in Section 26(5) as aforesaid;

- (e) therefore the contention of the appellant / writ petitioner that Section 26(5) envisages notice not only to the informant but also to the person against whom information is given or reference is made, cannot be accepted;
- (f) the definition of the expression 'party' in Regulation 2(1)(i) of The Competition Commission of India (General) Regulations, 2009 as including *inter alia* an information provider as well as an enterprises against whom any inquiry or proceeding is instituted, thus could not be used for the purpose of interpreting Section 26(5);

- (g) the Supreme Court in *Steel Authority of India Limited* supra has already held that at the stage of Section 26(1), no notice is required to be given to the person against whom information is received or reference is made;
- (h) that the argument of the appellant / writ petitioner on the basis of principles of natural justice could not be accepted because the statute does not mandate issuance of notice to the affected party before directing investigation to be made by the DG;
- (i) if the law does not mandate issuance of notice to the affected party before directing investigation to be made by the DG, there is no reason to imply such a notice before directing further investigation in exercise of powers under Section 26(7);
- (j) as far as the affected party is concerned, there is no difference between direction for investigation or direction for further investigation since any further investigation by the DG would only be in continuation of the investigation carried out earlier;
- (k) the order directing further investigation cannot prejudicially affect the person against whom information is provided or a

reference is made; an order of this nature does not visit the person against whom information is provided or a reference is made with any civil consequences nor does it impair any legal right of such a person; thus the principles of *audi alteram partem* would have no application at this stage; and,

- (1) Regulation 41(5) of the 2009 Regulations *supra* also empowers the CCI and the DG to direct evidence of a party to be led and if deem necessary, grant an opportunity to the other party to cross examine the person giving the evidence; the CCI vide order dated 1st July, 2013 had merely permitted the respondent no.3 / informant to cross examine the witnesses of the appellant; such cross examination can take place only if further investigation is directed by the CCI.

14. The contention of the counsel for the appellant before us is, that the language of Section 26(1), on the interpretation whereof the Supreme Court in *Steel Authority of India Limited* (*supra*) has held that the person against whom information is given or reference is made has no right to be heard, is materially different from the language of Section 26(7); while Section 26(1)

does not provide for any hearing to the person against whom information is received or reference is made, Section 26(7) expressly requires the CCI to, only after consideration of the objections or suggestions referred to in sub Section (5), if of the opinion that further investigation is called for, direct further investigation by the DG. It is further argued that Section 26(5) also expressly requires the CCI to invite objections or suggestions from “the parties concerned” if the report submitted by the respondent no.2 DG recommends that there is no contravention of the provisions of the Act. It is thus argued that the judgment of the learned Single Judge is against the language of the statute. Attention is also invited to paragraphs 23 and 71 of the judgment of the Supreme Court in *Steel Authority of India Limited* and it is argued that the Supreme Court in the said judgment has itself held that in contradistinction to Section 26(1), Section 26(7) requires CCI to invite objections and provide an opportunity of hearing. It is thus contended that the learned Single Judge has gone against the judgment of the Supreme Court.

15. We deem it appropriate to set out herein below, paras 23 and 71 of the judgment aforesaid of the Supreme Court:-

“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.

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 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 contradistinction 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, the Central Government, the 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 53-A(1)(a) in regard to the orders termed as appealable under that provision. Section 53-B 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.”

16. It is further argued by the counsel for the appellant that the learned Single Judge has also erred in holding that the appellant, from the order dated 1st July, 2013, is not visited with any civil consequences or that the same does not impair any legal right of the appellant. It is contended that since the appellant, in terms of the said order is subjected to further investigation, it is visited with civil consequences and its rights are impaired.

17. Per contra, the counsel for the respondent no.1 CCI and the respondent no.2 DG has contended that the reference in Section 26(5) to “the parties concerned” is only to the informant and not to the party against whom information is given. Reliance in this regard is placed on the proviso

to Section 26(1) of the Act. It is further argued that investigation is merely an administrative function of the respondent no.1 CCI.

18. Though Sections 26(5) and (7) on a bare reading appear to provide that if the investigation report of the DG is that there is no contravention, “objections” shall be invited by the CCI from “the parties concerned”, which would include the person/enterprise informed/referred against and that direction for further investigation shall be issued only “after consideration” (and which may include hearing) of the said objections, but on deeper consideration, Sections 26(5) & (7) cannot be so interpreted.

19. Infact we had, during the hearing repeatedly enquired from the counsel for the appellant whether not it would be illogical to hold that though while ordering investigation, no opportunity of hearing is required to be given to the person ordered to be investigated against, such a person is required to be heard before “further investigation” is ordered. The only answer of the counsel for the appellant was that the legislature itself having provided so, the CCI cannot go against the law of which it is the creation.

20. Though we can think of another answer, i.e. that though it may not be necessary to give an opportunity of hearing before the CCI forms a *prima facie* opinion and orders investigation but once the DG on investigation has found the information to be wrong and the person/enterprise informed/referred against of being not guilty of any contravention, such person, before further investigation has a right of hearing, but we find the Courts to have held otherwise.

21. The Supreme Court in *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh* (1999) 5 SCC 740, in the context of Section 173(8) of the Code of Criminal Procedure, 1973 (and which saves the power of the Magistrate to direct further investigation) held that the Court is not obliged to hear the accused before any such direction for further investigation is made and that casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all the potential accused, to be afforded with the opportunity of being heard and since the law does not require it, the Court need not be burdened with such an obligation.

The proposition of law which thus emerges is that an investigation report in favour of the accused does not vest the accused with a right of

hearing before the Court/authority, to which the investigation report is submitted, orders further investigation.

22. Per contra, it is also the settled legal position that before closing a case on the basis of investigation report of no case for proceeding further having been made out, issuance of notice and hearing the informant/complainant is necessary / mandatory. Reliance in this regard can be placed on ***Bhagwant Singh v. Commissioner of Police*** (1985) 2 SCC 537 laying down that in case the Magistrate, to whom an investigation report is forwarded under Section 173(2)(i) of the Cr.P.C., decides not to take cognizance of the offence and to drop the proceedings or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. The same view has been reiterated in ***Union Public Service Commission Vs. S. Papaiah*** (1997) 7 SCC 614, ***Gangadhar Janardan Mhatre Vs. State of Maharashtra*** (2004) 7 SCC 768, ***Sundeep Kumar Bafna Vs. State of Maharashtra*** AIR 2014 SC 1745 (where it was held that if the proceedings are likely to be quashed, then the complainant should be heard at that stage, rather than compelling him to assail the quashment by taking recourse to an

appeal) and by this Court in *Praveen Grover Vs. Central Bureau of Investigation* MANU/DE/8725/2007.

23. Reference in this regard can also be made to *Popular Muthiah Vs. State* (2006) 7 SCC 296 where the Supreme Court, while holding that the High Court in an appeal, before directing prosecution of a person though mentioned in the FIR but not charge-sheeted, should have heard such person, clarified that the judgment should not be read as laying down the law that the Magistrate, while directing further investigation or the Sessions Judge while exercising jurisdiction under Section 319 of the Cr.P.C. is required to hear the accused. It was held that the accused has no right to be heard at that stage and thus the question of hearing him at that stage does not arise. Similarly, in *Pritish Vs. State of Maharashtra* (2002) 1 SCC 253 even in relation to a proceeding under Section 340 of the Cr.P.C., it was held that a person complained against has no right to be heard in the inquiry, whether he should be tried for the offence or not but such a legal right is envisaged only when the Magistrate summons him – then he has a right to participate in the pre-trial inquiry and to satisfy the Magistrate that he is entitled to be discharged.

24. The position in law is thus quite clear. There is no right of the accused to be heard, before the Magistrate or the Sessions Judge directs further investigation, even where the investigation carried out has found him to be not guilty. What needs to be determined is, whether the language of Section 26 carves out an exception to the said general proposition of law.

25. The Supreme Court, in *Steel Authority of India Limited* (supra) does not appear to be of the said opinion,

- (a) by holding in para 10 of the judgment that the Competition Act and the Regulations framed thereunder indicate the legislative intent of dealing with the matters related to contravention of the Act expeditiously and even in a time-bound programme;
- (b) by holding in para 21 of the judgment that Section 19 does not suggest that any notice is required to be given to the affected party and thus the affected party cannot claim the right to notice or hearing;
- (c) by holding in para 31(1) of the judgment that the order by which the CCI forms a *prima facie* view and issues a direction to the DG for investigation would not be appealable;
- (d) by holding in para 31(2) of the judgment that no duty has been cast on the CCI to issue notice or grant hearing to the person against whom

information is given, at the stage of formation of opinion by the CCI in terms of Section 26(1) of the Act and issuing a direction to the DG to cause an investigation to be made in the matter;

- (e) by holding in para 71 of the judgment that Section 26(1) also does not require the CCI to issue notice to the party against whom information is given;
- (f) by holding in para 77 of the judgment that issuance of notice to a party at the initial stage of the proceeding, which is not determinative in nature and substance, can hardly be implied;
- (g) by holding in para 78 of the judgment that the scheme of the Competition Act 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 Section 26(1) of the Act;
- (h) by holding in para 79 of the judgment that it is difficult to state as an absolute proposition of law that at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice or that non-compliance therewith would always result

in violation of fundamental requirements vitiating the entire proceedings;

- (i) by holding in para 83 of the judgment that Section 26(1) clearly indicates exclusion of principles of natural justice, at least at the initial stages;
- (j) by holding in para 86 of the judgment that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself and that “natural justice” is a term which may have a different connotation and dimension depending upon the facts of the case;
- (k) by carving out a distinction in para 87 of the judgment between inquisitorial and adjudicatory functions;
- (l) by holding in para 91 of the judgment that jurisdiction of the CCI under Section 26(1) does not contemplate any adjudicatory function and the CCI is not expected to give notice to the informant or the affected parties and hear them at length before forming its opinion, as the function is of a very preliminary nature and in fact in common

parlance, it is a departmental function; at that stage CCI does not condemn any person and therefore application of *audi alteram partem* is not called for and that formation of a *prima facie* opinion departmentally (DG being one of the wings of the CCI) does not amount to an adjudicatory function but is merely of administrative nature and so, keeping the nature of function performed in terms of Section 26(1), the right of notice or hearing cannot be held to be contemplated under Section 26(1) of the Act; and,

- (m) by holding in para 134 of the judgment that the legislative intent in enacting Competition Act is that investigations under the provisions thereof should be concluded as expeditiously as possible.

26. The reasons given by the Supreme Court for holding that no notice or hearing is required to be given, to the person/enterprise informed/referred against, by the CCI before forming a *prima facie* opinion and directing investigation under Section 26(1) of the Act, apply also to the stage under Section 26(7) of the Act. The stage of Section 26(7) is also an “initial stage” which is not determinative in nature and substance; “further investigation” is also a pre-cognizance stage; issuance of notice to the person/enterprise informed/referred against, at that stage cannot be implied. Besides the

judgments cited above, reference can also be made to ***K. Chandrasekhar Vs. State of Kerala*** (1998) 5 SCC 223 in support of the proposition that there is no difference between ‘investigation’ and ‘further investigation’. The Supreme Court in the said judgement, relying on the dictionary meaning of "further" when used as an adjective, held 'further investigation' to be a continuation of the earlier investigation and not a fresh investigation or re-investigation to be started *ab initio*, wiping out the earlier investigation altogether. Secondly, just like Section 26(1) does not contemplate any adjudicatory function and the function of the CCI thereunder has been held to be of a preliminary / departmental / administrative nature with no person being condemned at that stage, similarly the function of the CCI under Section 26(7) insofar as of directing further investigation is concerned is also not adjudicatory and of a preliminary/department/administrative nature only, with the person/enterprise informed / referred against being not condemned at that stage also. We have already noticed above that ordering investigation against anyone does not amount to condemning that person/enterprise. The word ‘investigation’ has not been defined in the Act. However the Supreme Court in ***H.N. Rishbud v. State of Delhi*** AIR 1955 SC 196, dealing with the

definition of 'investigation' in the Code of Criminal Procedure, held that investigation generally consists of the following steps:

- i. proceeding to the spot;
- ii. ascertainment of the facts and circumstances of the case;
- iii. discovery of the suspected offender;
- iv. collection of evidence relating to commission of offence and which evidence may consist of examination of various persons including the accused and search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and,
- v. formation of the opinion as to whether on the material collected there is a case to place the accused for trial.

Even in *Steel Authority of India Limited* (supra), it was held that the power of investigation is inquisitorial in nature. 'Further investigation' cannot also be anything but inquisitorial. Thirdly, just like requiring giving of an opportunity of hearing to the person/enterprise informed/referred against at the stage of Section 26(1) was held by the Supreme Court to lead to delays, defeating the function to be performed by the CCI, similarly the giving of an opportunity of hearing to the person/enterprise informed/referred against at the stage of Section 26(7) would also lead to delays defeating the function to be

performed by the CCI. The stage of Section 26(7), is also not determinative in nature.

27. In fact this Court, applying the principles laid down by the Supreme Court in *Steel Authority of India Limited* (supra), in *DLF Ltd. Vs. Securities and Exchange Board of India* 186 (2012) DLT 145 and an appeal being LPA No.100/2012 to the Division Bench whereagainst was dismissed vide judgment dated 20th November, 2012 has held, (i) that since the Securities and Exchange Board of India Act, 1992 provides the mode of inquiring into the complaint of, first, investigations conducted prior to ordering investigation, second, investigation by the investigating authority and finally adjudication, the exercise of inquisitorial power to determine whether an investigation is to be conducted, in fact does not require hearing the affected parties; and, (ii) that at the stage of inquiry by the authority / body (in that case SEBI) of examining whether or not the facts disclosed the material for entertainment of a reasonable belief to cause an investigation which is an inquisitorial and not an adjudicatory exercise, no notice of hearing is required to be given to the party sought to be investigated against.

28. However, the Supreme Court in *Steel Authority of India Limited* and this Court in *DLF Ltd.* (supra) were concerned with Section 26(1) of the Competition Act and Section 11C(1) of the SEBI Act (and which are not *pari materia* to the provisions of the Competition Act) respectively, the said judgments thus cannot be said to be conclusive on the issue before us.

29. The ‘objections’ which are to be considered under Section 26(7) are the objections which the CCI is to invite under Section 26(5). Under Section 26(5), objections have to be invited from the “parties concerned”. The learned Single Judge in this regard has held the person/enterprise informed/referred against to be not a party concerned for the reason of the use of the word ‘or’ in Section 26(5) between the words "... statutory authority..." and the words "...the parties concerned...". We are entirely in agreement. If the legislature was of the view that the person/enterprise informed/referred against is also one of the ‘parties concerned’ within the meaning of Section 26(5), the legislature would have, in the case of Section 26(1) being initiated on a reference from Central Government/State Government/Statutory Authority, would have used the word “and” in place of “or” in Section 26(5) requiring the CCI to besides inviting objections from the Central Government/State Government/Statutory Authority, also

from the person/enterprise referred against. Not only so, the question of the person/enterprise informed/referred against having any ‘objection’ or ‘suggestion’ when the Report of the DG is in its favour i.e. of there being no contravention, does not arise. ‘Objection’ or ‘suggestion’ at that stage, can only be of the informant or the referring Government / Statutory Authority, inspite of whose information /reference of contravention of the Act, DG has found otherwise. Besides the said reason given by the learned Single Judge, as we have noticed above, under the general law, the accused has no right of hearing at that stage. Thus, the legislature, when used the words ‘parties concerned’ in Section 26(5) cannot be said to have meant the person/enterprise informed/referred against, which is in the position of an accused in the said investigation. The consideration under Section 26(7) thus, of the objections / suggestions has to be of the objections / suggestions of the informant / referring Government / Statutory Authority only and not of the person/enterprise informed/referred against. We would however be failing in our duty if do not mention that Section 26 as it stood prior to amendment w.e.f. 20.05.2009, in Sub-Section (5) thereof, provided for giving of an opportunity to the “complainant” to rebut the findings of the DG of there being no contravention. Similarly, Section 26(7) as it stood

prior to the said amendment, provided for hearing the complainant before further investigation. We wondered whether the amendment, substituting giving of notice and hearing to the ‘complainant’ with inviting objections/suggestions of the ‘parties concerned’ and consideration thereof was with the intent of including therein the person/enterprise informed/referred against also. In this regard, we perused The Competition (Amendment) Bill, 2007 (Bill No.70/2007), which led to the amendment with effect from 20th May, 2009. However, the Statement of Objects and Reasons given for the amendment does not list any such reason. It thus appears that the reason which prevailed with the legislature to so amend Section 26 was not to provide for notice or hearing to the person/enterprise informed/referred against, before directing further investigation. In the absence of any such reason having been given by the Legislature, we have to interpret the language of the statute as it stands post amendment and on which interpretation, we have concluded that ‘parties concerned’ would at the stage of investigation not include the person/enterprise informed/referred against. Our research has also disclosed introduction in the Lok Sabha of the Competition (Amendment) Bill, 2012 (Bill No.136 of 2012) which proposes to *inter alia* amend Section 26(7) and (8) of the Act but which proposed amendments

also, though not law till date, are not suggestive of the intent of the Legislature being otherwise than what has been interpreted by us.

30. The learned Single Judge has further held that the definition of ‘Party’ in Regulation 2(1)(i) of the 2009 Regulations as including an enterprise against whom an inquiry or proceeding is instituted, would not apply to Section 26(5). We may add that it is the settled position in law (see ***Jeevan Chandrabhan Idnani Vs. Divisional Commissioner, Konkan Bhavan*** (2012) 2 SCC 794) that the Rules/Regulations even if framed under the statute, cannot alter or vary the meaning of the statute itself, where it is unambiguous. A good discussion on the said aspect is also to be found in a decision of England and Wales High Court (Chancery Division) in ***BDW Trading Ltd. Vs. South Anglia Housing Ltd.*** MANU/UKCH/0234/2013 where, quoting Maxwell on interpretation of Statutes, it was inter alia held that Regulations made under a Statute provide a parliamentary or administrative *contemporanea expositio* of the statute but do not decide or control its meaning: to allow this would be to substitute the rule making authority for the judges as interpreters and would disregard the possibility that the regulation relied upon was misconceived or ultra vires.

31. Yet another facet which may be noticed is that Section 26(7), besides the expression “further investigation” also uses the expression “further inquiry” either by the DG or by the CCI itself. The Supreme Court, in *Steel Authority of India Limited* (supra) has held that ‘investigation’ is distinct from ‘inquiry’ inasmuch as investigation by the DG is only in terms of the directive of the CCI and it is only after the ‘investigation’ that the ‘inquiry’ commences and in which the CCI has to consider the report of the DG “as well as consider the objections & submissions” made by other party and it is the inquiry which continues till the final order is passed by the CCI. We find the CCI also in its order in *All India Tyre Dealers’ Federation Vs. Tyre Manufacturers* MANU/CO/0097/2012 to have so understood the difference between “investigation” and “inquiry”, with ‘inquiry’ leading to determination of rights of the parties and levy of penalty on those contravening the law, through adjudication or decision and in which principles of natural justice have to be complied with and ‘investigation’ as not conferring any rights and leading to no penalties. The Supreme Court in *Directorate of Enforcement Vs. Deepak Mahajan* (1994) 3 SCC 440 held that term “investigation” cannot be limited only to police investigation but

has a wider connotation and is flexible, so as to include *inter alia* investigation carried out under the direction of a Magistrate.

32. In our opinion, ‘investigation’ includes all proceedings for collection of evidence, to form an opinion whether any law has been contravened or not. Per contra, an ‘inquiry’ is akin to prosecution i.e. a proceeding to adjudicate after hearing the accused whether the opinion formed after investigation, of law having been contravened, is established or not. A Full Bench of the Bombay High Court also in ***Motilal Hirall Vs. Emperor*** MANU/MH/0314/1921 though in the context of Code of Criminal Procedure, has held that the word inquiry is used to indicate a judicial proceeding as distinguished from investigation. A Single Judge of the Allahabad High Court also in ***Gauri Shankar Sawhney Vs. State of U.P.*** MANU/UP/0972/2012 held that while distinguishing between inquiry and investigation it may be borne in mind that the object of inquiry is to determine the truth or falsity of certain facts in order to take further action thereon, while the object of an investigation is to collect evidence.

33. Before proceeding further, we may also notice that as per the scheme of the Act, the opinion/investigation report of the DG is not binding on the CCI. We find the CompAT also, in ***Gulf Oil Corporation Ltd. Vs.***

Competition Commission of India MANU/TA/0010/2013 to have taken the same view.

34. On the basis of the above discussion, in our view, the procedure to be followed after the Section 26(1) stage, is as under:-

(I) If the report of the DG referred to in Section 26(3) recommends that there is no contravention, the CCI is to invite objections either from the referring Government / Statutory Authority if the proceedings under Section 26(1) were commenced on such reference or from the informant if the proceedings under Section 26(1) were commenced on receipt of information and formation of a *prima facie* opinion thereon. [Section 26(5)]

(II) CCI on consideration of the aforesaid objections, may agree with the report of the DG and close the case (see para 24 of ***Steel Authority of India Limited***). [Section 26(6)]

(III) However if the CCI on the basis of the material collected by the DG and the objections, forms an opinion different from that of the DG, the nature of the proceedings changes from ‘investigation’ to adjudicatory and it is such proceeding which has been labelled by the Supreme Court in ***Steel Authority of India Limited*** (supra) as ‘inquiry’ and of which inquiry notice will have to be issued to the person/enterprise informed/referred against.

(IV) However CCI, if on the basis of the material collected by the DG and after consideration of the objections, is neither able to close the case nor able to proceed from investigative to the inquiry stage, and is of the opinion that there are lacunae /deficiencies in the report of the DG, may give directions for 'further investigation'. For issuing such directions, no hearing has to be given to the person/enterprise informed/referred against.

(V) A direction, under Section 26(7), of “further investigation”, within the meaning of (IV) above, is distinct from “causing further inquiry to be made in the matter or itself proceed with further inquiry....”. While at the time of ordering “further investigation”, CCI has not formed an opinion of the statute having been contravened, before “causing further inquiry” to be made, formation of opinion (as distinct from *prima facie* opinion under Section 26(1)) by the CCI of the statute having been contravened, is a must. It was so held by the Supreme Court in para 24 of the ***Steel Authority of India Limited*** by observing that if the CCI is of the opinion that there is contravention of any of the provisions of the Act, it may order further inquiry into the matter.

35. The order dated 1st July, 2013 of the CCI does not record any satisfaction having been reached or opinion having been formed by the CCI,

of contravention having been committed by the appellant. The same is indicative of the order dated 1st July, 2013 being merely an order of further investigation in continuation of which investigation the report of ‘no contravention’ was submitted by the DG, and not being an order of conducting inquiry after recording satisfaction, higher than the *prima facie* view under Section 26(1), of contravention having been committed.

36. As far as the reliance by the counsel for the appellant on Paras 23 and 71 of the judgment in *Steel Authority of India Limited* is concerned, the Supreme Court in the said judgment was not concerned with Section 26(7) of the Act and a stray observation, which otherwise goes against the grain of the judgment, cannot be relied upon. It was so held in *UOI Vs. Dhanwanti Devi* (1996) 6 SCC 44 and *Gangadhara Palo Vs. The Revenue Divisional Officer* (2011) 4 SCC 602.

37. The Supreme Court in *Steel Authority of India Limited*, for determining whether the stage of the proceeding is in the realm of investigation or adjudication, also applied the test of maintainability of appeal thereagainst as provided in Section 53A(1) of the Act. The said provision though provides for appeal against a direction/decision under

Section 26(2) and (6) i.e. the decision of the CCI on receipt of reference/information that there is no *prima facie* case and the decision of the CCI on consideration of the report of the DG of no contravention and the objections and suggestions invited thereon, of closure of the case, but not against directions under Section 26(7) for further investigation. For this reason also we are of the opinion that direction for further investigation under Section 26(7) is not in exercise of adjudicatory but of preliminary/departmental/administrative/inquisitorial functions.

38. We find that the same learned Single Judge who has authored the judgment impugned before us, has also dealt with the procedure to be followed by the CCI and the DG, in ***Grasim Industries Ltd. Vs. Competition Commission of India*** 206 (2014) DLT 42 and though the impugned judgment was cited before him but observed that the impugned judgment had no application to the issue involved in ***Grasim Industries Ltd.*** (supra). We however refrain from dealing with the judgment in ***Grasim Industries Ltd.*** since we find that LPA No. 137/2014 preferred thereagainst is pending consideration.

39. Before parting, we may record that the language of Section 26(4) to (7) as well as of Regulation 21 of the 2009 Regulations leaves much to be desired. However, it is the settled principle of law (see *Bhag Mal Vs. Ch. Parbhu Ram* (1985) 1 SCC 61, *Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam* (1989) 3 SCC 709, *Deepak Mahajan* (supra), *Surjit Singh Vs. Mahanagar Telephone Nigam Ltd* AIR 2008 SC 2226,) that where plain and literal interpretation of a statutory provision produces a manifestly absurd and unjust results, the Court may modify the language used or even do some violence to it so as to achieve the obvious intentions of the legislature and produce a rational construction and just result.

40. The counsel for the appellant has also argued that the CCI, in the order dated 1st July, 2013 has proceeded on the safety concerns, which have no relevance.

41. However, having held that the CCI is still at investigative stage, according to us the said argument is not available to the appellant at this stage. The Courts have always been reluctant to interfere at the investigation stage.

42. We therefore hold that the challenge by the appellant to the order dated 1st July, 2013 of the CCI on the ground of the same having been passed without giving any opportunity of hearing to the appellant, which is the enterprise informed against, has no merit. Resultantly, the appeal is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

SEPTEMBER 3, 2014

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