

GAHC010165582023



Reportable

THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

WA 281/2023

Dalmia Cement (Bharat) Ltd.
Office Situated At 11th And
12th Floor Hansalaya Building,
15 Barakhamba Road, New Delhi.
And Also At 4th Floor, Anil Plaza Ii,
Abc, Gs Road, Guwahati-781005, Assam
Rep. by Mrs. Purbali Bora The Authorised
Representative Of The Petitioner Company

..... Appellant

VERSUS

1:The Union Of India And 3 Ors.
Vide The Ministry Of Corporate Affairs.
A Wing, Shastri Bhawan, Rajendra Prasad
Road, New Delhi-01, India

2:The Competition Commission Of India
9th Floor, Office Block-1, Kidwai Nagar(East)
New Delhi 110023

3:Director General
Competition Commission Of India, B- Wing
Hudco Vishala, 14 Bhikaji Cama Place
New Delhi-110066

4:Oil And Natural Gas Corporation Limited

Deen Dayal Urja Bhawan 5 Nelso Mandela
Marg Vasant Kunj, New Delhi- 110070, India

..... Respondents

BEFORE
HON'BLE THE CHIEF JUSTICE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant	: Dr. Ashok Saraf, Sr. Counsel Mr. N.N. Dutta, Advocate Mr. P.K. Bora, Advocate
Advocate for the Respondents	: Mr. T.J. Mahanta, Sr. Counsel Ms. K. Phukan, R-1 Mr. Dhruvad Das, R-2 & 3 Mr. B. Choudhury, R-4, SC
Date of Hearing	: 28.08.2023
Date of Judgment	: 19.10.2023

JUDGMENT & ORDER (CAV)

(S.P. Khaund, J)

1. This intra-court writ appeal is preferred against the judgment and final order dated 28.06.2023 passed by the learned Single Judge in connection with Writ Petition (Civil) 76/2022. The appellant in this case is Dalmia Cement (Bharat) Limited. The Union of India [Ministry of Corporate Affairs], the Competition Commission of India, Director General of Competition Commission of India and Oil & Natural Gas Corporation Limited [ONGC for short] are arrayed as Respondent Nos. 1, 2, 3 and 4 respectively, and will hereinafter also be referred to as respondent Nos. 1, 2, 3 and 4, for brevity.

2. Brief facts of this case are that an information u/s 19[1][a] of the

Competition Commission Act, 2002 (the Competition Act for short) was filed before the respondent No. 2 by the respondent No. 4 [ONGC] on 31.07.2020 alleging cartelisation during the bidding process of four tenders floated by ONGC for the purchase of Oil Well Cement [hereinafter referred to as OWC] in the years 2013, 2015, 2017 and 2018. The aforesaid information was registered and numbered as Case No. 35/2020 against Shree Digvijay Cement Co. Ltd, Dalmia Cement Bharat Ltd (appellant herein) and India Cements Ltd as opposite parties No, 1, 2 and 3. The respondent No. 2, thereafter vide order dated 18.11.2020 in the purported exercise of powers u/s 26(1) of the Act formed a prima facie opinion that the appellant and some other cement manufacturing companies rigged through collusion /cartelisation four tenders for the supply of OWC to ONGC for the aforementioned years and fixed prices and allocated various consignees amongst themselves. It was observed by the respondent No. 2 that the appellant and some other cement manufacturing companies have prima facie violated provisions of Sections 3[3][a], 3[3][b], 3[3][c] and 3[3][d] read with Section 3[1] of the Act. The Respondent No. 2 (also referred to as the CCI or the Commission for brevity) vide order dated 18.11.2020 u/s 26 of the Act directed the respondent No. 3 to investigate into the matter and submit report within a period of 60 days from the date of receipt of the order. It was also further directed that if during investigation, involvement of any other entities

could be unearthed then the respondent No. 2 shall also ascertain the role, if any of the person/persons who are in charge of the affairs of such entities or with whose consent or connivance, the alleged conduct of the opposite-parties took place. It is stated that a year after the order u/s 26[1] of the Act was passed, the respondent No. 3 issued notice dated 08.11.2021 u/s 36[2] read with Section 41 of the Act directing the appellant to furnish information as was enumerated in the notice. The copy of the order dated 18.11.2020 was not annexed with the notice. The appellants were directed to furnish the information by 19.11.2021.

3. It is contended that the appellant was unaware of the investigation initiated under the direction of respondent No. 2 vide order dated 18.11.2020 till the receipt of notice dated 08.11.2021. Thereafter, an application for inspection of record was filed by the appellant on 15.11.2021 and the appellant was allowed to examine the records vide order dated 24.11.2021. Although the appellant company filed an application for certified copies of records on 25.11.2021, it was not provided with the full set of documents filed by the ONGC [Respondent No.4] as certain excerpts of opinion as well as minutes of the meeting of the tender committee were treated as confidential. After a second request for documents the appellant received an oral communication from the office of the respondent No. 2, CCI, on 28.11.2021 denying appellant's

request, on the grounds of confidentiality.

4. On perusal of the documents received on 30.11.2021 the appellant realised that the notice dated 08.11.2021 does not satisfy the standard of legality and is liable to be set aside, being beyond the period of limitation and for indulging in a roving and fishing enquiry. The appellant then filed an application under Article 226 of the Constitution of India for issuance of writ of mandamus/certiorari or any other appropriate writ which was registered as Writ Petition (Civil) No. 76/2022.

5. It is averred that certain crucial documents relied by the respondent No. 2 before passing the impugned order dated 18.11.2020 were not provided to the appellant despite repeated requests, which is against the principles of natural justice.

6. The appellant is aggrieved by the order of the learned Single Judge dated 28.06.2023 in WP(C) 76/2022, wherein, it was held that the impugned order dated 18.11.2020 passed by the Competition Commission of India was a well reasoned order. The operation of the notice dated 8.11.2021 was not interfered with, in the interest of facilitating a proper inquiry by the Director General (also referred to as Respondent No. 3 or DG).

It is the fervent case of the appellant before the learned Single Judge that, if

the order dated 18.11.2020 passed under section 26[1] of the Act is not stayed restraining the respondent Nos. 2 and 3 from proceeding further with the investigation, the reputation and commercial prospects of the company will be tarnished. The effect of an order of investigation under section 26[1] of the Act being very drastic inasmuch as an investigation against the public limited company poses a risk of credit breach and may adversely affect its competitive position in the business world even though the company may be completely exonerated later.

7. The learned counsel for the respondents have submitted that the impugned order dated 18.11.2020 passed by the Competition Commission of India does not suffer from illegality. It is also submitted on behalf of the respondents that the order dated 28.06.2023 in WP(C) 76/2022 does not suffer from any infirmity. The order of the Commission, CCI dated 18.11.2020 under Section 26[1] of the Act in case No. 35/2020 inter alia reflects that the respondent No. 4 floated four tenders in the years 2013, 2015, 2017 and 2018 inviting bids for purchasing OWC for consignees located at different geographical locations, but Shree Digvijay Cement Co. Limited, Dalmia Cement [appellant] and M/s India Cements Limited acted in concert and quoted either identical rates or cosmetically different rates and allocated the market amongst themselves, in contravention to Section 3 of the Act. After scrutinising whether

the technical conditions to submit quotations were fulfilled, the ONGC, respondent No. 4, could unearth collusion between Shree Digvijay Cement and Dalmia Cement in relation to tender No. 3 (ZNIVC13001) dated 04.07.2013.

7.1 In 2015 ONGC invited bids for tender No. 5 (ZNIAC15001) and both Shree Digvijay Cement and Dalmia Cement submitted identical bids with the base price of Rs. 8,000/- per unit for all destinations. Two foreign bidders – Schlumberger and Classic Oil Field had also qualified for submission of the price bids. In order to escape scrutiny and avoid price negotiations with ONGC, Shree Digvijay Cement quoted lower rates for the Silchar and Jorhat consignee destinations and Dalmia Cement (appellant-herein) in turn quoted lower rates for Bokaro and Sonarpur consignees, thereby securing equal work distribution. Likewise in the year 2017 similar nature of concerted agreement to quote exactly the same price even though they belong to different geographical areas have been alleged by the ONGC against appellant/Dalmia Cement and Shree Digvijay Cement.

7.2 It was also found that the ONGC has alleged that to arrive at the same FOR rate of Rs. 8282.70 Shree Digvijay as well as Dalmia cement had indulged in backward calculation to arrive at the same basic price. Thus it is manifest that both the bidders had formed a cartel, thereby defeating the very purpose of public tendering by resorting to unfair trade practices. When India Cements was

qualified for tender No. 7, collusion between Shree Digvijay Cement, Dalmia Cement and India Cements emerged on scrutiny by ONGC indicative of some kind of concert or agreement amongst the same cement companies to share the market amongst themselves by way of geographical allocation.

7.3. It was also alleged by the ONGC that it floated tender No. 8 [ZNINC18001] dated 31.08.2018 and collusion between the three cement companies as bidders could be detected. A comparative statement of bids submitted by Shree Digvijay Cement, Dalmia Cement and India Cements in all the aforementioned four tenders depicted their parallel rate offering as submitted by ONGC. The respondent No.4/ONGC has alleged that based on the price bids submitted by the domestic bidders in response to tender Nos. 3, 5, 7 and 8, it became clear that the appellant/Dalmia Cement, Shree Digvijay and India Cements had colluded in submitting identical base rates, ex-works rate and FOR rate/unit qua most of the consignees destination and the OPs (Dalmia, Digvijay and India Cements) had a tacit understanding in escalating and inflating the rates together. Although Shree Digvijay, Dalmia and India cements are located at different geographical locations in India, yet the rates quoted by all the three bidders are identical/nearly identical in most tenders which cannot be a matter of coincidence. The three cement companies have endeavoured to geographically trifurcate the market amongst themselves. Similar rates are

quoted for Mumbai Port, Chennai Port and Kolkata Port by the three cement companies. The respondent No. 4/ONGC who is dependent on OWC is bereft of any alternative and hence is compelled to pay a higher price due to the unholy nexus between the three cement companies. ONGC has also submitted before the Commission that a letter dated 26.08.2019 was issued by the Vigilance Division of the Ministry of Petroleum and Natural Gas, Govt. of India to the Chief Vigilance Officer, advising to refer the matter of unfair trade practices by the bidders to the Competition Commission of India. ONGC/respondent No.4 had also sought confidentiality over the third party documents that were submitted by the bidders against the tenders invited by the ONGC.

8. Heard Dr. Ashok Saraf, learned Senior Counsel for the appellant assisted by learned counsel Mr. N.N. Dutta and Mr. P.K. Bora. Also heard Mr. T.J. Mahanta, learned Senior Counsel for respondent Nos. 2 & 3 assisted by learned counsel Mr. D. Das and heard learned counsel Ms. K. Phukan, for respondent No. 1 and Mr. B. Choudhury, Standing Counsel, ONGC for respondent No. 4.

Arguments: the appellant

9. It is contented by the appellant that a writ petition under Article 226 of the Constitution of India, challenging the investigation order is maintainable in view of the Judgment dated 05.12.2018 passed by the Hon'ble Supreme Court

of India in **Competition Commission of India Vs. Bharti Airtel** reported in **(2019) 2 SCC 521**.

10. It is averred that the only ground on which the respondent No. 2 formed an opinion of a prima facie case for investigation by the Director General, respondent No. 3, was based on the allegation that the writ petitioner/appellant conspired and formed a cartel with other manufacturers while making quotation of identical rates in the tender process acting in contravention to Section 3(3) (a), 3(3)(b) and 3(3)(c) read with Section 3(2) of the Act of 2002, without appreciating the fact that there were a handful of suppliers of the OWC in India and a mere price parallelism cannot be a ground to record a prima facie satisfaction of malpractices or anti-competitive conduct. Reliance in support of the above contention was placed on the Supreme Court Judgment in the case of **Rajasthan Cylinders and Containers Limited Vs. Union of India and Anr.**, reported in **(2020) 16 SCC 615**, wherein, the Hon'ble Supreme Court held that mere price parallelism cannot be a ground for prima-facie conclusion of collusive agreement of bid rigging and thus, the respondent no. 2 ought not to have issued the direction under Section 26(1) of the Act, as there were no grounds for directing such an investigation. The petitioner/appellant had portrayed a strong prima facie case for grant of an interim order but the decision of Hon'ble the Supreme Court in **Rajasthan Cylinders and**

Containers Limited (supra) has been misconstrued as the learned Single Judge held that this decision was not applicable in the present case, because the judgment and order in **Rajasthan cylinder and Containers Limited** (supra) was passed after a final order whereas, the instant case is at its initial stage. It is contended that the ratio of the decision is binding and not the stage at which the case is pending.

11. Learned Senior Counsel Dr. Saraf laid stress in his argument that the information of the instant case was filed by the respondent no. 4 in the year 2022 and anti competitive practice was alleged against the appellant for the years 2013, 2015, 2017 and 2018. No cogent reasons were assigned justifying the delay in filing the information under section 19 (1)(a) of the Act. By Section 14 of the Competition [Amendment] Act, 2023, two provisos have been inserted in sub-section [1] of Section 19 of the Competition Act, 2002. As per the first proviso to sub-section [1] of Section 19, the Commission shall not entertain an Information or a reference unless it is filed within 3 [three] years from the date on which the cause of action has arisen. As per the second proviso to sub-section [1] of Section 19, an Information or a reference may be entertained after the period specified in the first proviso if the Commission is satisfied that sufficient cause is shown for not filing the information or the reference within such period after recording its reasons for condoning such delay.

11.1. The learned Senior Counsel for the appellant has submitted that in Case no. 34/2020 and other connected cases, the Competition Commission of India observed that the lease deed referred to in matters dates back to as early as July, 2010, October 2010 and June 2014 and the informant had offered no justifiable reasons for approaching the CCI at this belated stage.

12. It is also contended that the respondent no. 3, DG transgressed the investigation order and conducted a roving and fishing enquiry. The appellant is also aggrieved because it was not provided with certain vital documents which were relied upon by the respondent no. 4 in support of its information before the respondent No. 2. The appellant was denied the copies of these documents retained by the respondents leading to deprivation of opportunity to offer an explanation. Thus, the respondents acted against principles of natural justice. The appellant had a strong prima facie case with the balance of convenience tilting in its favour. The appellant will indeed suffer irreparable loss if the operation of the notice dated 18.11.2021 is not stayed. Such an order will adversely affect the appellant's competitive position and reputation in the business world, even though, it may be exonerated later from such charges of anti competitive conduct. The appellant has thus prayed for an order to set aside/stay the order dated 18.11.2020 passed by the respondent No. 2/Competition Commission of India (CCI).

Arguments: The respondents

13. Mr. T.J. Mahanta Senior Advocate argued on behalf of the respondents that the writ petition against the order under section 26(1) of the Act was filed at a premature stage. In the event respondent no. 2 decides to proceed further after receipt of a report from the respondent no. 3 with findings that there was contravention of any of the provisions of the Act, the appellant can avail the remedy of appeal under Section 53A of the Act. It has further been submitted by the respondents' counsel that the information under Section 19(1) of the Act of 2002 more particularly Annexure-1 of writ petition was forwarded by the respondent No. 4 against the opposite parties i.e.

O.P. No. 1 Shree Digvijay Cement,

O.P. No. 2 Dalmia Cement, and

O.P. No. 3 M/s India Cements Limited.

Thereafter, notices were issued against the opposite parties and the impugned order dated 18.11.2020 was passed against the opposite party Nos. 1, 2 (Appellant) and 3.

14. The learned counsel for the respondents have supported the decision of the Commission, CCI. It is also submitted on behalf of the respondents that the

order dated 28.06.2023 in connection with WP(C) 76/2022 has been justly passed. It is submitted that an investigation on the information/complaint of the respondent no. 4 ought not to be interjected at the initial stage. It is submitted that in terms of the penultimate order dated 18.11.2020, under Section 26 of the Act, the CCI directed the respondent no. 3, DG to investigate into the matter and notice was issued on 08.11.2021 under Section 36(2) read with Section 41 of the Act directing the appellant to furnish information as enumerated in the notice. The aforementioned orders are not barred by limitation as per the newly inserted sub-section 1 of Section 19 of the Competition Act of 2002. The Commission, in connection with Case No. 35/2020 considered the comparative statements provided by the ONGC-respondent No. 4. The spreadsheet of the comparative statements with the breakdown of the quoted rates, has been meticulously dealt with by the Commission. It is easily deducible from the comparative statements of the tender process of Shree Digvijay Cement, Dalmia Cement (Appellant) and India Cement that the companies have quoted identical, ex-work rates, FOR rates/units etc., relating to four tenders of 2013, 2015, 2017 and 2018. After a meticulous scrutiny of the comparative statements and bidding prices along with the information provided by the ONGC-respondent no. 4, it was decided that the appellant, along with India Cement and Digvijay Cement have acted in violation of the provisions of Section 3 of the Act and the

DG was directed to investigate into the role of the appellants, Digvijay Cement and India Cement as well as the other persons or officers responsible for indulging in anti competitive conduct.

Findings of the Commission

15. It would be apt to reiterate that the commission meticulously scrutinised the comparative statements provided by the ONGC-respondent no. 4 with respect to the four tender processes of the years 2013, 2015, 2017 and 2018 for OWC. The ONGC had provided a detailed statement in a tabulated form along with the information. The prominent statements of the aforementioned four tenders which depict identical and similar base rates, ex-works rate, FOR rate/ unit etc were culled out for the purposes of conciseness.

15.1. The Commission, CCI considered the information (dated 31.07.2020) in its ordinary meeting held on 27.10.2020. The CCI has also inter-alia observed that the cement market is subjugated by few players and is thus prone to cartelisation. The OWC is a special kind of cement, used to fill the space between the well walls and steel lining tubes and the cements sets slowly to give the slurry time to reach a larger depth of the oil well and develop strength for stability in high temperature. As there are few suppliers of OWC in the market, it becomes easier for the cement companies to coordinate their

conduct. The Commission had analysed the facts and allegations presented in the information.

15.2 It was observed by the Commission that the comparative prices [Base rates as well as FOR rates] quoted by Shree Digvijay and Dalmia Cements in the impugned Tender No. 3 (2013) appears to be the same for the locations covered by the Mumbai Port, Chennai Port and Kolkata Port except Kolkata MBA. It was also decided by the Commission, CCI that the comparative prices relating to tender No. 5 [2015] reveals that Shree Digvijay Cement and Appellant/Dalmia Cement submitted identical bids. The Commission also noted that two foreign bidders Schlumberger and Classic Oil Field had also qualified for the price bid submission for this tender and the Classic Oil Field was the L1 bidder for Mumbai and Chennai. Due to urgency, the Classic Oil Filed was disqualified to deliver the consignment for Mumbai and Chennai despite being the L1 bidder. Moreover, the appellant along with Digvijay and Dalmia Cement through representations asked for BIS certification of international bidders.

15.3 The question of cartelisation was also raised by Classic Oil Field and also by Tender Committee relating to Tender No. 5. After a detailed deliberation, the Commission held that Tender No. 5 is indicative of some sort of understanding between Digvijay and Dalmia Cement [appellant]. It was also

held by the Commission that price fixing was observed between both the cement companies in relation to Tender No. 5.

15.4 In relation to Tender No. 8, it was held that the cement companies Shree Digvijay, Dalmia and India Cements submitted identical ex-works price bids of Rs. 7350/- qua all consignees which does not appear to be a mere coincidence. On evaluation, it was found that an international bidder, namely, Bell Weather was the L1 bidder from Mumbai and Chennai whereas the above three cement companies were L1 bidder from Kolkata where the bid was evaluated on the basis of ex-works price of domestic bidder and FY price of foreign bidder. It was observed by the Commission that with relation to Tender No. 8, the cement company trifurcated for market amongst themselves and quoted suitable rates for different regions and different posts.

16. The Commission formed an opinion that :-

"36. In view of the foregoing, the Commission prima facie notes that the aforementioned 4 impugned tenders were rigged through collusion/cartelization among the OPs as stated above, who fixed the prices and allocated various consignees among them, thus prima facie appear to be in contravention of provision of Sections 3[3][a], 3[3][b], 3[3][c], and 3[3][d], read with Section 3[1] of the Act.

37. In view of the foregoing, the Commission is of the opinion that there exists prima facie case which requires investigation by the DG, to determine whether the alleged anti-competitive conduct has resulted in contravention of the provision of Section 3 of the Act."

17. The Commission then directed the Director General to cause an

investigation to be made into the matter under the provisions of Section 26[1] of the Act and to submit report within a period of 60 days from receipt of the direction. With respect to violation of the provisions of Section 3 of the Act, the Director General/respondent no. 3 was also directed to investigate into the role of the persons/officers who were in charge of and responsible for the conduct of the activities of such entities, who may be found to have indulged in anti-competitive conduct at the time the alleged contravention was committed as well as persons/officers in whose consent or connivance the alleged contradiction was committed, in terms of the Section 48 of the Act.

Consideration of submission

18. We have given a thoughtful consideration to the submissions made at the Bar. It has been aappositely held by the learned Single Judge that the decision of Hon'ble the Supreme Court in **Rajasthan Cylinders and Containers Limited (supra)** was rendered on appeals filed against orders passed by the Competition Appellate Tribunal, whereby the Competition Appellate Tribunal had upheld the findings of the CCI that the appellant/suppliers of liquefied petroleum gas (LPG) cylinders to the IOCL had indulged in cartelization, thereby influencing and rigging the prices, thus violating the provisions of Section 3(3) (d) of the Act. The CCI had already passed the final order holding that the

appellants were guilty of contravention of Section 3(3)(d) and Section 3(3)(a) of the Act and imposed penalties in the Form of fines under Section 27 of the Act. Several affected parties preferred statutory appeals before the Competition Appellate Tribunal who, by its judgment upheld the findings of the CCI. Thus, the Supreme Court Judgment in the case of **Rajasthan Cylinders and Containers Limited (supra)** was rendered after final orders had been passed whereas, the appellant is before this Court at a premature stage of proceeding and it was thereby held by the learned Single Judge that the observations made in **Rajasthan Cylinders and Containers Limited (supra)** were not directly applicable to the facts and circumstances to this case.

19. It could be deciphered from the order of the CCI dated 18.11.2020 in connection with Case No. 35/2020 and the order of the learned Single Judge dated 28.06.2023 in connection with WP(C) 76/2022 that this case is at the premature stage. The information submitted by the respondent no. 4 under Sections 19(1)(a) of the Act, 2002 was taken into consideration by the CCI. The information was relating to cartelization and rigging of four tenders of 2013, 2015, 2017 and 2018 by the appellant along with two other cement companies and a direction for investigation was ordered by the CCI to unearth if the cement companies including the appellants had acted in contravention to section 3(3)(a) 3(3)(c) 3(3)(d) read with Section 3(1) of the Act. The Director

General (DG) was directed to cause an investigation under the provision of Section 26(1) of the Act. It is true that notices were issued after almost a year i.e. on 08.11.2021. Aggrieved by the order dated 18.11.2020 and the notice dated 08.11.2021, the appellant preferred the writ petition being WP(C) 76/2022. As the operation of the notice dated 08.11.2021 was not interfered with by the learned Single Bench, the appellant is before this Court. The appellant is speculating the ramifications of the investigation by the DG under Section 26(1) of the Act. It is submitted by the appellant that the company's reputation is at stake. It is submitted that if the companies' reputation is marred, it could adversely impact its future business prospect.

20. The ONGC-respondent no. 4 had forwarded all the comparative statements of the pricing bids and the tender processes pertaining to the four tenders of 2013, 2015, 2017 and 2018. The figures tabulated relating to the bidding process of the four tenders have been scrutinized by the CCI. These figures were also elaborately discussed and dealt with by the learned Single Judge while passing the order dated 28.06.2023 in connection with WP(C) 76/2022. The appellant is silent about these facts and figures.

21. Apart from offering a bald denial, the appellant has failed to refute these statements at this preliminary stage. Interference into the merits of the case

without specific denial by the appellant is not warranted at the initial stage. In case the appellant's company is exonerated from the allegation of rigging and cartelization, it can regain uphold its reputation.

22. The complaint/information and the case no. 35/2020 initiated on the information by the ONGC-respondent no. 4 does not appear to be barred by limitation as contended by the appellant. It does not appear that the Commission, CCI had conducted a roving and fishing enquiry and has transgressed its jurisdiction. The notice under Section 41 read with Section 36(2) of the competition Act dated 08.11.2021, more particularly, Annexure(C) of the writ petition has been impugned. A scrutiny of the notice reflects the nature of the investigation ordered by the CCI. The format of the notice however reflects that to cause the investigation certain information has been solicited by the CCI from the appellant. At this juncture, it cannot be held that the respondent no. 3 has gone beyond the scope of the impugned order dated 18.11.2020 and has conducted a roving and fishing enquiry.

23. The appellant is also aggrieved that the full set of documents filed by the respondent no. 4 were not provided to the appellant. An application was filed by the appellant on 15.11.2021 to examine the records. Although, the appellant filed an application for certified copies of the records on 25.11.2021, they were

not provided certain documents. It is alleged that the respondent no. 2, CCI relied on these documents before passing the impugned order dated 18.11.2020 and as these documents were not provided to the appellant, the CCI acted against the principles of natural justice. This contentions of the appellant holds no water. The order of the CCI dated 18.11.2020 clearly reflects on what grounds investigation was initiated under Section 26(1) of the Competition Act. Moreover, it is true that at this premature stage, when notice dated 08.11.2021 has been issued, an opinion cannot be formed that such a notice does not satisfy the standards of legality and that the notice is issued in furtherance of a roving and fishing enquiry. At this juncture, the operation of the notice cannot be stayed as the appellant is apprehending that he will be placed in a disadvantageous position and his reputation will be tarnished. It has been opined by the CCI and has also been held by the learned Single Judge that a prima facie case necessitating investigation exists. It would not be justified to stay the operation of the notice dated 08.11.2021.

24. The appellant has relied on the decision of Hon'ble the Supreme Court of India in **Competition Commission of India Vs. Bharti Airtel Limited and Ors. (Supra)** wherein, it has also been observed that:-

"97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these

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

98. *Once we hold that the order under Section 26(1) of the Competition Act is administrative in nature and further that it was merely a prima facie opinion directing the Director General to carry the investigation, the High Court would not be competent to adjudge the validity of such an order on merits. The observations of the High Court giving findings on merits, therefore, may not be appropriate."*

25. Reverting back to the case at hand, it is discernable from the impugned order of the CCI dated 18.11.2021 in case No. 35/2020 that an opinion was formed by the CCI on the basis of the information received from the respondent no.4 – ONGC, after the documents provided by the ONGC were taken into

consideration to express that in no uncertain terms the CCI is of the view that a prima facie exists, requiring issuance of direction for investigation to the DG. The learned Single Judge was therefore reluctant to stay the operation of the notice. In the light of the decision of Hon'ble the Supreme Court of India in the case of **Competition Commission of India Vs. Bharti Airtel Limited and Ors. (Supra)**, this Court is reluctant to adjudge the validity of such an order on merits. However, it is hereby provided that the copies of the complete set of documents relied upon by the CCI which the appellant has been allowed to inspect and excluding the documents for which privilege is claimed shall forthwith be provided to the appellant so as to give a proper opportunity of defence to the appellant in the subsequent proceedings.

26. In the wake of the foregoing discussions, the appeal is hereby dismissed as this appeal is bereft of merits with the above observation.

27. No order as to cost(S).

JUDGE

CHIEF JUSTICE