

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.03.2016

Date of Reserving the Order	Date of Pronouncing the Order
09.03.2016	29.03.2016

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P.No.7233 of 2016
&
W.M.P.Nos.6428 & 6429 of 2016

Chettinad International Coal
Terminal Private Limited,
Rep., by its Director,
5th Floor, Rani Seethai Hall,
#603, Anna Salai,
Chennai - 600 006.

.... Petitioner

Vs

1.The Competition Commission of India,
Rep., by its Registrar,
B Wing, HUDCO Vishala,
14, Bikhaji Cama Place,
New Delhi - 110 066.

2.Tamilnadu Power Producers Association,
No.6, Sardar Patel Road,
Guindy, Chennai - 600 032.

3.Kamarajar Port Limited,
No.23, Rajaji Salai,
Chennai - 600 001.

.... Respondents

Prayer :- Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records in case No.73 of 2015, on the file of the first respondent and quash the impugned order dated 04.01.2016, passed by the respondent No.1 under Section 26(1) of the Competition Act, 2002.

For petitioner .. Mr.P.S.Raman Senior counsel for
Mr.M.Suresh Kumar

For Respondents .. Mr.G.Rajagopalan ASGI
Assisted by
Mr.P.Mahadevan SCGSC for R1
Mr.Vinodkumar for R2
Mr.M.Ravindran Sr. Counsel for
Mr.Krishna Ravindran for R3

O R D E R

The petitioner operates a coal handling terminal at the third respondent Port, Kamarajar Port Limited. The petitioner was established as a special purpose vehicle by a consortium and was selected to create a facility of common user coal terminal at the third respondent Port on Built, Operate and Transfer (BOT) basis.

2. The petitioner entered into a licence agreement with the third respondent Port on 14.09.2006, for establishing the common user coal terminal, with an investment of Rs.350 crores in building and commissioning the terminal with a capacity of 8MMTPA. It commenced business operations from 11.03.2011. The promoters of the third respondent Port are the Government of India, Ministry of Shipping and Chennai Port Trust (ChPT) with a share holding of 67.7% and 33.33% respectively.

3. The second respondent is a registered association of power producers in Tamil Nadu, formed during 2004. The members of the second respondent who are thermal power plants using coal as their main input have located their plants in and around Chennai and coal, which is obtained both from domestic and international sources, is transferred from the Ports to the power plants through road transport.

3(a). The second respondent filed an information before the first respondent, Competition Commission of India, under Section 19(1)(a) of the Competition Act, 2002, (hereinafter referred to as the 'Act') against the petitioner to enquire into the alleged abusive practices of the petitioner that violate the provision of Sections 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b)(i) and 4(2)(d) of the Act; determine the tariff set up by the petitioner, consequent upon the closure of the coal handling facility at ChPT, alleging that it amounts to an imposition of unfair prices in abuse of its dominant position; to determine the charges for coordination and liasoning services; alleged to

have been imposed by the petitioner through its proxy/agents being abusive and extortionate charge; to make a reference to the TAMP, in terms of Section 21A of the Act; to direct the third respondent to appoint a regulator in terms of the Licence Agreement with the petitioner to examine and approve the prices periodically revised/fixed by the petitioner till such time, a second common user coal berth at the third respondent Port becomes operational; to direct the third respondent to hasten the process of creation of the second common user coal berth at Kamarajar Port; and to direct the petitioner to not further increase its tariff during the pendency of the proceedings before the Commission and to impose a transparency obligation on the petitioner.

4. (i) The gist of the information furnished by the second respondent to the Commission was that its members used to source their coal through the ChPT, however, due to an order passed by a Hon'ble Division Bench of this Court on 11.05.2011, handling of coal at ChPT was stopped with effect from 01.10.2011, on account of the adverse impact on environment caused by coal handling activities in Chennai, as a result of which coal importers had no other option, but to import coal through the petitioner located in the third respondent Port, which had become operational from 11.03.2011. It was stated that during the period from March 2011 to September 2011 both the first respondent and the ChPT were operational and buyers had a choice to use the facility of either of them and during that period, the charge levied by the petitioner was Rs.145/- to Rs.180/- per MT and the charges levied by ChPT was Rs.148/- to Rs.153/- Per MT. However, after import of coal through ChPT was stopped, the petitioner assumed position of dominance and drastically increased its charges from Rs.180/- Per MT to Rs.300/- Per MT from October 2011. It was stated that the coal handling facilities at Krishnapatnam and Karaikal Ports were not feasible, due to distance factors and therefore, the petitioner became the only common user coal terminal and hence, dominant in the relevant market of provision of common user coal terminal services in and around Kamarajar Port, extending upto a point beyond which the total cost of transportation to an alternate port is higher. Thus, it was stated that the petitioner abused its dominant position by imposing unregulated charges by charging for co-ordination and liasoning services in an unfair manner, by supplying lesser coal than the agreed quantity and by unfairly escalating the charges. Referring to clause 13 of the Licence Agreement between the petitioner and the third respondent, it was stated that the petitioner is free to fix and collect charges from the users for the provisions of the facilities, subject to the approval by the Regulatory Authority, which was not done by the third respondent nor the State Government to regulate/approve the tariff charged by the petitioner. It was emphasised that due to such liberty granted

to the petitioner, the third respondent also stands to gain, as it gets minimum annual guaranteed revenue for 30 years of commercial operation or a revenue share of 52.33% of the gross revenue, whichever is higher and therefore, higher gross revenue of the petitioner means higher revenue for the third respondent.

(ii) The second respondent further stated that the petitioner requires the users to pay a part of the charges termed as charges for coordination and liasoning services to M/s.Breeze Enterprises Private Limited (hereinafter referred to as 'BEPL') alleging that it is condition precedent for availing the services of the petitioner despite the fact that such charges do not form part of the "published tariff" of the third respondent. It was stated that inspite of oral and written representations in this regard, the third respondent did not take cognizance of the matter, but merely hosted a trade notice on its website, advising the importers/exporters/agents operating in the Kamarajar Port not to pay any other charges, apart from the published tariff. It was alleged that due to shortage of the quantum of coal supplied by the petitioner, the power plants were facing difficulties; frequent increase in the charges and imposition of unfair conditions by the petitioner has lead to escalation of costs, which cannot be transferred to the customers with whom the members of the second respondent have entered into long term agreements.

5. Broadly for the above reasons, the second respondent requested the commission to look into the alleged abusive practices of the petitioner owing to its dominant position in the relevant market with the closure of coal terminal at ChPT and prayed that the third respondent be directed to appoint a regulator to examine and approve the prices fixed by the petitioner and to hasten the process of creating the second common user coal terminal facility at the third respondent port. The second respondent also prayed for an interim relief. On notice from the Commission, the petitioner and the third respondent filed their replies and the Commission heard the parties in its ordinary meeting dated 01.12.2015.

6. The petitioner contended that the second respondent has conceded various facts including the challenge made before the Hon'ble Supreme Court to the order passed by a Division Bench of this Court dated 11.05.2011, dealing with the same allegations and the Hon'ble Supreme Court had disposed of the Special Leave Petition by order dated 04.11.2015, with a direction to the Empowered Committee appointed by it by its order dated 02.04.2012 to evaluate the proposal submitted by the ChPT along with objections of the other parties on it and the Committee thereafter to formulate its conclusions whether the proposals submitted by the ChPT, is just and proper and whether pollution could be curtailed as claimed by them. It was contended that

the allegations regarding monopoly, excessive pricing and loss of coal as mentioned in the information to the Commission were included in the challenge before the Hon'ble Supreme Court and the petition has already been disposed of. With regard to the allegation of abuse of dominance by way of opportunistic pricing, it was stated to be baseless, as facilities were available within a distance of 130/300kms at Krishnapatnam Port and Karaikal Port respectively and the members of the second respondent are availing the services of these Ports. The price comparison made by the second respondent between the ChPT and the petitioner was stated to be untenable, as the facility available at ChPT was a manual facility, outdated, compared to the state of art facility available with the petitioner established at a huge cost and the facility being fully automated, saves time and cost for its customers. The jurisdiction of the Commission to determine price was challenged stating that it cannot issue directions sought for by the second respondent, can neither determine price nor can it direct any authority to interfere in the market determined prices, where the applicable statute does not require the tariff to be fixed by any regulator. Broadly on the above grounds, the petitioner prayed for dismissal of the information furnished by the second respondent to the Commission.

7. The third respondent in their submissions stated that it condemns payment made by any third party operating in the third respondent Port in excess of the tariff which has been published. Further, the allegation that the tariff rate was revised from Rs.180/- Per MT to Rs.300/- Per MT by October, 2011, was denied by stating that even after the order passed by this Court forbearing the coal handling at Chennai Port, the tariff was maintained at Rs.160/- from 4th, March, 2011 to 5th January 2012, as per the tariff intimation of the third respondent and the revision of tariff to Rs.300/- Per MT was done only in February 2014. It was further stated that the third respondent operates on a "landlord model" providing basic infrastructure and management of resources while the rest of the operations are to be carried out by the BOT operator. That there are six terminals catering to different substances of which three are dedicated coal terminals, two exclusively earmarked for TANGEDCO and the third developed and operated by the petitioner. The third respondent further stated that the petitioner has invested Rs.350 crores for establishing the facilities with fully automated equipment etc and for this reason, the petitioner is granted freedom to set the rate and user charges for the provision of project facilities, berth higher charges, cargo handling charges and other charges for cargo handling facilities. The facilities available at Krishnapatnam and Karaikal are used by many power producers and therefore, it cannot be said that the third respondent is operating independently of competitive forces prevailing in the

relevant market. The third respondent sought to justify the revision of tariff to Rs.300/- due to rise in demand rather than any abuse of dominant position. With regard to payment to BEPL, it was submitted that the said payment is without the authorisation or knowledge of the third respondent and the third respondent advised the importers/exporters/agents operating at its Ports not to pay more than the notified tariff to BOT operators and also published a trade notice to the said effect.

8. After hearing the parties, the Commission by order dated 04.01.2016, held that prima facie, the petitioner appears to be abusing its dominant position in contravention of provision of Section 4 of the Act and accordingly, directed the Director General (DG) under Section 26(1) of the Act, to investigate the matter and to submit a report within a period of 60 days from the date of receipt of the order. It was further observed that during the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties, who may have indulged in the said contravention and in case of contravention, DG shall also investigate the role of the persons, who at the time when such the contravention who were in charge or responsible for the conduct of the business of the contravening entity/entities. It was made clear that nothing stated in the order shall tantamount to an expression of final opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observation made in the order. This order passed by the Commission under Section 26(1) of the Act, dated 04.01.2016, is impugned in this Writ Petition.

9. Mr.P.S.Raman, learned Senior counsel appearing for the petitioner referred to the various provisions of the Act including the definition of "relevant market" as defined under Section 2(r) of the Act and submitted that the members of the second respondent association are using the facilities at Krishnapattinam and Karaikal Ports and this being an important factor ought to have been considered by the Commission to assess dominant position. It is submitted that the petitioner had issued circular calling upon all the customers to come to them directly, as they are in a position to provide all services and they had taken a clear stand in their reply before the Commission stating that the allegation of excess pricing is false, as the price for liasoning and coordination for malafide reasons has been falsely included in the price charged by the petitioner for the services and the receipts filed along with information, makes it clear that the companies offering such services have no connection with the petitioner. It was further submitted that neither does the petitioner offer liasoning and coordination services as part of coal handling nor does it compel its customer in any manner to take such services from any particular agency and customers are independent and free to take

such services, if they deem fit from any of the several such agencies offering their services in the relevant market. Therefore, it was submitted that the information given by the second respondent was liable to be thrown out for being false and frivolous. Further, it is submitted that the petitioner is not a free market player, as the rates are determined by the fourth respondent and in this regard, the shareholding pattern of the fourth respondent was referred to. To impress upon this Court that the fourth respondent is a Government organisation and this ought to have been taken note of by the Commission in the light of Section 19(4)(g) of the Act.

10. Further, by referring to the dissent note made by one of the members of the Commission, the learned counsel would submit that the reasons given by the dissenting member is just and proper and the same has clearly appreciated the facts as raised by the petitioner, which the Commission failed to take into consideration before directing investigation. It is submitted that the second respondent failed to disclose the information that the petitioner is paying 52% of its revenue to the fourth respondent, whereas it is only 3% in Krishnapattinam. Referring to the observations made by the Commission in paragraph 25 of its order, it is submitted that without considering the factual position, the Commission erroneously treated the petitioner as dominant in the market and the Commission did not take into consideration the cost of transportation by road, which is a very relevant factor. In this background, it is submitted that the observations made by the Commission in paragraph 30 of the order is not tenable. An alternate submission was made stating that even assuming the petitioner had knowledge about the collection made by the third party, the Commission should have endeavoured to go into the aspect as to whether mere knowledge would amount to abuse of dominant position and to examine this aspect, the Commission ought to have impleaded the BEPL as a party to the proceedings and heard them in the matter. Therefore, it is submitted that in the absence of any material, Section 4(2)(d) of the Act, would not stand attracted. It is therefore, submitted that the matter requires to be reconsidered by the Commission for which purpose, this Court may remand the matter to the Commission to reconsider on the above contentions.

11. Mr.G.Rajagopalan, learned Additional Solicitor General of India appearing for the Commission submitted that at this stage of the matter, the Commission cannot take any stand on the factual aspect and his role is to place before this Court, the legal position and to submit that the finding of the Commission in the impugned order is only a prima facie finding and no civil consequences arise on account of ordering investigation and a prima facie finding is not an appealable order under the Act. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Competition Commission of

India vs. SAIL, (2010) 10 SCC 744. It is further submitted that all factual issues pointed out by the petitioner are matters for investigation and no adverse orders have been passed by the Commission and no person could state that he should not be investigated, especially when Section 2(1) of the Act define a 'person' to include any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956. Further, it is pointed out that 52% of the amount, which is paid to BEPL does not go to the third respondent Port. On the above submissions, it was contended that the Writ Petition is not maintainable and liable to be dismissed.

12. Mr.M.Ravindran, learned Senior counsel appearing for the third respondent submitted that the order of the Commission is not tenable and out come of non-application of mind, as the information furnished by the second respondent was merely based on surmises. It is submitted that the fourth respondent is a regulatory authority and it has permitted the BOT operator to operate the terminal and the Writ Petitioner is not the only handler and there is no dominant position for the third respondent, as there are two other ports namely, Krishnapattinam and Karaikal which are close by. Further, it is submitted that only 30% of the third respondent Port and the remaining 90% use the facility at Krishnapattinam. The learned counsel elaborately referred to certain portions of the reply filed by the petitioner before the Commission to show that only 30% of the companies, who import coal operate through the third respondent Port.

13. Drawing the attention of this Court to a tabulated statement contained in paragraph 19 of the reply filed by the third respondent before the Commission, it is submitted that the tariff details have been clearly notified and the petitioner has not exploited the position after the coal handling facility at ChPT was banned. Further, it is stressed that the tariff charged as mentioned in the tabulated statement in paragraph 19 of the reply, would show that the rates are lesser than Krishnapattinam and Karaikal and its comparable to rates, which was prevailing at ChPT in contrast with the higher rates at Bombay and Gujarat. It is further submitted that out of the tariff, 52.524% of the revenue goes to the Government. It is submitted that if the second respondent had a grievance, they ought to have lodged a complaint to the third respondent and should not have approached the Commission. In this regard, reference was made to the trade notice, which was issued by the third respondent notifying the tariff and informing the users of the Port not to pay anything more than the tariff which has been notified. It is further submitted that the tariff was raised to Rs.300/- on 07.02.2014, but the complaint was lodged only in August 2014 and even now the third respondent is ready to

enquire into the matter and find out, though they had earlier conducted such an exercise obtained Auditor's report and found no illegality. Further, it is submitted that the third respondent has no control over the service providers engaged by the importers and they have no role to play and the order directing investigation is unwarranted.

14. Mr.Vinod Kumar, learned counsel for the second respondent/informant submitted that though an objection was raised by the petitioner at the first instance that the coram of the members of the Commission requires a Judicial member, such plea is incorrect, as Section 8 of the Act does not mandate the presence of the Judicial member in the meetings of the Commission. In this regard, reference was made to Section 22 of the Act, which deals with the 'Meeting of the Commission'. The learned counsel elaborately referred to the reasons assigned by the Commission for forming a prima facie opinion and submitted that the argument of the petitioner and the third respondent is as if, the impugned order is a final order when it is only a prima facie finding recorded by the Commission to direct investigation. The learned counsel has drawn the attention of this Court to Section 26 of the Act and after elaborately referring to the various sub-sections, under Section 26, it is submitted that the impugned order is an order passed under Section 26(1) and it is not an appealable order. Reference was also made to the Competition Commission of India (General) Regulations, 2009, and in particular, Regulation Nos.16, 18, 20, 21, 35, 41(1), 41(2), 41(5), 42, 45 and 46. The learned counsel referred to paragraphs 24 to 27 of the impugned order, as regards the prima facie opinion recorded by the Commission with regard to "relevant market" and "dominant position". In support of his contention, the learned counsel referred to the decision in the case of Aamir Khan productions Private Ltd., & Anr., vs. UOI & Ors., reported in 2010 SCC Online Bombay 1226 and Kingfisher Airlines Ltd & Anr., vs. Competition Commission of India & Ors., reported in (2010) 4 Company Law Journal 557 (Bombay).

15. Heard the learned counsels appearing for the parties and perused the materials placed on record.

16. When this Writ Petition was listed before this Court on 03.03.2016, the learned Senior counsel appearing for the petitioner raised a preliminary objection stating that the Commission which passed the impugned order consisted of six members one of whom was the Chairperson and the coram did not consist of a Judicial member and therefore, the impugned order is without jurisdiction.

17. The learned Additional Solicitor General of India and learned counsel appearing for the second respondent raised a preliminary objection stating that the impugned order is only a prima facie view of the Commission taken under Section 26(1) of the Act and the Writ Petition would not be maintainable against such prima facie finding.

18. That apart, this Court raised a query that if a Judicial member in the rank of a former Judge of the High Court is required to preside over the meeting of the Commission, whether the Writ Petition is required to be heard by the Hon'ble Division Bench. Therefore, this Court framed three preliminary issues for consideration as to whether a judicial member is required to be part of the coram; whether the challenge to a preliminary finding is maintainable by way of Writ Petition and if the Commission is to be headed by a Former Judge of the High Court, whether the matter requires to be heard by the Division Bench.

19. In the opening remarks, the learned Senior counsel appearing for the petitioner stressed upon the issue relating to Coram, but when the matter was taken up for hearing, there appears to be no serious contest on the issue. Thus, this issue has virtually become academic. Nevertheless, it would be worthwhile to take note of Section 8 of the Act, which deals with 'Composition of Commission', which reads as follows:-

8(1) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

(3) The Chairperson and other Members shall be whole-time Members.]

The clause seeks to substitute section 8 of the Competition Act, 2002, relating to composition of Competition Commission of India.

The new clause provides that the Commission shall consist of a Chairperson and not less than two and not more than six other Members instead of

ten Members as provided for under the existing provisions of section 8, to be appointed by the Central Government. It also proposes to remove from eligibility requirement that the person who has been or is qualified to be a Judge of a High Court, and to omit the special knowledge of, and professional experience of administration or in any other matter from the qualifications for appointment as Chairperson or any other Member.

20. In terms of sub-section 2 of Section 8, as substituted by Act 39 of 2007, with effect from 12.10.2007, the Chairperson and every other member of the Commission shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission and the Chairperson and other Members shall be whole-time Members. This substitution which was brought about by Act 39/2007, removed from the eligibility requirement that the person, who has been or is qualified to be a Judge of a High Court, and to omit the special knowledge of, and professional experience of administration or in any other matter from the qualifications for appointment as Chairperson or any other Member. Thus, the statute, does not prescribe that the Chairperson should be a Former Judge of a High Court. In such circumstances, the contention raised by the petitioner that the Commission should have been headed by a Former Judge of the High Court and therefore, the impugned order is without jurisdiction is a plea to be rejected. Consequently, the matter does not require to be heard by a Hon'ble Division Bench of this Court and a Single Bench would be entitled to hear the Writ Petition.

21. The other issue which framed was regarding the maintainability of challenge to the impugned order. This submission essentially was on the ground that the impugned order is only a prima facie opinion recorded by the Commission under Section 26(1), does not result in any civil consequences and under the scheme of the Act, the order is not appealable and therefore, the Writ Petition should not be entertained. This submission by the learned counsel for the respondents 1 and 2 cannot be stated to canvass a contention that a Writ Petition is not maintainable as against an order passed by the Commission. There can be no such general embargo as facts of the each case has to be gone into, as essentially a 'Writ' remedy under Article 226 of Constitution of India is an extra-ordinary power vested with the High Courts to examine correctness of orders passed by forums, subordinate to it. It is true that by a long-line of decisions, the power of judicial review in these matters

have been circumscribed and by now, they have been clearly defined. Therefore, the argument of the respondents 1 and 2 regarding the maintainability of the Writ Petition should not be misunderstood to mean that no 'Writ' is maintainable, but could be argued that against the preliminary finding/opinion of the Commission, no "Writ" could be entertained, as it is only a prima facie finding and not a final order and does not result in civil consequences.

22. Having steered clear of this position, let us proceed to examine the arguments placed before the Court. The necessity to go into the factual issues would arise, if this Court is not convinced with the plea that the impugned order is only a prima facie conclusion and not a final order and does not result in any civil consequences and requires no interference at this stage. The necessity to venture into facts, consider the bonafides of the plea as elaborately argued by the learned Senior counsels for the petitioner and the third respondent, would depend upon the finding to be rendered on the scope of the review of the impugned order.

23. The Hon'ble Supreme Court in the case of SAIL (supra), pointed out that the main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition were stated to be three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law. The Act was aimed at preventing practices having adverse effect on competition, to protect the interest of consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto. Under the provisions of the Act, the following jurisdictions are vested with the Commission namely, inquisitorial, investigative, regulatory, adjudicatory and to a limited extent advisory jurisdiction. Thus, as explained by the Hon'ble Supreme Court, the three main elements intended to be controlled by implementation of the Act, namely, anti-competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition. In the said decision, SAIL (supra), was aggrieved by an order passed by the Commission forming an opinion that prima facie case existed for investigation by the DG and an appeal was filed to the Tribunal as against such order and one of the question which arose was whether the appeal was maintainable. The Tribunal in its order among other things held that giving reasons is essential element

of administration of justice, a right to reason is, therefore, an indispensable part of sound system of judicial review and the Commission was directed to give reasons, while passing any order, direction or taking any decision. While examining the correctness of the order of the Tribunal, the Hon'ble Supreme Court examined the scheme of the Act in general and pointed out as hereunder:-

21.....When such information is received, the Commission is expected to satisfy itself and express its opinion that a prima facie case exists, from the record produced before it and then to pass a direction to the Director General to cause an investigation to be made into the matter. This direction, normally, could be issued by the Commission with or without assistance from other quarters including experts of eminence. The provisions of Section 19 do not suggest that any notice is required to be given to the informant, affected party or any other person at that stage. Such parties cannot claim the right to notice or hearing but it is always open to the Commission to call any 'such person', for rendering assistance or produce such records, as the Commission may consider appropriate. (emphasis supplied)

22. The Commission, wherever, is of the opinion that no prima facie case exists justifying issuance of a direction under Section 26(1) of the Act, can close the case and send a copy of that order to the Central Government, State Government, Statutory Authority or the parties concerned in terms of Section 26(2) of the Act. It may be noticed that this course of action can be adopted by the Commission in cases of receipt of reference from sources other than of its own knowledge and without calling for the report from Director General.

24. In order to examine the merit or otherwise the contention raised by the respective parties, the Hon'ble Supreme Court formulated six points for determination of which point Nos. 1, 2 & 5, would be relevant for the case on hand, which are:-

- 30....
- 1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a prima facie opinion would be appealable in terms of Section 53A(1) of the Act?
- 2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as

a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case?

3)...

4)...

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

25. The above points were answered on the following terms:-

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

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

(2) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor can any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26 (1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter. However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the party(s) concerned to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from

any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17(2) of the Regulations to invite not only the information provider but even "such other person" which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be "preliminary conference", for whose conduct of business the Commission is entitled to evolve its own procedure.

(3)

(4)

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

26. It was pointed out that the legislature, in its wisdom, has used different expressions in regard to exercise of jurisdiction by the Commission. The Commission may issue (i) directions, (ii) pass orders or (iii) take decisions. In the light of such powers conferred on the Commission, the Hon'ble Supreme Court held that the direction under Section 26(1) of the Act after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Elaborating on the same, it was held as follows:-

38. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and

Regulation 35 of the Regulations.(emphasis supplied)

39. Wherever, in the course of the proceedings before the Commission, the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable.

27. Further, with regard to issue of notice to the party at the initial stage of the proceedings was also considered and it was held that issue of notice at an initial stage can hardly be implied and it was pointed out in paragraphs 77 to 79 of the judgment as to why the statute has not provided for such notice, which is as follows:-

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

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

28. While examining the kind of function, the Commission is called upon to discharge, it was held:-

87. Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power.....

91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (the Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice or hearing is not contemplated under the provisions of Section 26(1) of the Act. (emphasis supplied)

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

29. The manner in which the Commission should proceed at the stage of forming a prima facie view was elaborated in paragraph 97 of the judgment which is as hereunder:-

97.....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....

..... 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. (emphasis supplied)

30. The legal principles deducible from the decision of the Hon'ble Supreme Court in the case of Competition Commission of India vs. SAIL (supra), are manifold and for the purposes of the instance case, it is suffice to note that at the stage of forming of prima facie view as required under Section 26(1) of the Act, the Commission may not be required to record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists requiring issuance of directions for investigation to the DG and such view should be recorded with reference to the information furnished to the Commission, opinion be formed on the basis of the records including information furnished and while doing so, the Commission should not be entering into any adjudicatory or determinative process and record minimum reasons substantiating the formation of such opinion. The function performed by the Commission under Section 26(1) are preparatory measures in contrast to the decisions making process and this is clear from the word "direction" to be issued to the DG for investigation. Drawing a comparison to departmental proceedings, it was pointed out that the Commission is not expected to give notice to the parties, i.e., informant or affected parties and hear them at length before forming its opinion, as the function is of a very preliminary in nature and it is a departmental function and formation of a prima facie opinion departmentally does not amount to an adjudicatory function, but it is merely administrative nature. The Hon'ble Supreme Court pointed out that keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), the right of notice or hearing is not contemplated under the said provision.

31. In this regard, it would be beneficial to refer to the Competition Commission of India (General) Regulations, 2009, framed in exercise of powers conferred by Section 64 of the Act. In terms of Regulation 16(2), in case of alleged anti-competitive agreements and/or abuse of dominant position, the Commission shall, as far as possible, record its opinion on existence of a prima facie case within sixty days; The Commission, under Regulation 17(1), may if it deems necessary, call for a preliminary conference to form an opinion whether a prima facie case exists; Regulation 20 deals with 'Investigation by Director General' and timelines are fixed in this regard. The procedure for enquiry under Section 26 of the Act on receipt of report by DG is stipulated in Regulation 21; In terms of Regulation 35(1), the Commission shall maintain confidentiality of the identity of an informant on a request made to it in writing. Regulation 41 is about 'taking of evidence' by the Commission or the DG; Regulation 45 empowers Commission or DG to issue commissions for examination of witnesses or documents. Thus, the demarcation of the powers and functions of the Commission and the DG has been clearly spelt out under the regulations, and at the stage of Section 26(1) all that the Commission is required to do is record its opinion on existence of a prima facie case and nothing more. The impugned order records reasons in support of its opinion.

32. Thus, the petitioners could have never insisted upon issuance of notice based on the information furnished by the second respondent nor an elaborate hearing, nevertheless the Commission in its discretion thought fit to issue notice to the petitioner, the second and third respondents received their responses/reply, heard them during the meeting and has recorded reasons as to why it is of the prima facie opinion to direct the DG to assist the Commission by investigating into the matter, who has been appointed by the Central Government to assist and is one of the wings of the Commission. Neither the petitioner nor the third respondent has raised a plea of violation of principles of natural justice or any other plea, which would entitle them to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution.

33. As rightly pointed out by the learned counsel for the second respondent, the arguments advanced by the learned Senior counsel for the petitioner and the third respondent appears to be on the premise that the Commission has taken a decision in the matter and such decision is contrary to the factual position when the Commission has only formed a prima facie opinion and

issued a direction to cause investigation by the DG who is part of the Commission appointed by the Central Government to assist the Commission and there was no final view of the matter. Hence, the plea raised by the petitioner that the impugned order results in civil consequences, is a plea stated to be rejected.

34. The Commission while passing the impugned order has been carefully enough to form a prima facie view without entering upon any adjudicatory or determinative process. If the plea raised by the petitioner and the third respondent is to be accepted and the Commission be directed to redo the exercise consider the submissions, it would fall foul of Section 26(1), which clearly places an embargo on the Commission not to adjudicate or determine the matter. Precisely for this reason, the Hon'ble Supreme Court held that an order under Section 26(1) is only a prima facie view and would not be an order appealable under Section 53A of the Act.

35. Thus, the Commission having clearly confined themselves to the restrictive role required to be exercised under Section 26(1) cannot be found fault of having not examined all issues, if done would have been an adjudicatory exercise, which the Commission was not entitled to do while forming a prima facie view under Section 26(1) of the Act.

36. Hence, for all the above reasons, there is no error in the impugned order for this Court to interfere in the matter. As pointed out earlier, no argument was advanced by the learned Senior counsel appearing for the petitioner or the learned Senior counsel appearing for the fourth respondent as regards any violation of principles of natural justice or issue of bias or prejudice etc. Though the Commission was statutorily not bound to issue notice and afford opportunity of hearing to the parties, it thought fit to exercise its discretion and called upon the petitioner as well as the respondents 2 and 3 to assist them while forming a prima facie view. This Court refrains from entering into the factual controversy, as the entire issue is at a preliminary stage before the Commission and the Commission has only formed a prima facie view and it would not be the interest of parties to dwell into facts and therefore, this Court has not ventured into examining the merits of the factual contentions raised by the contesting parties.

37. In the result, the Writ Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

- 1.The Registrar,
The Competition Commission of India,
B Wing, HUDCO Vishala,
14, Bikhaji Cama Place,
New Delhi - 110 066.
- 2.Tamilnadu Power Producers Association,
No.6, Sardar Patel Road,
Guindy, Chennai - 600 032.
- 3.Kamarajar Port Limited,
No.23, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.P.Vinodh Kumar, Advocate Sr.19430
+2cc to Mr.M.Suresh Kumar, Advocate Sr.19237
+1cc to Mr.P.Mahadevan, Advocate SR.19627
+1cc to Mr.Krishna Ravindran, Advocate Sr.19479
+1cc to Mr.P.Mahadevan, Advocate SR.15561 (14/6/16)

सत्यमेव जयते

W.P.No.7233 of 2016

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srg 12/04/2016

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