

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

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Date of decision: 9th March, 2018

+ W.P.(C) 2106/2018

CADILA HEALTHCARE LIMITED AND ANR. Petitioners

Through: Mr. Krishnan Venugopal, Sr. Adv.
with Mr. Rahul Goel, Ms. Anu Monga,
Mr. Neeraj Lalwani and Mr. Rishabh
Arora, Advs.

versus

COMPETITION COMMISSION OF INDIA
AND ORS.

..... Respondents

Through: Mr. Samar Bansal and
Ms. Shreya Singh, Advs. for CCI

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The present petition has been filed by the petitioners challenging the orders dated January 16, 2018 and January 17, 2018 and order dated November 17, 2015 passed by the respondent No.1 under Section 26(1) of the Competition Act insofar as it extends to petitioners, whereby the respondent No.1 has dismissed the review/recall application preferred by the petitioners.

2. Some of the facts as noted from the petition are that three information filed by M/s Alis Medical Agency, Ahmedabad, M/s Stockwell Pharma, Surat and M/s Apna Dawa Bazar, Vadodara were filed by the respondent No.1. In the information filed by the aforesaid three entities, it was alleged that when they approached certain pharmaceutical companies, or their clearing and forwarding agents for

supply of medicines, they were allegedly denied the same on the alleged directions of Federation of Gujarat State Chemist & Druggists Association in the State of Gujarat. It is stated that one Dayabhai Patel is a partner in both Apna Dawa Bazar and Reliance Medical Agency and he filed another case on similar issue through another firm Reliance Agency before the respondent No.1. One Nayan Raval, the Authorized Signatory of respondent No.3 herein Reliance Medical Agency is also a partner in Apna Dawa Bazar and Reliance Agency.

3. It is the case of the petitioners on or before July 09, 2015 respondent No.3 prepared a pay order bearing No. 371845 dated July 09, 2015 for ₹50,000/- in favour of respondent No.1 CCI for filing the information. Vide letter dated July 09, 2015 respondent No.3 approached the petitioner No.1 through its C&F Agent i.e petitioner No.2 seeking supply of certain pharmaceutical products. On August 03, 2015, information dated July 27, 2015 was filed by respondent No.3 in Case No. 68/2015 before the respondent No.1 against the Chemist & Druggist Association, Baroda and certain pharmaceutical companies including the petitioners herein alleging limiting and controlling the supply of drugs in Vadodara by requiring No Objection Certificate for the appointment of stockists. It is stated, Dayabhai Patel, who is a partner in Apna Dawa Bazar is also a partner in Reliance Medical Agency. On August 26, 2015, respondent No.1 CCI passed an order taking cognizance of the above information and decided to call respondent No.3 to explain its case on September 30, 2015. It is averred that none of the petitioners were informed about the information or called for hearing.

4. The petitioner No.1 received balance payment of ₹3,25,000/- from respondent No.3 for order dated July 09, 2015 on September 24, 2015. It is the case of the petitioner No.1 that it fulfilled the order dated July 09, 2015 by supplying the same between September 26-29, 2015. On September 30, 2015, the respondent No.3 appeared before the respondent No.1 CCI. The respondent No.1 CCI passed an order dated November 17, 2015 under Section 26(1) of the Competition Act directing the respondent DG to investigate the role of certain opposite parties for the alleged contravention. Pursuant thereto, the DG respondent No.2 herein issued notice to petitioner No.1 under Section 36(2) read with Section 41(2) of the Competition Act with direction to furnish certain information on or before January 29, 2016. After seeking some extension, petitioner No.1 submitted the part reply to the DG notice dated January 19, 2016 on February 05, 2016 providing all the information and documents except one which was submitted on February 11, 2016. A further notice was issued by DG on April 25, 2016. The petitioner No.1 filed a response to this notice as well. It is the case of the petitioner No.1 that it had placed on record the facts relating to respondent no.3 order dated July 09, 2015. It is also averred that even after the order dated July 09, 2015, the respondent No.3 has been placing the orders on regular basis with petitioners, who have been duly supplying goods to respondent no.3. It is averred that respondent No.3 submitted three CDs containing certain material. It is the case of the petitioners, the same CDs were supplied in the earlier cases and therefore incapable of being relied upon. The respondent No.2 DG issued summons on May 05, 2016 under Section 36(2) read with Section 41(2) of the Competition Act. Averments have been made in the petition as to

how the Officers of the Company were dealt with by the respondent No.2.

5. On July 05, 2016 on the request of the respondent DG-Federation was made an opposite party in Case no. 68/2015 by respondent No.1 CCI. The respondent DG filed its investigation report with the CCI on May 01, 2017. It is averred, on June 20, 2017 respondent No.1 CCI considered the DG report and passed an order forwarding electronic copies of the same to the respondent No.3 herein. It also forwarded electronic copies of the report to the CMD of the petitioner No.1 and other functionaries of respondent No.2 as well. On June 22, 2017, the respondent No.1 CCI forwarded its order dated June 20, 2017 and directed the petitioners to submit their reply to the DG report by July 20, 2017. In the said communication, it was conveyed that the case would be listed for final hearing on the DG report on August 08, 2017. It may be relevant to state here that it is the case of the petitioner No.1 that after receiving the DG report, it came to the knowledge of the petitioners that the petitioners were opposite party in the said case. The petitioners accordingly appointed legal counsel for conducting the inspection and reviewing documents forming the basis of the said case. On July 20, 2017, the petitioner filed a request for extension of time for review of documents and filing appropriate reply to the DG report along with photocopy of the authorization letter in favour of his counsel. On July 24, 2017, the first inspection application was rejected. The second inspection application was filed by the petitioner No.1 on July 27, 2017. The inspection was granted and conducted by the petitioners on July 31, 2017. A third inspection application was also submitted by the petitioner No.1 in view of the voluminous record and time constraint. On August

02, 2017 an application for obtaining certified copies of certain documents filed with the respondent No.1 CCI. On August 04, 2017 inspection was granted to the petitioner No.1, which conducted the inspection of certain files pursuant to the permission granted by the respondent no.1 CCI. On August 08, 2017 first hearing was held before the respondent No.1 CCI. It is averred that the petitioners are awaiting receipt of certain copies of the documents from the respondent No.1 CCI and on the basis of which petitioners will file an appropriate application/submissions before the respondent CCI.

6. On August 11, 2017 the petitioner No.1 received certified true copies of the documents. On September 08, 2017 petitioners filed review/recall application seeking review/recall of Section 26(1) order. It is the case of the petitioner that it filed an application for disposing off the review/recall application by the respondent No.1 CCI. On December 12, 2017 the hearing of the matter was rescheduled by the respondent No.1 CCI to January 16, 2018 and January 17, 2018. It is the case of the petitioners, on January 08, 2018 the petitioner No.1 filed an application with the respondent No.1 CCI under Section 36 of the Competition Act read with Section 41 of the CCI General Regulations, 2009 seeking cross examination of Nayan Raval partner of respondent No.3, Dayabhai Patel, partner of respondent No.3 and Jashvant P Patel, President of the Federation. On January 08, 2018 itself the petitioners filed a common reply to the investigation report submitted by the respondent DG with the respondent No.1 CCI so as to comply with this direction. On January 16, 2018 petitioners appeared before the respondent CCI and made oral submissions regarding their review/recall application and their application seeking cross examination. Under cover letter dated

February 08, 2018 petitioners received orders dated January 16, 2018 and January 17, 2018 passed by the respondent no.1 CCI rejecting the petitioners review/recall application and its application seeking cross examination. The present petition has been filed by the petitioners on March 05, 2018.

7. At the outset, Mr. Krishnan Venugopal, learned Senior Counsel for the petitioners has drawn my attention to a judgment of this Court in the case of *Google Inc. v. CCI and Anr. LPA No. 733/2014 and connected appeals decided on April 27, 2015* to contend that a remedy lies under Article 226 of the Constitution of India against an order under Section 26(1) of the Act and the same would lie on the same parameter as prescribed by the Supreme Court in *Bhajan Lal's* case. He has taken me through various paragraphs of the said judgment to highlight the scope of the proceedings in this petition.

8. He also stated, prima facie the order of the respondent No.1 CCI under Section 26(1) is bad and unsustainable as the same is not in accordance with the provisions of the Competition Act and the law laid down by the Supreme Court and this Court. According to him, the question of jurisdiction or matters which goes to the root of jurisdiction and where the respondent No.1 CCI has acted beyond the provisions of the Competition Act cannot be decided by the respondent No.1 CCI at the time of final arguments or later by the Appellate Court and as such, has to be seen by this Court. It is his submission that the respondent no.1 CCI was required in law to form a prima facie opinion on each of the allegations in the information. Given the nature of order passed by the respondent No.1 CCI, it could not have abdicated the function and pass

an open ended order under Section 26(1) without forming any opinion on the allegations as contained in the information. It is his submission, the manner in which the order under Section 26(1) is worded by the respondent no.1 CCI, it appears that by not including the petitioners herein as proper opposite parties, the respondent No.1 CCI has tried to circumvent the position of law as laid down by this Court in **Google Inc. (supra)**. According to him, the respondent no.1 CCI in its order dated May 17, 2014 had not formed any prima facie opinion against the petitioners. The action of the respondent DG to issue notices and to investigate also go beyond the order under Section 26(1) of the Competition Act. He has also submitted, if the following can appropriately be argued before the respondent no.1 CCI especially during the final hearing then the settled legal position on review/recall would be rendered useless and this Court's order in **Google Inc. (supra)**, will be meaningless.

- a) where treating the allegations in the reference/information/complaint to be correct, still no case of contravention of Section 3(1) or Section 4(1) of the Act would be made out;*
- b) where the said allegations are absurd and inherently improbable or;*
- c) where there is an express legal bar to the institution and continuance of the investigation or;*
- d) where the information/reference/complaint is manifestly attended with mala fide and has been made/filed with ulterior motive or the like.*

9. He submitted that the petitioners can approach this Court for review/recall of order under Section 26(1) of the Competition Act, if any

of the abovementioned parameters are met. That apart, it is his submission that the petitioners have made allegation of fraud and mala fide and had the same been brought to the notice of the respondent no.1 CCI prior to the passing of the order under Section 26(1) then the respondent No.1 CCI would not have even passed the prima facie order. According to him, the COMPAT (Appellate Tribunal) has held that political rivalry and business fights cannot be overlooked in competition law cases. He would refer to the following judgments in this regard;-

(i) Lupin Limited & Others v. Competition Commission of India & Ors (COMPAT), Appeal No. 40 of 2016, decided on 7th December, 2016;

(ii) Schott Glass India Pvt. Ltd v. Competition Commission of India & Anr (COMPAT), Appeal No. 91 of 2012, decided on 2nd April 2014.

10. He also stated that as per the judgment of the COMPAT (Appellate Tribunal) in cases relating to Chemist and Druggist Association and Pharma Companies, there cannot be any violation of Section 3(1) of the Competition Act. It is his submission that it is a settled principle under the competition law that for applicability of Section 3(1) of the Competition Act the alleged 'agreement' should be between competitors (existing or potential) or between enterprises upstream downstream in any production chain. He would state, in the present case, Federation of Gujarat State Chemists and Druggists Association and petitioners are not engaged in identical or similar trade of goods of services, which is an essential condition for applicability of Section 3(3) of the Competition Act. Further, Association/Federation and petitioners are also not placed at different stages of the production

chain in different markets, which is an essential condition for applicability of Section 3 (4) of the Competition Act. Therefore, even if the alleged agreement between Association/Federation and petitioners are assumed to exist (which it does not), the same would neither fall within Section 3(3) or Section 3(4) of the Competition Act (and not constitute a contravention of the Competition Act). According to Mr. Krishnan Venugopal, Nayan Raval and Dayabhai Patel were/are partners of Reliance Agency, Apna Dawa Bazar and Reliance Medical Agency. The informant respondent no.3 had failed to disclose the said facts to CCI and that they have filed information with same allegations in two more cases with the respondent No.1 CCI earlier. According to him, it is clear that these individuals are using different entities to indulge in frivolous, vexatious litigations against the same set of parties.

11. Mr. Venugopal also submitted, the mala fides of the respondent No.3 are further amplified by the fact that it has misled the respondent CCI. Respondent No.3 obtained a demand draft for filing the information with the respondent CCI on the same date when he placed an order for medicines on the petitioners. Respondent No.3 did not disclose to the respondent CCI that respondent No.3 made balance payment on September 24, 2015 through RTGS and the petitioners had already supplied the drugs between September 26-29, 2015. He would further state, the order u/s 26(1), as regards petitioners were induced by fraud on part of the respondent No.3. It is a settled principle of law as laid down by the Supreme Court that suppression of material facts/documents amount to fraud. As per the law laid down by the Supreme Court, if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. Thus, once the

basis of a proceeding is gone (as in this case), all consequential acts, actions, orders would fall to the ground automatically. Therefore, all the consequential actions arising from the information qua petitioners, including the report of the respondent DG, are vitiated by fraud. It is further submitted that in terms of the Google order, this Court should exercise its power to recall/review order 26(1) of the Competition Act insofar as it extends to petitioners.

12. The grievance of the petitioners as canvassed by Mr. Krishnan Venugopal is that the respondent No.1 CCI has completely disregarded the fact that these individuals are abusing the process of law and using the form of a partnership firm to play around the jurisdiction of the respondent No.1 CCI without any regard to the truth and fair play. In the aforesaid background, it is also the submission of Mr. Krishnan Venugopal that the individuals Nayan Raval and Dayabhai Patel are using entities to indulge in frivolous, vexatious litigations against the same set of parties and as such the proceedings are barred by res judicata/double jeopardy.

13. One of the submissions of Mr. Krishnan Venugopal was initiation of proceedings under Section 48 of the Act at preliminary stage is erroneous. In this regard, he would state, initiation and continuance of the proceedings under Section 48 against petitioners officers and executives are inconsistent with the intent of the statute and binding orders regarding the same laid down by the COMPAT. According to him, this approach being followed by respondent CCI whereby the officers and executive of an enterprise are being investigated and their liability being affixed despite the liability of the enterprise itself being

undecided is contrary to the letter and spirit of Section 48 of the Competition Act. He would state, in the present case, no affirmative finding against petitioner exists at the present stage. Unless such a finding exists, no proceeding can be initiated against the officers, partners and executive of petitioners. As per settled rules of interpretation, a provision enacting an offence or imposing a penalty is to be strictly construed. COMPAT in numerous cases has unequivocally held that in the absence of a determination by respondent CCI that the company has committed contravention of any of the provisions of the Competition Act or any rule, regulation etc., proceedings against officers or executives of such a company cannot be initiated. According to him, the conclusion drawn by COMPAT is also supported by the fact that Section 48(1) as well as Section 48(2) of the Competition Act uses the term 'contravention' and not 'alleged contravention' which makes it clear that Section 48 can be only invoked after it is proved that a contravention has been committed by a company.

14. It is also one of the submissions of Mr. Krishnan Venugopal that respondent no.1 CCI has also arbitrarily declined petitioner No.1's plea for an opportunity of cross-examination of certain witnesses Nayan Raval, Dayabhai Patel and Jashvant P. Patel, who have given oral testimony qua the petitioners. The purported reason given by respondent CCI is inconsistent with the recognised purpose of cross-examination and its importance as acknowledged by the Supreme Court, this Court and the COMPAT (whose directions are binding on respondent CCI). He would state, it is a settled principle that every subordinate court is required to follow the law as laid-down by the superior court and not following the law as settled by superior court amounts to judicial

impropriety. The same has also been decided by Supreme Court in SAIL order.

15. In the end, it is his submission that the petitioner No.1 is a public limited company and grave prejudice and irreparable damage shall be caused to the petitioners, if petitioners are required/directed to participate in the proceedings before the respondent CCI without disposing of the present writ petition by addressing the questions of jurisdiction and law-as detailed in present writ petition. It is also submitted that there is no inordinate delay in approaching this Court. Respondent CCI's impugned orders dated January 16, 2018 and January 17, 2018 were received by petitioners on February 14, 2018. The petitioners are located in Ahmedabad and after obtaining all the due (internal) approvals filed the present writ petition on the 11th working day. It is also submitted that respondents have not been put to any hardship in any manner, even if it is assumed that there was delay in filing the present petition. Accordingly, he submitted that petitioners should not be deprived of the relief only on the ground that the writ petition was filed few days prior to the scheduled final hearing by the respondent CCI. He also stated, there is a precedent whereby this Court in similar circumstances has heard a writ petition, even though the final arguments with regard to the other opposite parties were being heard by CCI. Mr. Krishnan Venugopal has relied upon the following judgments in support of his submissions:-

Proposition: *Questions of jurisdiction or the matters which goes to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.*

Case Laws:

- (i) Calcutta Discount Company Limited v. income Tax Officer, Companies District, I and Anr. AIR 1961 SC 372;***
- (ii) The Executive Engineer and Anr. V. Sri Seetaram Rice Mill (2012) 2 SCC 108.***

Proposition: Delay in invoking writ jurisdiction cannot be a ground to sustain manifest illegality.

Case Laws:

- (i) Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur (1992) 2 SCC 598;***
- (ii) Hindustan Petroleum Corpn. Ltd v. Dolly Das (1999) 4 SCC 450.***

Proposition: Review/Recall of Section 26(1) Order

Case Law:

Google Inc. and Ors v. Competition Commission of India and Ors 2015 (150) DRJ 192.

Proposition: Prejudice caused to company due to investigation

Case Laws:

- (i) Rohtas Industries Ltd. v. S.D. Agarwal (1969) 1 SCC 325.***
- (ii) Google Inc. and Ors v. Competition Commission of India and Ors 2015 (150) DRJ 192***

Proposition: Abdication of Duty by CCI at 26(1) stage

Case Laws:

- (i) Competition Commission of India v. SAIL (2010) 10 SCC 744;***
- (ii) Google Inc. and Ors v. Competition Commission of India and Ors 2015 (150) DRJ 192***

Proposition: *Duty of the High Court to ensure CCI acts within the bounds of its authority*

Case Laws:

- (i) Tata Cellular v. Union of India (1994) 6 SCC 651;***
- (ii) Shalini Shyam Shetty and Anr. V. Rajendra Shankar Patil (2010) 8 SCC 329.***

Proposition: *Inherent illegality in inception of inquiry not curable*

Case Laws:

- (i) Chairman-cum-Managing Director, Coal India Limited and Others v. Ananta Saha and Others (2011) 5 SCC 142;***
- (ii) Roy V.D. v. State of Kerala (2000) 8 SCC 590.***
- (iii) A.V. Papayya Sastry and Others v. Govt. of A.P. and others (2007) 4 SCC 221;***
- (iv) Venture Global Engg. LLC v. Tech Mahindra ltd. (2018) 1 SCC 656;***
- (v) State of A.P. v. T. Suryachandra Rao (2005) 6 SCC 149;***
- (vi) Woodlands Diary (Pty) Ltd & anr. V. The Competition***

Commission.

Proposition: Order obtained by suppression/fraud not sustainable in law

Case Law:

Indian Bank v. Satyam Fibre (India) Pvt. Ltd. (1996) 5 SCC 550.

Proposition: Facts taken as alleged do not constitute a contravention of Competition Act-No vertical/horizontal relationship

Case Law:

(i) *Shri Norbert Lobo v. Citibank N.A. Case No. 15/28, 6/28, 13/28, 12/28;*

(ii) *V.E. Commercial Vehicles Limited v. Uttar Pradesh State Road; Transportation Corporation, Case No. 21/2017*

Proposition: Initiation of Section 48 Proceedings at initiation barred by law

Case Law:

Alkem Laboratories Limited v. Competition Commission of India and Ors. (COMPAT), Appeal No. 9/2016

Proposition: Proceedings barred by res judicata

Case Laws:

(i) *Tirupathi LPG Industries Limited v. Competition Commission of*

India, W.P.(C) 1807/2015;

(ii) Reliance Agency v. Chemists and Druggists Association of Baroda & Ors (CCI), Case No. 97/2013, Order dated January 04, 2018;

(iii) Saturn Vehicles Private Limited v. Hyundai Motor India Limited (CCI), Case no. 35/2017.

Proposition: *Cross examination is necessary to ascertain truth*

Case Laws:

Meenglass tea Estate v. Its Workmen, AIR 1963 Sc 1719

Proposition: *Arbitrary Exercise of Powers by DG- Extracting emails without following appropriate procedure*

Case Laws:

(i) Manohar v. State of Maharashtra (2012) 13 SCC 14;

(ii) Riley v. California 573 U.S (2014);

Proposition: *COMPAT judgments are binding on the CCI*

Case Law:

Competition Commission of India v. SAIL (2010) 10 SCC 744

Proposition: *Observations by COMPAT regarding CCI's approach in cases concerning pharmaceutical companies targeted due to chemists and druggists trade associations*

Case Law:

Lupin Limited & Others v. Competition Commission of India & Ors

(COMPAT), Appeal No. 40 of 2016, decided on 7th December, 2016;

16. On the other hand, Mr. Samar Bansal learned counsel appearing for the respondents 1 and 2 would submit, insofar as the plea of Mr. Krishnan Venugopal that (i) the respondent No.1 CCI should have formed a prima facie opinion against the petitioners herein under Section 26(1) before directing the respondent No.2 DG to investigate the parties including petitioners; (2) the respondent CCI could not have abdicated the said power to the respondent No.2 DG; (3) the matters which goes to the very root of jurisdiction and where the respondent CCI has acted beyond the provisions of the Competition Act need to be decided by this Court are concerned, the said submissions are contrary to the judgment of the Supreme Court in the case reported as ***(2017) 8 SCC 47 Excel Crop Care Limited v. Competition Commission of India and another***, wherein the Supreme Court has dealt with an identical submission made before it and has repelled the same by referring to the judgment of ***COMPAT (Appellate Tribunal)***, which was in appeal before the Supreme Court. According to him, the Supreme Court observed that if the arguments of the appellants therein, are accepted, it would render the entire purpose of investigation nugatory. He would state, the respondent No.1 CCI by issuing a general direction to the DG to investigate the conduct of such other parties, who may have indulged in the said contravention had authorized the DG to carry out such investigation against the petitioners as well. According to him, while carrying out the investigation, if the facts get revealed and are brought to light revealing that persons and enterprises entered into an agreement prohibited by Section 3 of the Act, the DG is within his power to include them i.e the

petitioners herein in his report. He referred to paras 44 and 45 of the judgment in this regard. According to Mr. Bansal, the reliance placed by Mr. Krishnan Venugopal on the judgment of this Court in the case of *Google Inc. (supra)*, would not be applicable to the facts of this case, inasmuch as in that case, the appellant i.e Google Inc. had approached this Court during the investigation and not after a report has been submitted by the DG. According to him, it was under those circumstances, this Court had held that the respondent no.1 CCI has the jurisdiction to review/recall without entering into a factual controversy. According to him, this Court would not interfere with the order dated November 17, 2015, or the subsequent orders and relegate the petitioners to the CCI, for them to argue the report submitted by the DG both on facts/law.

17. That apart, it is his submission that the petitioners have in fact submitted to the jurisdiction of the DG by drawing my attention to the following dates:-

17.11.2015 : Prima facie order u/s 26(1) of the Competition Act passed by the CCI.

19.01.2016 : First DG notice to petitioner No.1 u/s 36(2) read with Section 41(2) of the Competition Act.

25.04.2016 : Second DG notice to petitioners u/s 36(2) read with Section 41(2) of the Competition Act.

5.5.2016 : DG issued Summons under Section 36(2) read with Section 41(2) of the Competition Act for personal appearance to

1. Mr. Suryakant Dwivedi, Dy. GM-Distribution of Zydus Cadila

2. Mr. Dilesh Gajjar, Manager (Warehouse) Rimi.

26.05.2016 : Mr. Dilesh Gajjar (employee of Rimi) was deposed by the DG.

6.6.2016 : Mr. Suryakant Dwivedi (Manager OP-30/Cadila) was deposed by the DG.

8.8.2017 : First hearing before the CCI. Granted time to file reply to DG report by 8.09.2017.

08.09.2017 : Filed application for review/recall of order u/s 26(1).

12.12.2017 : Respondent No.1 CCI directed the review/recall application shall be taken up at the time of final arguments.

08.01.2018 : The petitioner No.1 filed reply to the DG report along with application for cross examination.

16.01.2018 : Submissions are made on review/recall application as well as application for cross examination.

18. According to Mr. Bansal, at no point of time, did the petitioner No.1 challenged the jurisdiction of the DG to carry out the investigation on the strength of the order passed by the respondent No.1 CCI under Section 26(1) of the Competition Act. That apart, it is his submission, the pleas raised by Mr. Krishnan Venugopal on (i) mala fides on the part of the informant; (ii) no violation of Section 3(1) of the Act, (iii) on res judicata; (iv) on proceedings u/s 48 of the Competition Act can be argued before the respondent No.1 CCI as the CCI has not given any findings on any of the factual submissions, made before it while arguing both the applications. In fact, it is his submission, that the CCI has rather granted

liberty to the petitioners to argue the same before it during arguments. He stated, even the plea of the petitioner No.1 on denial of cross examination is not tenable in the facts of this case inasmuch as the petitioners have never made a request for cross examination of the witnesses till January 08, 2018. So there was no occasion for the respondent No.1 CCI to grant the same. Even otherwise, it is his submission that the reasoning given by the respondent No.1 CCI that the three persons whose cross examination was sought by the petitioners, their affidavits were not relied upon by the DG during investigation to form an opinion against the petitioners in his report is justified/proper. Even otherwise, Mr. Bansal submitted that the petitioners would still be within their right to argue the relevancy of cross examination and also the effect of denial of cross examination before the Commission. In substance, it is his submission that the right of the petitioners to agitate all the grounds as being urged now except on Section 26(1) shall be available before the Commission and this Court would not like to go into these grounds and interdict the proceedings before the Commission, which is exercising its jurisdiction under a defined parameters in terms of the provisions of the Competition Act.

19. Having heard the learned counsel for the petitioners and respondent Nos.1 and 2, before I deal with the specific submissions of Mr. Krishnan Venugopal on Section 26(1), it is necessary to refer to paras 91 and 92 of the judgment of the Supreme Court in *SAIL (supra)*, wherein the Supreme Court has held as under:-

“91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties,

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

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

20. Having noted, the judgment of the Supreme Court in ***SAIL (supra)***, it is also necessary to refer to the judgment of the Division Bench of this Court in ***Google Inc (supra)***, which was heavily relied upon by Mr. Krishnan Venugopal during his submissions. The facts in that case are, the petitioner Google had challenged the (1) order dated April 15, 2014 of the CCI under Section 26(1) of the Competition Act directing investigation by DG, CCI; (2) order dated July 31, 2014 of the CCI dismissing the application filed by the Google for recall of order dated April 15, 2014, as not maintainable and (3) for restraining the respondent no.1 CCI from carrying out any further proceedings against the Google pursuant to the order dated April 15, 2014. The issue, as noted from para 18 of the judgment, before this Court was whether the order of CCI directing the DG, CCI in exercise of power under Section 26(1) of the Act to cause investigation is capable of review/recall. This Court has held, that such a person/enterprise would have a right to apply for review/recall of that order but such a power has to be exercised on the well recognized parameters of the power of review/recall and without lengthy arguments and without the investigation already ordered being stalled indefinitely. I may also state, this Court also held that judicial review under Article 226 of the Constitution of India is available on the same parameters as prescribed by the Supreme Court in ***Bhajan Lal (supra)***. But the judgment has no applicability to the facts of this case for the simple reason, there was no report of DG in that case. The investigation was still underway, when the application for recall was filed and also when the petition was filed in this Court. In the case in hand the recall application was filed after the report has been submitted by the DG to CCI. The conclusion of this Court in ***Google (supra)*** has to

be read/understood to mean a recall/review application can be filed during investigation and not after the submission of the report by the DG. This I say so once report is submitted, then an action/procedure under Section 26(5) or 26(8) gets triggered, taking the case out of the realm of 26(1) or 26(2) of the Act, [which was the position in **Google (supra)**]. The only remedy for the parties is to argue the report before the Commission and not on the order u/s 26(1) as was sought to be done in the case in hand. The same is impermissible in law, inasmuch as procedure as contemplated/provided must be allowed to be gone through.

21. Having said that, let me deal with the submissions of Mr. Krishnan Venugopal that (1) the CCI should have formed a prima facie opinion against the petitioners before directing the respondent No.2 DG to investigate the parties; (2) the respondent CCI could not have abdicated the said power to respondent No.2 DG and (3) the matters which goes to the very root of jurisdiction and where, the respondent CCI has acted beyond the provisions of the Act, this Court need to interfere are concerned, the answer to such submissions has to be found in para 45 of the judgment of the Supreme Court in **Excel Crop Care Limited (supra)**, wherein the Supreme Court has held as under:-

“45. If the contention of the Appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect

on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed Under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the Appellants as well touching upon the jurisdiction of the DG.”(emphasis supplied)

22. From the perusal of the aforesaid para, it is clear that even if the CCI has not formed a prima facie opinion against the petitioners in the order under Section 26(1) of the Act, the DG would still be within his power if investigation reveals facts that the persons/enterprises had entered into an agreement, which is prohibited by Section 3 of the Act. It is precisely for this reason, the CCI in the impugned order has used the words “investigate the conduct of such other party, who may have indulged in the said contravention”. The said words are in conformity with the position of law as laid down by the Supreme Court in **Excel Crop Care Limited (supra)**. The pleas of Mr. Krishnan Venugopal need to be rejected. I may also state here, in the facts of this case, when the report has been submitted, the plea that the matters which goes to the root of the jurisdiction and where the CCI has acted beyond the provisions of the Act and the Court need to interfere is also without merit, moreso in view of my conclusion in para 20 above.

23. That apart, the submissions made by Mr. Krishnan Venugopal can be looked from another perspective, inasmuch as the petitioners did file

an application for review/recall of order dated November 17, 2015. In the order, the CCI has considered the objections of the petitioners and did not find fault with the prima facie order by holding in para 10 of the order dated January 16, 2018 as under:-

“10. In this regard, the Commission notes that although in the prima facie Order the Commission had directed the role of 3 Ops to be specifically investigated, a general direction was also given to the DG to ‘investigate the conduct of such other parties who may have indulged in the said contravention’. The purpose of such a direction is to empower the DG to carry out detailed investigation in the matter, without getting restricted by the scope of the specific direction and specific Ops found to be prima facie contravening the provisions of the Act. The proceedings before the Commission are inquisitorial in nature and thus, the scope of inquiry need not be confined to the facts stated in the information. The purpose of filing information before the Commission is only to set the ball rolling as per the provisions of the Act. The investigation of the DG starts from the allegations stated in the information, but need not necessarily be confined to the facts stated therein. The scope of investigation by the DG is much broader and to hold otherwise would render the purpose of investigation infructuous and incomplete. Thus, the Commission finds no infirmity in the DG proceeding to investigate the Applicants, despite there being no specific directions in the prima facie Order against them. Moreover, once the matter is sent for investigation, Regulation 20(4) of the Competition Commission of India (General) Regulations, 2009 (hereinafter, the ‘General Regulations’) obligates the DG to investigate comprehensively and give its finding on each of the allegation made in the information.”

I agree with the aforesaid conclusion of the CCI. Further, the CCI having applied its mind afresh on the order of 26(1), I see no reason to interfere with the same.

24. That apart, it is noted that after the order under Section 26(1) of the Competition Act was passed, the DG had issued three notices on January 19, 2016, April 25, 2016 and May 05, 2016 under Section 36(2) and 41(2) of the Act. At least, from the replies submitted by the petitioners, it is seen the petitioners have never challenged the authority of the Director General to issue notices under Section 36(2) read with Section 41(2) of the Competition Act. The plea that these notices were issued to the petitioners not as opposite parties but only to elicit information in routine manner and not pursuant to the orders under Section 26(1), and the gravity of the situation was known, when report of the DG was given because of which they could not file application of recall/review earlier, does not appeal to the Court, as Section 36(2) and Section 41(2) under which the notices were issued, would surely indicate the purpose/relevancy/importance of such notices. Nothing precluded them to seek legal advice on the same. Even otherwise, that cannot be a ground to challenge the order u/s 26(1) of the Act after the report has been submitted.

25. Insofar as the other submissions of Mr. Krishnan Venugopal on (i) malafides/suppression of material facts amounting to fraud imputing to respondent No.3; (ii) there is no vertical or horizontal relationship between the petitioners and the Federation/Association and as such Section 3(1) of the Competition Act is not applicable or even otherwise, the alleged Agreement between the Association/Federation and petitioners assume to exist, the same would not fall within Section 3(3) or 3(4) of the Competition Act; (iii) that the proceedings are barred by res judicata/double jeopardy; (iv) initiation of proceedings under Section 48 at preliminary stage is erroneous, by relying upon various judgments

of the Supreme Court, COMPAT (Appellate Tribunal) to contend, the CCI has overlooked all these grounds/law in the impugned order while dismissing the review/recall application is concerned, suffice to state, the CCI in the impugned order has clearly left open all these questions being on merits and had observed that the petitioners shall be at liberty to argue on merits before the Commission while rebutting the evidence collected by the DG during investigation. I quote for benefit para 13 of order dated January 16, 2018 as under:-

“13. In view of the foregoing discussion, the Commission rejects the review/recall application of the Applicants and directs them to argue the case on merits on the investigation report of the DG. To ensure a fair opportunity, hearing on their oral arguments will be fixed on a later date to allow them sufficient time to object to the findings of the DG and discharge the burden of proof with regard to their involvement in the impugned conduct.”

26. I may note here, Mr. Krishnan Venugopal, during his arguments did submit that some of the findings of the CCI are conclusive against the petitioners leaving no scope for the petitioners to convince the CCI on the same during arguments. Even though, Mr. Bansal has stated that there are no findings on any factual aspects by the CCI, this Court holds and clarify that when CCI is hearing the petitioners on the report of the DG, surely it will be doing so without being influenced by any finding on facts in its order rejecting the review/recall application and shall consider all the material and position of law as put forward by the petitioners.

27. Insofar as the plea of Mr. Krishnan Venugopal on the denial of cross examination is concerned, the reasoning given by the CCI is, that the persons of whose cross examination was sought for, their affidavits

were not relied upon by the DG. The plea of Mr. Bansal in that regard that if on other grounds, the petitioners succeed, there would be no occasion for the Commission to go into the aspect of denial of cross examination. He also stated even if the Commission justifies the report on other grounds, the ground of denial of cross examination and the effect thereof can be agitated and also seen by the CCI, is appealing. It can also be argued that any material, which has come on record by denying reasonable opportunity, would be a case of no evidence in the eye of law.

28. I must state, Mr. Krishnan Venugopal has relied upon various judgments in support of his submissions. I refrain from referring to those, as it is for the petitioners to rely on them appropriately while arguing the case on merits before CCI.

29. Further, this Court is of the view, the proceedings before the CCI should not be interdicted, keeping in view the dicta of the Supreme Court in the case of *SAIL (supra)*, wherein in paras 134 and 135(B), the Supreme Court has held as under:-

“134. The scheme of the Act and the Regulations framed thereunder clearly demonstrate the legislative intent that the investigations and inquiries under the provisions of the Act should be concluded as expeditiously as possible. The various provisions and the Regulations, particularly Regulations 15 and 16, direct conclusion of the investigation/inquiry or proceeding within a "reasonable time". The concept of "reasonable time" thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade.

135. In this backdrop, we are of the considered view that the following directions need to be issued:

B) All proceedings, including investigation and inquiry should be completed by the Commission/Director General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.”

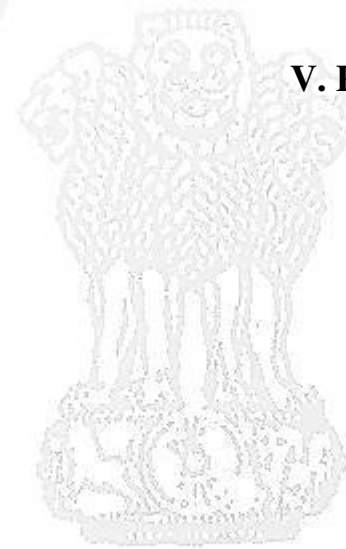
30. Accordingly, I am of the view, the impugned orders need no interference. The writ petition is dismissed. No costs.

CM. No. 8752/2018 (for Stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

MARCH 09, 2018/ak



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