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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 12129/2018 & CM Nos. 47096-47098/2018**

ABBOTT HEALTHCARE PVT. LTD.

..... Petitioner

Through Mr Akhil Sibal, Senior Advocate with
Mr Naval Chopra, Mr Aashish CGupta, Mr Aditya
Mukherjee, Mr Aman Sethi, Mr Anirudh Lekhi,
Mr Anjali Kumar, Advocates.

versus

COMPETITION COMMISSION OF
INDIA AND ANR.

..... Respondents

Through Mr Samar Bansal, Mr Manan Shishodia,
Ms Devahuti Pathak, Advocates for CCI/R1.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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13.11.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning an order dated 05.07.2017 passed by the Competition Commission of India (hereafter 'CCI') under Section 26 (1) of the Competition Act, 2002 (hereafter 'the Act'), whereby the Commission has directed the Director General (hereafter 'the DG') to cause an investigation into the matter and submit an investigation report within sixty days from the receipt of the said order. The petitioner also impugns an order dated 29.10.2018 passed by CCI, *inter alia*, rejecting the petitioner's application for review and recall of the impugned

order dated 05.07.2017.

2. The proceeding before the CCI was commenced pursuant to a letter dated 22.03.2017 received from the National Pharmaceutical Pricing Authority, Department of Pharmaceuticals (NPPA) requesting the CCI to analyse the alleged anti-competitive agreement between four leading pharmaceutical companies, namely, Novartis India, the petitioner (Abbott Healthcare Pvt. Ltd.), USV Ltd. and Emcure Pharmaceuticals Limited. The allegation against the said manufacturers is that they were controlling the prices of the oral diabetes drugs containing the Active Pharmaceutical Ingredient (API) *Vildagliptin*. In addition to the pricing data furnished by NPPA, the CCI had also received an anonymous e-mail enclosing therewith an e-mail dated 29.07.2016 purportedly sent by one of the employees of the petitioner, which indicated that there was an understanding to maintain the price of drugs across the country.

3. The petitioner claims that the said e-mail is a forgery and further, the data provided by NPPA in its letter is also inaccurate. In view of the above, the petitioner had filed an application for review and recall of the impugned order dated 22.12.2017. The CCI had considered the aforesaid application and after hearing NPPA, rejected the aforesaid application by an order dated 08.05.2018. The said order dated 08.05.2018 was successfully challenged by the petitioner by way of a writ petition (W.P.(C) 6647 of 2018). The order dated 08.05.2018 was set aside and the matter was remanded to the CCI to consider afresh after hearing the petitioner.

4. The CCI heard the parties and passed the impugned order dated

29.10.2018. As far as the admissibility of the e-mail which is alleged to be forged is concerned, the CCI was of the view that the DG could, during the investigation, employ appropriate tools to test the veracity of the said claim. As far as the issue as to the veracity of the data provided by the NPCC is concerned, the CCI observed that the fact that there had been a price increase was not rebutted although there may be some discrepancy between the dates on which such price increases were effectuated/implemented. The CCI was of the view that since the allegation against the petitioner and other pharmaceutical companies was with regard to co-ordinated and concerted action, the same was required to be examined by the DG.

5. Mr Akhil Sibal, the learned Senior Counsel appearing for the petitioner contended that the CCI was required to take an informed view regarding both the veracity of the e-mail as well as of the data provided by NPPA as to form a *prima facie* opinion. He earnestly contended that without considering the petitioner's contentions in this regard, the CCI could not have formed a *prima facie* view, which it was required to form in terms of Section 26 of the Act. He also referred to the provisions of Section 36(2) of the Act, which expressly conferred with CCI the powers of a Civil Court under the Code of Civil Procedure while trying a suit in respect of certain matters, including summoning and enforcing the attendance of any person; requiring the discovery and production of documents and receiving evidence on affidavit. He also referred to Regulation 17(2) of the Competition Commission of India (General) Regulations, 2009 (the Regulations), in terms of which the Commission is empowered to invite the information provider and such other person as is necessary for a preliminary conference.

He submitted that it was incumbent upon the CCI to exercise such powers and form a *prima facie* view after conducting due inquiry.

6. In addition, he also referred to Regulation 41 and 44 of the Regulations, which pertain to taking of evidence and calling for further information.

7. This Court is not persuaded to accept any of the contentions advanced by the learned counsel on behalf of the petitioner. As explained by the Supreme Court in ***Competition Commission of India v. Steel Authority of India Ltd. and Anr.: (2010) 10 SCC 744***, the order passed by the CCI under Section 26 (1) is, essentially, an administrative order and akin to a direction from one wing of the department to another. Under Section 26(1) of the Act, CCI can at best direct investigation and this does not amount to an adjudicatory function. The court had further observed as under:

“92....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.

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.”

8. The provisions of Section 36 and Regulations 17, 41 and 44 also relate to the powers of the CCI to take evidence and call for information. Clearly, this is not a case where the powers of the CCI are in question. The CCI would have a jurisdiction to exercise its powers in the manner in accordance with provisions of the Act. The contention that it was incumbent upon the CCI to first take evidence under Section 36(2) of the Act or Regulation 41 of the Regulations, is bereft of any merit. As explained by the Supreme Court in *Steel Authority of India (supra)*, the decision under Section 26(1) is only a preparatory measure, which precedes an inquiry.

9. This Court finds no merit in this petition and the same is, accordingly, dismissed. The pending application is also disposed of.

NOVEMBER 13, 2018
pkv

VIBHU BAKHRU, J