

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

% *Date of decision: 28th November, 2018*

+ LPA 658/2018, CM Nos. 49071-49075/2018
ABBOTT HEALTHCARE PVT LTD

..... Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Raj Shekhar Rao, Mr. Aashish
Gupta, Mr. Aditya Mukherjee,
Mr. Aman Sethi, Mr. Anirudh Lekhi
and Ms. Anjali Kumar, Advs.

versus

COMPETITION COMMISSION OF INDIA & ANR.

..... Respondents

Through: Mr. Samar Bansal, Mr. Manan
Shishodia and Ms. Devahuti Pathak,
Advs. for CCI.
Mr. Manish Mohan, CGSC for UOI

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM No. 49073/2018 (for exemption)

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

LPA 658/2018

1. The present appeal has been filed by the appellant challenging the order dated November 13, 2018 passed by the learned Single Judge in W.P. (C) 12129/2018, whereby the learned

Single Judge has dismissed the writ petition. The challenge in the writ petition was to an order dated July 05, 2017 passed by the Competition Commission of India (hereinafter 'CCI') under Section 26(1) of the Competition Act, 2002 (hereinafter 'the Act of 2002'), whereby the Commission has directed the Director General to cause an investigation into the matter and submit an investigation report within 60 days from the receipt of the said order.

2. The appellant has also impugned an order dated October 29, 2018 passed by the CCI rejecting the appellant's application for review and recall of the impugned order dated July 05, 2017. It is noted from the record that the proceedings before the CCI were commenced pursuant to a letter dated March 22, 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, Abbott Healthcare Pvt. Ltd. (appellant herein), USV Ltd., and Emcure Pharmaceutical Limited. The allegation against the said manufactures 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 also had also received an anonymous e-mail enclosing therewith an e-mail dated July 29, 2016 purportedly sent by one of the employees of the appellant, which indicated that there was an understanding to maintain the price of drugs across the country.

3. The plea on behalf of the appellant before the learned Single Judge was; (i) the CCI was required to take an informed view regarding both the veracity of the e-mail as well as also the data provided by NPPA so as to form a *prima facie* opinion; (ii) without considering the appellant's contentions, the CCI could not have formed a *prima facie* view, which it was required to form in terms of Section 26 of the Act, more so in light of Section 36(2) of the Act of 2002, which expressly conferred with CCI the powers of a Civil Court under the Code of Civil Procedure which includes summoning and enforcing the attendance of any person; and (iii) Regulation 17(2) of the Competition Commission of India (General) Regulations, 2009 in terms of which the Commission is empowered to invite the information provider and such other person as is necessary for a preliminary conference. In substance, it was the submission on behalf of the appellant before the learned Single

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

4. Suffice it to state that the learned Single Judge has in paras 7 and 8 held as under to dismiss the writ petition:

*“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.”

5. Mr. Sandeep Sethi, learned Senior Counsel appearing for the appellant has drawn our attention to various documents in support of his contention, that (1) the said e-mail is a forgery and could not have been relied upon, (2) the letter received from NPPA has been contested by the appellant and rather the NPPA response before the Commission only strengthened the appellant's contention that the data submitted by NPPA which had been relied upon by the Commission on the passing the order under Section 26(1) was incorrect.

6. He has referred to the judgment of the Supreme Court in the case of ***Competition Commission of India vs. Steel Authority of India Ltd. and Anr. (2010) 10 SCC 744***, as relied upon by the learned Single Judge to contend that reliance placed by the learned Single Judge on this judgment is totally misplaced.

7. According to him, the Supreme Court, in the very same judgement has held that the Commission, upon receiving any information alleging violation of the Act, must first satisfy itself and express an opinion that a prima facie violation exists, from the

record produced before it, and thereafter pass a direction to the Director General to cause an investigation to be made into the matter. It is his submission that the judgement relied upon by the learned Single Judge itself makes it manifestly clear that the Commission must first apply its mind to the material on record, ascertaining the authenticity and accuracy of the material supplied along with the information/reference, before forming a prima facie opinion. According to him, formation of a prima facie opinion is sine qua non for directing the Director General to conduct an investigation.

8. We are not in agreement with the submissions made by Mr. Sethi. On a perusal of the judgment of the Supreme Court in ***Competition Commission of India (supra)***, the Supreme Court in paras 21, 38 and 91, has held as under:

“21. The informant, i.e. the person who wishes to complain to the Commission constituted under section 1 of the Act, would make such information available in writing to the Commission. Of course, such information could also be received from the Central Government, State Government, Statutory authority or on its own knowledge as provided under Section 19(1)(a) of the Act. 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.

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.

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.”

9. From the reading of the aforesaid the following position of law emerges:

1. Upon receiving the information from any person including Central Government, State Government, Statutory Authority or on its own knowledge under Section 19 (1)(a) of the Act, the commission is expected to satisfy itself and express its opinion that a prima facie case exists and then pass a direction to the Director General to cause an investigation into the matter in terms of Section 26 (1).

2. This direction under Section 26 (1) to the Director General may be passed with or without seeking assistance from any other quarters including experts of eminence or the affected parties themselves. The aggrieved / affected parties cannot claim a right to notice or hearing at this stage.

3. Issuance of a direction by the Commission under Section 26 (1) of the Act is a direction simplicitor to cause a

investigation and is administrative in nature to one of its own wings departmentally. It does not effectively determine any right or obligation of the parties to the lis. Such direction for investigation to one of the wings of the commission is akin to a departmental proceedings and does not entail civil consequences for any person.

5. The subject provision does not contemplate any adjudicatory action on the part of the Commission. The Commission is not expected to give notice to the parties and hear them at length. It is of a very preliminary nature.

6. It is only after consideration of the report of the Director General and passing of an order in terms of Section 26 (2) of the Act that the aggrieved / affected parties gain a specific right of notice and hearing.

10. In view of the above position of law, we agree with the conclusion arrived at by the learned Single Judge which we have already reproduced above. We do not see any merit in the appeal, and the same is dismissed. The time granted by the DG for furnishing information is extended for a period of three weeks from today.

CM Nos. 49071/2018, 49072/2018, 49074/2018 & 49075/2018

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

NOVEMBER 28, 2018/aky

