JPP

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3492 OF 2018

1. Hardcastle Restaurants Pvt. Ltd.
A Company incorporated under the
Companies Act, 1956 having its office
at Tower 3, 10th Floor, Indiabulls Finance
Centre, Senapati Bapat Marg, Prabhadevi,
Mumbai – 400 013.

2. Shri Banwarilal Jatia, shareholder
of the Petitioner No.1 having address at
Avanti, 67A, Bhulabhai Desai Road,
Mumbai – 400 026. … Petitioners

V/s.

1. Union of India, through Secretary,
Ministry of Finance (Department of Revenue)
No. 137, North Block, New Delhi – 110 001.

2. The National Anti-Profiteering Authority,
through Chairman, 6th Floor, Tower I, Jeevan
Bharti Building, Connaught Place, New Delhi.

3. Director General of Anti-Profiteering,
Second Floor, Bhai Vir Singh Sahitya Sadan,
Bhai Vir Singh Marg, Gole Market,
New Delhi. ... Respondents.

Mr. Rohan Shah a/w. Divya Jeswant, Mayank Jain i/b. Khaitan & Co. for the Petitioners

Mr. Zoheb Hossain with J.B. Mishra for the Respondents.

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, JJ.

DATE : 1 OCTOBER 2019

Judgment Per (Nitin Jamdar, J.) :-

Rule. Rule is made returnable forthwith. Respondents waives service. Taken up for final disposal.

2. The Goods and Service Tax regime was introduced in the year 2017. Thereafter tax rates for certain items were reduced. The State noticed that the benefit of reduced tax rates was not being passed on to the consumers. For this purpose, the National Anti-profiteering Authority is constituted under section 171 of the Goods and Services Tax Act. The Authority can direct the registered persons to pass on such benefits to the consumers and if the beneficiary cannot be identified, to deposit it in a welfare fund. The Authority is empowered to levy penalty on the registered person and take further deterrent measures. One such order passed by the Authority against the Petitioner is the subject of challenge in this Petition.

3. The Petitioner No1-Hardcastle Restaurants is a private limited company. The Petitioner no.2 is the director. For convenience, they are referred in singular. Petitioner operates quick-service restaurants under the brand name McDonald's in Western and Southern India. The Petitioner serves around 2320 types of food and beverages items from its restaurants. The Petitioner is registered under the Goods and Services Tax Act, 2017 in ten States. After the commencement of GST Act till 14 November 2017, the services rendered by the Petitioner were subjected to 18% of GST. A notification was issued on 14 November 2017 reducing the rate of GST to 5% with effect from 15 November 2017. As a result, the Petitioner had to charge GST at 5% on the services rendered without availing impugned tax credit of the taxes paid on input, input services and capital goods.

4. Some customers of the Petitioner made complaints that, though the rate of GST on restaurant services was reduced from 18% to 5% with effect from 15 November 2017, the Petitioner had increased the prices of product sold, which was an act of illegal profiteering. The Standing Committee on Anti Profiteering examined the complaints. The Standing Committee referred the complaints to the Director-General of Safeguards. The Director-General called upon the Petitioner to submit a reply to the

allegations levelled in the complaints and also to suo-motu determine the quantum of benefit the Petitioner had not passed on to the consumers between 15 November 2017 to 31 January 2018. The persons who had filed the complaints/applications were given the opportunity to inspect the evidence and reply furnished by the Petitioner. The applicants did not attend nor participated any further. The Petitioner filed a reply on 5 January 2018 and denied the allegations.

5. The Director-General analyzed the material placed before it by the Petitioner. The Director-General noted that the Petitioner was selling 1844 types of products and after comparing the price list published before and after 15 November 2017, opined that the Petitioner had increased the base price of 1774 products, which constituted 96.20% of its total products. Though the Petitioner had charged GST at 5% on or after 15 November 2017, due to the increase in the base price, the customers had to pay the same price charged before 15 November 2017. The Director-General, after setting out the reasons, concluded that the profiteering amount was of Rs.7.49 crores. The Director-General submitted a report accordingly to the Authority.

6. The Anti-Profiteering Authority considered the report of the Director-General in its sitting held on 5 July 2018. It was

decided to give hearing to the interested parties and to fix schedule of hearings. The Director-General was represented through the Officers. The Petitioner was represented through its Chief Finance Officer, Chartered Accountant and Advocate. Complainants did not remain present. The Authority consisted of three members: Mr. B.N. Sharma, Chairman, Mr. J.C. Chauhan, Technical Member, Ms. R. Bhagya Devi, Technical Member. They heard the Petitioner on 24 July 2018, 9 August 2018, 16 August 2018 and 20 August 2018. The Petitioner took up various grounds to demonstrate that there was no profiteering. The Petitioner questioned the jurisdiction of the Director-General, and also the bar of limitation for instituting the proceedings. The Petitioner contended that the reduction in the tax was neutralized due to withdrawal of input tax credit. The Petitioner stated that the commensurate benefit from the reduction was passed on to the customers. Contentions were raised regarding the implications of the Section 171 of the GST Act. The Petitioner sought to demonstrate as to how, due to the increase in the prices of raw materials, the prices had to be increased, and there is no profiteering. The Petitioner also contended that there was no methodology laid down to determine profiteering. The Director-General, through his representation, justified the report and the conclusions regarding the profiteering made by the Petitioner.

7. The Authority did not accept the contentions of the

Petitioner. The Authority *interalia* held that the Section 171 of the Central GST Act was applicable since there was a reduction in the rate of tax from 5% to 18%. The contention of the Petitioner that there was no methodology was negatived holding that the Authority framed its methodology. It held that only because the CGST was charged at 5% did not mean there was no anti-profiteering since the output tax invoices after 15 November 2017 did not show that benefit has been passed on. Authority observed that the Petitioner increased base prices overnight on 14 November 2017. It held that the Petitioner could not avail the input tax credit after 15 November 2017, and therefore, the benefit in input tax credit from December 2017 to March 2018 could not have been given. Authority held that the Director General had correctly considered the incremental revenue. The Authority carried out the computation and profiteering amount was derived at Rs.7.49 crores for all products where price increase was over 5.11%. The Authority directed the Petitioners to reduce the prices of its products and to deposit an amount of Rs.7.49 crores to the Consumer Welfare Fund along with 18% interest. The Director General was directed to continue investigation till the Petitioners reduced the prices commensurate to the reduction in tax and to submit a report. Directions were also issued to initiate penalty proceedings.

8. The Authority passed the order on 16 November 2018.

Mr. Amand Shah, Technical Member, who had joined on 7 September 2018 ,after the hearings, also signed the order along with three others who had heard the parties.

9. The Authority issued a show-cause notice to the Petitioner on 20 November 2018 as to why penalty should not be imposed. The Petitioner thereafter filed this Writ Petition on 3 December 2018 on the ground that there is no appeal against the order passed by the Anti Profiteering Authority under the CGST Act or the Rules.

10. The Petition came up before the Division Bench of this Court on 17 November 2018 when it was adjourned at the request of the Respondents. By an ad-interim order the Division Bench stayed the directions for investigation into the quantum and initiation of the penalty proceedings. The matter was heard again on 7 February 2019 and the ad-interim order was reiterated to be continued till further orders. On 16 August 2019, parties were put to notice that the Petition will be considered finally on the next date.

11. We have heard Mr. Rohan Shah, learned Counsel for the for the Petitioner and Mr. Zoheb Hossain learned Counsel for the Respondents.

12. The main contention of the Petitioner is of violation of the principles of natural justice. Petitioner contends that since the hearing was only by three members and the impugned order is by four members, it is in breach of principles of natural justice. The Petitioner was not afforded an opportunity to present its case before Mr. Amand Shah, the fourth signatory. The Petitioner further contends that the Rules provides that if the difference of opinion occurs, the opinion of the majority is to be considered and, if equality of votes occurs, the Chairman has the casting vote, which implies internal deliberation amongst the members. It is submitted that the impugned order, in as much as relates to Mr. Amand Shah, is passed based on hearsay, and therefore, deserves to be set aside in totality as it is not separable. The Petitioner contends that the proceedings are beyond the jurisdiction of the Authority since the complaints were filed regarding one product, a type of coffee, and could not have been extended all the goods and services of the Petitioners. According to the Petitioner that the Authority has taken such a view in case of other entities. It is contended that sufficient evidence was not available in respect of all the products taken up for scrutiny. The Petitioner further contends that no methodology is framed for determining profiteering and absence of any statutory guideline, the exercise carried out is entirely arbitrary. Thus the order suffers from arbitrariness, perversity and contradictions. The

Petitioner further contends that various material facets such as loss of input tax credit during 1 November 2017 to 14 November 2017, incremental input tax credit loss due to branch transfer, input tax credit from 1 July 2017 to 14 November 2017 availed in the subsequent months and increase in the variable costs, were not been considered.

13. The Respondents have justified the impugned order contending that this is a clear case of profiteering. The Respondents contend that GST Act, Rules and Procedure framed supply adequate guidance and there is no arbitrariness in the decision making. The Respondents contend that the Director-General on its own motion can look into the matter and its jurisdiction is not restricted to the product for which complaint has been received. On the ground of breach of principles of natural justice, the Respondents contend that as per the Rules, no act or proceedings of the Authority shall be invalid merely on the ground of any irregularity in the procedure followed by the Authority not affecting merits. The Respondents contend that the Rules provides for a quorum of three members, signing the order by four member is superfluous. The basic ground put-forth by the Respondents is that there was no illegality and at the most a mere irregularity and no prejudice has been demonstrated by the Petitioners. The Respondents also contend that the Rules do not mandate oral hearing and the entire record was before the Authority

to take a decision.

14. We take up the ground of breach of principles of natural justice first. There is no dispute about the factual position. The Petitioners received notice for oral hearing. Mr. B. Sharma, Chairman, Mr. J.C. Chauhan, Technical Member, Ms. R. Bhagya Devi, Technical Member constituted the Authority. This Authority heard the Petitioners on 24 July 2018, 9 August 2018 and 20 August 2018. Mr. Amand Shah joined the Authority on 7 September 2018. When the final order was passed by the Authority, it was signed by four i.e. Mr. Sharma, Mr. Chauhan, Ms. Bhagya Devi and Mr. Amand Shah. Mr. Amand Shah did not participate in any proceedings of the Authority and he joined after hearings were completed and has signed the order. According to the Petitioners Mr. Amand Shah being party to the ultimate decision when he had joined after the hearing was concluded is against the basic notions of fairness and in breach of principles of natural justice. According to the Respondents, there is no requirement of oral hearing and the case can be decided on documents. The Respondents contend that oral hearing is not contemplated and signing the order by the fourth member is a mere irregularity. Thus, the stand is that there is no breach of principles of natural justice, and even assuming there is a breach, no prejudice is caused to the Petitioner, and the breach is a mere irregularity.

15. The concept of natural justice will vary with the nature of the enquiry and the object of the proceedings and consequences that ensue from the order passed. A bare reading of the statutory scheme reproduced below will show that the proceedings before the Authority are quasi-judicial, oral hearing is contemplated and orders entail civil consequences. We have underlined the relevant portions of the Rules and the Procedure to emphasis this point.

16. The Anti Profiteering Authority is constituted under Section 171 of the Goods and Services Tax Act, 2017. The provision mandates that any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. The provision reads thus:

> *"1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*
>
> *(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.*

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

*[1]**(3A)** Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub- section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:*

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

***Explanation.—** For the purposes of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.*

...."

17. The composition and functioning of the Anti Profiteering Authority is elaborated under Chapter XV of the Central Goods and Services Tax Rules, 2017. The composition of the Authority is under Rule 122. Rule 122 reads as under :

"The Authority shall consist of,-

(a) a Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India; and

(b) four Technical Members who are or have been Commissioners of State tax or central tax for at least one year or have held an equivalent post under the existing law, to be nominated by the Council."

(c) Rule 122 lays down that it will consist of a Chairman and four Technical Members.

….. ….. ….. ….. ….. ….. ….. ….."

The constitution of Standing Committee and Screening Committee is provided for under Rule 123, which reads as under :-

"(1)The Council may constitute a Standing Committee on Anti-profiteering which shall consist of such officers of the State Government and Central Government as may be nominated by it.

(2) A State level Screening Committee shall be constituted in each State by the State Governments which shall consist of-

(a) one officer of the State Government, to be nominated by the Commissioner, and

(b) one officer of the Central Government, to be nominated by the Chief Commissioner.

….. ….. ….. ….. ….. ….. ….. ….."

The manner of appointment, payment of salary, allowances and other terms and conditions of the service is provided under the Rule 124. Rule 126 states that the Authority may determine

methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods and services or the benefit of input tax credit has been passed on by the registered person to the recipient by commensurate reduction in prices. The Authority is duty bound, as provided under Rule 127, to determine whether any reduction in rate of tax has benefited the recipient. Rule 127 reads as under :

> *"It shall be the duty of the Authority,-*
>
> *(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;*
>
> *(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;*
>
> *(iii) to order,*
>
> *(a) reduction in prices;*
>
> *(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57;*

(c) imposition of penalty as specified in the Act; and

(d) cancellation of registration under the Act.

(iv) to furnish a performance report to the Council by the tenth day of the close of each quarter."

The Authority is to identify the registered person who has not passed on the benefit of reduction. The Authority is empowered to direct reduction in prices to return to the recipient the amount equivalent to the amount not passed on and to impose penalty and to cancel registration under the Act.

18. The procedure for conducting the proceedings is laid down in Rule 128 to 132 of the Rules. The procedure under Rule 128 is for receipt of written application. Rule 128 reads as under :

"(1) The Standing Committee shall, within a period of two months from the date of the receipt of a written application or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority, in such form and manner as may be specified by it, from an interested party or from a Commissioner or any other person, examine the accuracy and adequacy of the evidence provided in the application to determine whether there is prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices.

> *(2) All applications from interested parties on issues of local nature or those forwarded by the Standing Committee shall first be examined by the State level Screening Committee and the Screening Committee shall, within two months from the date of receipt of a written application, or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority, upon being satisfied that the supplier has contravened the provisions of section 171, forward the application with its recommendations to the Standing Committee for further action."*

The Standing Committee, if it is *prima-facie* satisfied refers the matter to the Anti Profiteering for a detailed investigation under Rule 129(1). Rule 129 is as under :-

> *"(1)Where the Standing Committee is satisfied that there is a prima-facie evidence to show that the supplier has not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, it shall refer the matter to the Director General of Anti-profiteering for a detailed investigation.*
>
> *(2) <u>The Director General of Anti-profiteering shall conduct investigation</u> and collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices.*

(3) The Director General of Anti-profiteering shall, before initiation of the investigation, issue a notice to the interested parties containing, inter alia, information on the following, namely:-

(a) the description of the goods or services in respect of which the proceedings have been initiated;

(b) summary of the statement of facts on which the allegations are based; and

(c) the time limit allowed to the interested parties and other persons who may have information related to the proceedings for furnishing their reply.

(4) The Director General of Anti-profiteering may also issue notices to such other persons as deemed fit for a fair enquiry into the matter.

(5) The Director General of Anti-profiteering shall make available the evidence presented to it by one interested party to the other interested parties, participating in the proceedings.

(6) The Director General of Anti-profiteering shall complete the investigation within a period of six months of the receipt of the reference from the Standing Committee or within such extended period not exceeding a further period of three months for reasons to be recorded in writing as may be allowed by the Authority and, upon completion of the investigation, furnish to the Authority, a report of its findings along with the relevant records."

The Director General is to investigate and collect evidence to determine the benefit of reduction and whether the benefit of reduction has been passed on to the recipient. For this purpose, the Director General is empowered to issue notices to the interested parties. The Director General is also empowered to issue notices to any such person who will aid and assist the enquiry. The Director General is to complete the investigation within a period of three months from receiving reference or such extended period not exceeding further period of three months for reasons recorded in writing upon completion of the investigation and furnish a report to the Authority.

19. Rule 132 empowers the Director General and the Authority to summon persons to give evidence and produce documents. The Director General is deemed a civil court for this purpose and the proceedings are judicial proceedings. The Rule reads thus :

> *"(1)The Authority, Director General of Anti-profiteering, or an officer authorised by him in this behalf, shall be deemed to be the proper officer to exercise the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing under section 70 and shall have power in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).*

> *(2) Every such inquiry referred to in sub-rule (1) shall be deemed to be a judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860)."*

The Authority, within period of three months from receipt of report from the Director General, would determine whether the benefit of reduction in rate of tax has been passed on. The Rule 133(2) states that an opportunity of hearing shall be granted to the interested parties. Rule 133 is reproduced below :-

> *"(1) The Authority shall, within a period of six months from the date of the receipt of the report from the Director General of Anti-profiteering determine whether a registered person has passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.*
>
> *(2) An opportunity of hearing shall be granted to the interested parties by the Authority where any request is received in writing from such interested parties.*
>
> *(2A) The Authority may seek the clarification, if any, from the Director General of Anti Profiteering on the report submitted under sub-rule (6) of rule 129 during the process of determination under sub-rule (1).*
>
> *(3) Where the Authority determines that a registered person has not passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, the Authority may*

order-

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount including interest not returned, as the case may be;

(c) the deposit of an amount equivalent to fifty per cent. of the amount determined under the above clause along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of deposit of such amount in the Fund constituted under section 57 and the remaining fifty per cent. of the amount in the Fund constituted under section 57 of the Goods and Services Tax Act, 2017 of the concerned State, where the eligible person does not claim return of the amount or is not identifiable;

(d) imposition of penalty as specified under the Act; and

(e) cancellation of registration under the Act.
Explanation: For the purpose of this sub-rule, the expression, "concerned State" means the State or Union Territory in respect of which the Authority passes an order.

(4) If the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129 recommends that there is contravention or even non-contravention of the provisions of section 171 or these rules, but the Authority is of the opinion that further

investigation or inquiry is called for in the matter, it may, for reasons to be recorded in writing, refer the matter to the Director General of Anti-profiteering to cause further investigation or inquiry in accordance with the provisions of the Act and these rules.

(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry."

This Rule demonstrates the impact of the order of the Authority. It also shows that oral hearing is contemplated. The Authority is also empowered in certain circumstances to order further investigation or an enquiry.

20. The decision of the Authority is to be taken as provided under Rule 134, which reads as under :-

> *"(1) A minimum of three members of the Authority shall constitute quorum at its meetings.*
>
> *(2) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote."*

Three members constitute the quorum. If the members differ in their opinion on any point, the point is to be decided by voting and if equality of votes occurs, the Chairman would have a casting vote. Rule 134(2) clearly contemplate deliberations within the members before deciding.

21. Under Rule 126 of the CGST Rules, the Authority has notified a procedure. The procedure is called *National Anti Profiteering Authority under the Goods and Service Tax Methodology and Procedure, 2018.* It is provided that the principal seat of the Authority will be at New Delhi and the Authority can hold seat at such places within the territory of India. Relevant clauses for this petition are referred to as below. Clause 6 is to be noted, which reads as under :-

> *(6) In the discharge of its functions the Authority shall be guided by the principles of natural justice and shall have the power to regulate its own procedure. No order whether interim or final shall be passed by it without affording opportunity of being heard to the concerned*

interested party.

Clause 6 of the methodology states that in the discharge of its functions the Authority shall be guided by the principles of natural justice. It further states that no order, whether interim or final shall be passed, without affording opportunity of being heard to the concerned interested party. There can be no better evidence than this to indicate that principles of natural justice apply to the proceedings of the Authority. Clause 7 relied upon by the Respondents reads as under :-

> *(7) No act or proceedings of the Authority shall be invalid merely on the ground that there was a vacancy or any defect in the constitution or appointments made in the Authority or there was any irregularity in the procedure followed by the Authority not affecting merits of the case.*

Clause 7 states that no act or proceedings of the Authority shall be invalid merely on the ground that there was any irregularity in the procedure followed by the Authority unless it affects the merits of the case. But the clause 7 has to be read along with clause 6 which incorporates principles of natural justice and cannot be read in isolation. Conjoint reading of these two clauses mean that irregularity contemplated clause 7 is not the one involving breach of principles of natural justice. Further clauses are also relevant. Clauses 10 and 11 read as under :-

> *(10) As per Rule 134 (1) a minimum of three members of the Authority shall constitute quorum at its meetings.*
>
> *(11) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote, Rule 134 (2).*

Clauses 10 and 11 reiterate the provisions of the Rule regarding quorum. Clause 13 lays down the procedure for receipt of the report from the Director General. Clauses 14 and 15 read as under :-

> *(14) In case the report filed by the Director General of Anti-profiteering recommends that there is no violation of the provisions of section 171 of the above Act, the Authority may send a copy of the report to the complaint interested party and invite objections from it and after hearing the above party may either close the matter or pass any order it may deem just and proper or under Rule 133 (4) direct the Director General of Anti-profiteering to further investigate the matter as the case may be.*
>
> *(15) After registration of the report a notice shall be issued to the interested parties or their agents or their counsels intimating the date, time and place fixed for hearing and a copy of the report shall also be supplied to such parties along with the notice.*

These clauses refer to hearing the parties. Clauses 14 to 19 state

how notices are to be issued to the interested parties, and empowers the Authority to dismiss the proceedings in default. Clauses 23, 24, 25 and 26 read as under :-

> *(23) No adjournments shall be ordinarily granted and an adjournment shall be given only on highly compelling grounds and shall also be subject to cost if circumstances so warrant.*
>
> *(24) The interested parties shall not be allowed to produce additional oral or documentary evidence before the Authority.*
>
> *(25) The interested parties shall be ordinarily required to file written submissions only; however they can address oral arguments with the permission of the Authority.*
>
> *(26) The interested party on whose part the proceedings have been initiated shall file or address the arguments first and shall also supply copies of such arguments to the other interested parties who shall be entitled to file their arguments, copies of which shall be supplied to the opposite interested parties, who shall be entitled to rebut the same.*

Again in clause 25 oral hearing is referred to. Clauses 20 to 30 regulate the procedure of hearing before the Authority such as adjournments, additional oral or documentary evidence, etc. The Authority is entitled to correct any clerical, arithmetical or factual mistake apparent from the record within three months from passing

the order. These are generally the provisions which regulate function of a quasi-judicial authority. Clauses 31 to 35 deal with the communication of the order and disposal of record. Clause 41 states that civil court will have no jurisdiction regarding the matters pending before the Authority, conferring an exclusive jurisdiction.

22. To summarize the scheme in the context of the challenge. Consumers can lodge a complaint of profiteering by the registered persons to the authorities empowered to investigate in the complaints. An detailed enquiry, with powers of Civil court and deemed judicial enquiry, is contemplated. Witnesses can be examined. Oral and documentary evidence can be produced. There can be examination and cross examination of witnesses. The Rules and the Procedure incorporate principles of natural justice. The Authority is guided by the principles of natural justice. A hearing is, thus, contemplated not merely looking at the records. The scheme of Rules and the Procedure demonstrate that the principles of natural justice are statutorily ingrained. There is a deliberation amongst the members. Therefore, the presence of a member of the Authority during the hearing is not a formality. Multi-member panels are constituted so a decision through discussion and exchange of opinions takes place. The litigant is entitled to be heard by all members who are the ultimate decision-makers so the litigant can try to convince each member of the adjudicating Authority. Therefore oral hearing is clearly contemplated and the argument of the

Respondent that since all the record was before the Authority, there is no illegality in the fourth member in signing the order, is not correct. If the scheme itself provides for hearing by all members, not giving hearing itself will cause prejudice. Therefore the argument of the Respondents that there is no prejudice, also cannot be accepted.

23. We now turn to the case law relied upon by the parties.

24. In the case of *Emperor v Dasrath Rai and Ors.*[1] of the Privy Council ,relied upon by the Petitioner, the issue arose from Section 350A of the Code of Criminal Procedure. The Privy Council held that only those members of the bench present throughout the proceedings and who formed a quorum should arrive at their conclusion to write the judgment and pronounce and sign it. In the case of *Mushtaq Ali and Ors v. State*[2], the Allahabad High Court took a review of the case law on the subject. The Allahabad High Court held that if any of the members of the bench who has assisted in making the judgment was absent at any hearing of the case, the judgment would be invalid and the invalidity of the judgment will not be curable by Section 350 of the Code of Criminal Procedure. The need to remain present during the hearing was emphatically stated by the Supreme court in the case of *G. Nageshwara Rao v*

1(1933) LVI ILR 599

2 (1964) All LJ 609

APSRTC[3]. The Court held that the divided responsibility of hearing and decision making destroys the concept of a judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables an authority to clear-up its doubts during the arguments, and the party can persuade the authority by reasoned argument to accept the viewpoint. The Court ruled that if one person hears and another decides, then personal hearing becomes an empty formality. The Division Bench of Delhi High Court in the case of *M/s. Kwality Restaurant and Ice-Cream Co. v/s. The Commissioner of VAT, Trade and Tax Department and Ors.*[4] extended this principle to the VAT tribunal.

25. In the case of *Punjab University, Chandigarh vs. Vijay Singh Lamba and Ors.*[5], relied by the Respondents, the Supreme Court was considering a case wherein the High Court of Punjab had set aside a decision on the ground of composition and attendance by one of the members. Here the committee was a Standing Committee established to look into the conduct of students of Punjab University who were disqualified for adopting unfair practices in the examination. In this case, the Supreme Court found that though only two and not all three members of Committee participated in the proceedings and the quorum was of two. In the case of *General*

3 AIR 1959 SC 308

4(2012) SCC OnLine Del 4993

5(1976) 3 SCC 344

Manager Eastern Railway vs. Jawala Prasad Singh[6], the case was where the issue before the Supreme Court was whether the proceedings of Enquiry Committee constituted to enquire into the charges of misappropriation against the Respondents therein were vitiated by violation of principles of natural justice. Here the Enquiry Committee was constituted and in the proceedings of Enquiry Committee which had gone on for some time, one member of the Enquiry Committee was transferred and in his place other member had stepped in. The High Court had taken a view that the persons who decided the matter finally did not hear the witnesses. It is in this context that the Supreme Court found that the change in the Enquiry Committee, which was not a final authority to impose punishment would not be fatal to the final order passed. In this case, therefore, the change in composition was at the stage of the enquiry authority and not the final Authority. In *Indore Textiles Ltd. vs. Union of India*[7] the issue before the Division Bench of Madhya Pradesh High Court was regarding the management of a textile mill taken over by the Madhya Pradesh State Textile Corporation under the orders of the Central Government. Breach of principles of natural justice was alleged on the ground that the person who passed the order to take over did not hear the petitioner, and a different person gave the hearing. The Division Bench observed that it is not an absolute rule that the person concerned must himself hear and

6 (1970) 1 SCC 103

7(1983) MPLJ 41

cannot rely on the report of the officer. The decision of the Kerala High Court in the case of *Raghava Menon vs. Inspector General of Police*[8], was again a case where the Court rejected the contentions based on breach of principles of natural justice on the ground that the evidence was recorded by a person other than the enquiry authority. As these cases would show that they are different from the present case. In the case at hand, hearing by the Authority is contemplated and was given. The order is signed by the fourth member not part of the Authority earlier.

26. In the case of *State of Madhya Pradesh & Ors. v Mahendra Gupta & Ors.*[9], relied upon by the Respondents, the petitioners before the High Court were permit holders of a route for transportation. Another permit holder had applied for modification of the schedule for movement of his vehicle, which was allowed. The petitioners challenged this decision and one of the contentions that were raised that the Transport Authority which was of three members, had heard the matter. However, the order was passed by two members. The Madhya Pradesh High Court held that this could not have been done and the decision of the Authority was set aside. The State of Madhya Pradesh filed an appeal against the decision of the High Court in the Supreme Court. The Supreme Court considered the Motor Vehicle Act and the Rules and the

8 AIR 1961 Kerala 299

9 (2018) 3 MLJ 618

Constitution of the Regional Transport Authority. The Supreme Court noted the fact that the third member was transferred and was not available to be part of the order issued. The Supreme Court examined the facts of the case and found that when the hearing took place, the quorum was complete and all three members were present during the hearing of the Applicants and the objectors. However, before the order could be signed, one member was transferred and was not available for signing. In this context, the Supreme Court analyzed the position and observed that there was no breach of the principles of natural justice. This decision is different on facts. The position was converse to the one at hand. When three members hear, and the fourth member joins subsequently and all sign the order, the roles cannot be severed because they get merged in the collective decision. Situation could be different when some members hear the matter, one is transferred or not available, and others are constituting the quorum sign the order. In such a case, it may be argued that the role of the member who left was automatically severed and the decision of the quorum could be tested independently. The contention of the Respondents that if the role of the fourth member is removed, then the remaining three constitute a quorum and the order can be sustained, thus is not correct.

27. The Respondents, based on the decision of the Supreme Court is *Ossein and Gelatine Manufacturers Association vs. Modi*

Alkalies and Chemicals Ltd.[10], sought to invoke the concept of institutional hearing. In this case, the appeal had come up to the Supreme Court under the Monopolies and Restrictive Trade Practices Act, 1969. The Central Government had granted an application for permission to establish an undertaking for manufacturing, the association made representation to the Central Government objecting to the grant of application to a private party. This application was rejected, and the Petitioner filed an appeal to the Supreme Court under the Act. The Supreme Court observed that the decision therein was an institutional decision and by an officer specially empowered. The Respondents have stressed on the concept of the institutional decision-making. Respondents seek to extend the concept of the institutional decision-making to the Anti Profiteering authority to state that no one member is authorized to take a decision but it is an institutional decision. There is no merit in this contention. No doubt the procedure for institutional decision making differs from the judicial decision making, but the institutional decision making would be the decision by the Government such as the one was before the Supreme Court in the above case. In the present case, the decision is by a designated quasi-judicial body.

28. The above analysis of the decisions cited by the parties will show that the breach of principles of natural justice are examined

10 (1989) 4 SCC 264

in the facts of the case. Certain basic positions of law however are settled. The rule that one who hears must pass the order remains as the basic proposition. In certain circumstances, this rule can be deviated from. None of the decisions relied upon by the Respondents fit the fact situation at hand to justify that deviation. We had adjourned the hearing to enable the Counsel for the Respondents to cite before us any decision where in identical facts courts have permitted the infraction of the basic rule. The Counsel for the Respondents has also fairly accepted that the decisions cited by him can be distinguished on facts, but sought to contend that these decisions lay down certain principles which we must follow. These, according to Respondents, are where an oral hearing is not contemplated; there is no prejudice; is a case of mere irregularity, the court should not interfere. These propositions cannot be accepted from the analysis of the statutory provision which we have undertaken earlier.

29. We conclude that when the three members of the Authority had heard the Petitioner and participated in the entire hearing, the collectively signed decision, when the fourth member joined only for signing the order has resulted in violation of the principles of natural justice and fairness, and is liable to be set aside.

30. There is one more facet , that is of the perception of the litigants. This was underscored by the Division Bench of the Delhi High Court in the case of *M/s. Kwality Restaurant and Ice-Cream Co. v/s. The Commissioner of VAT, Trade and Tax Department and Ors.*[11] . In this case, a challenge was raised to the continuation of hearing before the VAT Appellate Tribunal wherein two members had heard the case substantially in the absence of the third member who had proceeded on leave, and after the hearing was closed, the third member sought to join the bench. The Court did not permit the same. The Court referred to the importance of public confidence in the decision making by the courts and the tribunals. The Court observed that any practice which even remotely suggest a sense of unfairness must be eschewed. It held that our legal system mandates that no one can suffer an adverse order after being subjected to an unfair procedure. The Court observed that procedural safeguards against executive excesses or apathy apply with equally to the Tribunals responsible for dispensing justice within their sphere of activity. Invoking this broader principle also that the Delhi High Court issued the directions. Thus, fairness and transparency in adjudication will enhance the credibility of the Authority.

31. The issues that come up before the Anti-Profiteering Authority are complex. The Act and Rules provide no appeal. The

11 (2012) SCC OnLine Del 4993

Authority can impose a penalty and can cancel the registration. The term profiteering, under the Act and Rules, is used in a pejorative sense. Such a finding can severely dent the business reputation. The Authority is newly established. Therefore, as a guidance to this Authority, highlighting the importance of fair decision-making is necessary.

32. As a result, the impugned order dated 16 November 2018 passed by the National Anti-Profiteering Authority is set aside. The proceedings bearing Case No. 14 of 2018 before the National Anti-Profiteering Authority – Respondent No.2. stand restored. Fresh notice to the Petitioner is not necessary as the Petitioner will appear before the Authority on 25 November 2019.

33. We keep all the contentions of the parties on merits, jurisdiction and validity of the Authority, open.

34. The Rule is made absolute in the above terms. No costs.

NITIN JAMDAR, J. M.S. SANKLECHA, J.