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W.P.No.11911 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.10.2023

CORAM :

**THE HON'BLE MR.SANJAY V.GANGAPURWALA,
CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY**

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1. Agni Steels Private Limited
Represented by its Managing Director,
M.Chinnasami

2. M.Chinnasami .. Petitioners

Versus

1. Union of India
Through Secretary,
Ministry of Corporate Affairs,
4th Floor, A Wing, Shastri Bhawan,
New Delhi - 110 001.

2. Office of the Director General,
Competition Commission of India,
"B" Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.

3. Competition Commission of India,
Through Secretary,
9th Floor, Office Block - 1,
Kidwai Nagar (East)
New Delhi - 110 023, India. .. Respondents



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Prayer : Writ Petition filed under Article 226 of the Constitution of India seeking a Writ of Certiorari to call for the records of Suo Motu Case No.02 of 2021 on the file of respondent No.3, summons, dated 14.03.2023 bearing No.DG/CCI/IW/1/05/2021/199, 28.03.2023 bearing no.DG/CCI/IW/05/2021 and the email dated 06.04.2023, all issued by respondent No.2 and quash the same being void ab initio.

For Petitioners : Mr.Vijaya Narayan, Senior Counsel
for Mr.Thriyambak J.Kannan

For Respondents : Mr.N.Venkataraman,
Additional Solicitor General of India
Assisted by Mr.K.Srinivasamoorthy,
Senior Panel Counsel
for Central Government, for R1

: Mr.Rohan K.George, for RR-2 and 3

ORDER

(Order delivered by the Hon'ble Mr.Justice D.Bharatha Chakravarthy)

On 06.03.2021, one *Coimbatore Corporation Contractors Welfare Association* lodged a complaint with the Central Bureau of Investigation, New Delhi, alleging that the nine companies named in the complaint which are into the business of sale of steel products, considering the demand for steel products by the real estate sector and contractors carrying out infrastructure projects, dishonestly formed a cartel among themselves to obtain wrongful gain and all of them though own iron ore mines, have hiked



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the price from Rs.2,500/- to Rs.2,700/- a tonne for flat and long products and with the hike hot rolled coil price Ex-Mumbai hit a record high of Rs. 47,000/- a tonne.

2. By a communication, dated 30.04.2001, the Superintendent of Police, SPE:CBI:ACB: Chennai, forwarded the complaint to the Director General (Investigation), Competition Commission of India, New Delhi and the said communication reads thus:

“ Please find enclosed complaint No.CA/0019/2021, in original, for taking necessary action at your end.

CBI has not caused any enquiry on the enclosed complaint and not retained any copy of the same.”

3. However, the said Association filed CrI.O.P.No.6153 of 2021 on the file of this Court under Section 482 of the Code of *Criminal Procedure, 1973* and before this Court, on behalf of the Central Bureau of Investigation, it was informed that the complaint has already been forwarded to the Competition Commission of India and that C.B.I has no jurisdiction to take up the matter. On the said submission, the above Original Petition was disposed of on the following terms :



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“8. In view of the above, as the said complaint has already been forwarded to the Director General(Investigation), Competition Commission of India, New Delhi by letter dated 30.04.2021 for taking necessary action, the Direction General (Investigation), concerned is hereby directed to proceed further in this regard and take necessary and appropriate action on the complaint dated 06.03.2021 filed by the petitioner herein in accordance with law within a period of four weeks from the date of receipt of this order.”

4. Thereafter, on 17.08.2021, an urgent special meeting of the Commission was convened virtually. The meeting was attended by the Chairperson, two Members and Secretary of the Commission. Besides five officers, including Director General, two Advisors (Eco) and two Directors (Law) also attended the meeting. After deliberation, the following decisions were taken and the minutes reflected in the communication, dated 23.08.2021 as such is reproduced hereunder:

“ The decisions of the Commission subsequent to detailed deliberations, are as under:

(i)The Secretariat Division is directed to register and number the captioned matter as Suo Moto case and convey the same DG/ATD

(Action: Secretariat Division)

(ii)The DG to investigate the matter in terms of directions contained in the Order dated 29/07/2021 passed by the Hon'ble High Court of Judicature at Madras in Crl.O.P. No. 6153 of 2021.



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(Action :Director General)”

5. The Director General commenced investigation and on 29.11.2022, an application for search and seizure was moved before the learned Chief Metropolitan Magistrate, New Delhi, which was allowed. Pursuant to the warrant, search was conducted in the premises of the writ petitioner on 16.12.2022 and 17.12.2022. On 17.12.2022, the Executive Director of the petitioner Company e-mailed to the respondent authorities seeking marker status for filing a leniency application. It is contended on behalf of the petitioners that the Executive Director was co-erced to write such a communication.

6. Thereafter, the writ petitioner Company after engaging legal Counsel filed an application for inspection of the records of the case on 11.01.2023. On 14.03.2023, summons was issued by the respondent authorities seeking personal appearance of the writ petitioner's officials. Again, a request was made for inspection of records on behalf of the writ petitioner on 15.03.2023 and followed by one more request on 21.03.2023. Adjournment was sought for personal appearance. On 23.03.2023, the respondent officials permitted inspection of the records. Since inspection



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did not reveal any order passed under Section 26(1) of the *Competition Act, 2002* (hereinafter referred to as 'the *Act*'), by an application, dated 24.03.2023, certified copy of the order under Section 26(1) of the *Act* was sought. Again, a fresh summons for personal appearance came to be issued on 28.03.2023 by the respondent authorities. On 29.03.2023, once again the copy of the order under Section 26(1) of the *Act* was sought. An adjournment was also sought seeking exemption from personal appearance on 12.04.2023 as per the summons. However, the said request was turned down by a communication, dated 06.04.2023.

7. At this stage, the petitioners filed W.P.No.11911 of 2023 is filed to call for the records relating to the summons, dated 14.03.2023 and 28.03.2023 and the communication, dated 06.04.2023 and to quash the same as being *void ab initio*.

8. In the affidavit filed in support of the Writ Petition, after detailing the above facts, very many grounds are raised against the summons and investigation. The sum and substance is that there is no order demonstrating the formation of *prima facie* opinion as per Section 26(1) of



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the *Act*, which is not only mandatory, but forms the basis of the commencement of investigation. The exercise of *suo moto* powers shall be strictly in accordance with the *Act*. The respondents have arbitrarily chosen to proceed against the writ petitioner and have left out companies of their choice. The presence of the Director General and other officials in the meeting of the Commission held on 17.08.2022 vitiates the entire process.

9. A counter affidavit is filed on behalf of the respondents contending that the investigation is underway and without appearing for the summons, the petitioners have prematurely approached this Court. It is the case of the respondents that when this Court has directed to take action on the complaint, the Commission cannot sit over on appeal and as such, directed the Director General to proceed with investigation by ordering *suo moto* registration of a case and there is no illegality in the procedure. Rejoinders are also filed denying the averments in the counter and countering the contentions.

10. *Mr. Vijay Narayan*, the learned Senior Counsel appearing on behalf of the writ petitioner, would contend that any investigation under the



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Act has to be conducted strictly as per the provisions of the *Act*. Formation of a *prima facie* opinion by the Commission is mandatory and sine qua non for any investigation under the act. A perusal of the minutes of the meeting as reflected in communication dated 23.08.2022 reveals that there was no consideration of *prima facie* case and that the Commission directed investigation on the strength of the order of this Court. On a perusal of the order of this Court, it will be clear that this Court ordered investigation only in accordance with law. When Section 26(1) of the *Act* makes it mandatory for the Commission to form a *prima facie* opinion which is the foundation for investigation, the same is an incurable and material irregularity and absence of the same should result in quashment of the entire proceedings irrespective of the fact that the investigation has been proceeded further.

11. *Mr. Vijay Narayan*, learned Senior Counsel also submitted that even though the complaint specifically mentioned about 9 steel companies, the respondents chose to proceed against only two of the nine companies and have proceeded against companies of their choice which were not mentioned in the complaint and have also left out the companies which they wanted to even though their names figure in the complaint. He submit that



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the investigation suffers from the vice of cherry picking and thus is arbitrary.

12. *Mr. Vijay Narayan*, the learned Senior Counsel would also submit that the very presence of the Director General and other officials who are not part of the Commission in the meeting, dated 17.08.2022 would only lead to the conclusion that the same cannot be a meeting of the Commission. As such, in the absence of a proper meeting and deliberation of the Commission the entire investigation is liable to be quashed.

13. *Mr. Vijay Narayan*, the learned Senior Counsel placed strong reliance upon the Judgment of the Hon'ble Supreme Court of India in ***Competition Commission of India Vs. Steel Authority of India Limited***¹ more specifically paragraph Nos.37, 97 and 98. He relied upon the judgment in ***Excel Crop Care Limited Vs. Competition Commission of India***², more particularly paragraph No.44 of the Judgment.

1 (2010) 10 SCC 744

2 (2017) 8 SCC 47



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14. *Mr. Vijay Narayan*, the learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court of India in ***Mannanlal Khetan Vs. Kedar Nath Khetan***³, to contend that when law mandates a particular thing to be done in a particular manner the same shall be done only in that manner. He submitted that the order of this Court in the Criminal Original Petition has to be read in the manner so as not to do violence to Section 26(1) of the *Act* and for the said proposition relied upon the judgments in ***Fida Hussain Vs. Moradabad Development Authority***⁴ and ***Maharshi Dayanand University Vs. Surjeet Kaur***⁵.

15. For the proposition that would be the foundation to all the other *Acts* of investigation should fall, the learned Senior Counsel relied on the judgment in ***Coal India Ltd Vs. Ananta Saha***⁶. Further, reliance was made on paragraph No.37 of the judgment of the Hon'ble Supreme Court of India in ***State of Orissa and Anr. Vs. Mamata Mohanty***⁷ to contend that the investigation which is bad at the inception cannot get sanctified.

3 (1977) 2 SCC 424

4 (2011) 12 SCC 615

5 (2010) 11 SCC 159

6 (2011) 5 SCC 142

7 (2011) 3 SCC 436



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16. Per *contra*, Mr.Venkataraman, the learned Additional Solicitor General of India, would submit that the order of this Court in the Criminal Original Petition is not to consider but with a positive direction to take action and proceed further. The investigation is ordered by the Commission in compliance of the said Order and the Commission is duty bound to comply with the order. The investigation is at an advanced stage and when materials are being gathered, the petitioners are before this Court for interdiction during the course of investigation. The Investigating Officers in their discretion shall summons, search or simply call for information from companies. They can also proceed against Companies whose name does not figure in the list. Prematurely, no allegation of cherry picking or arbitrariness can be made even before the conclusion of the fact finding inquiry and formation of any opinion.

17. The learned Additional Solicitor General of India also placed reliance on certain passages in ***Competition Commission of India Vs. Steel Authority of India*** (cited *supra*), more specifically, on paragraph Nos.78, 87, 91 and 93 to contend that the Hon'ble Supreme Court of India has ruled that there was no necessity to issue an notice as per Section 26(1) of the *Act*



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and the inquiry of the Commission is neither criminal nor civil but *sui generis* and the power exercised by the Commission is inquisitorial and regulatory in nature, and is in the nature of a preparatory measure in contrast with the decision-making process. As such, when in terms of the directions of this Court, investigation is ordered, no exception can be taken for the same.

18. The learned Additional Solicitor General of India also placed reliance on Regulation 14 of the *Competition Commission of India (General) Regulations, 2009* to refer to role of the Secretary of the Commission. The order of the learned Single Judge of the Calcutta High Court, dated 18.05.2023 in W.P.A.No.10107 of 2023 in refusing to interfere in the very same investigation was also placed before us.

19. We have considered the rival submissions made on either side and perused the material records of the case. The following questions arise for determination in the instant cases :



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(i) Whether or not the investigation against the writ petitioner in *Suo Moto* Case No.2 of 2021 is vitiated for non-compliance of Section 26(1) of the *Act*?

(ii) Whether or not the presence of Director General and other officials would render the meeting of Commission, dated 17.08.2022 illegal?

(iii) Whether or not the investigation is liable to be interfered on the ground that the petitioner Company has been cherry picked?

Question (i) :

20. In order to answer this question, Section 26 of the *Act* is extracted for ready reference :

" 26. Procedure for inquiry on complaints under section 19.—

(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information



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received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

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Thus, it mandates that the Commission shall form a *prima facie* opinion before directing investigation. A reading of the judgment of the Hon'ble Supreme Court of India in ***Competition Commission of India Vs. Steel Authority of India's*** case (cited *supra*) and ***Excel Crop Care's*** case cited *supra*, it would be clear that (i) the Director General can investigate only after the direction of the Commission; (ii) the Commission has to form an opinion about the existence of *prima facie* case before directing investigation; (iii) that the Commission need not issue notice or hear the parties but express its mind that a *prima facie* case exists with reference to the information furnished to the commission.



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21. In this regard, it is also essential to advert to Section 19 of the *Act* which reads as follows :

19. Inquiry into certain agreements and dominant position of enterprise.—

(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

Provided that the Commission shall not entertain an information or a reference unless it is filed within three years from the date on which the cause of action has arisen:

Provided further that an information or a reference may be entertained after the period specified in the first proviso if the Commission is satisfied that there had been sufficient cause for not filing the information or the reference within such period after recording its reasons for condoning such delay.

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Thus, it can be seen that the Commission can order inquiry (i) on its own motion; (ii) on receipt of information from any person; or central government or a state government or a statutory authority. In the instant



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to institute a *suo moto* case; (ii) the same is adequately expressed by the reference of detailed deliberation, decision to register and also the order of this Court. In the peculiar facts and circumstances of this case, where this Court directed to 'proceed further and take necessary and appropriate action', we find that the Commission's expression of its satisfaction in other words and not expressly using 'that it finds a *prima facie* case' as appropriate in the context. Therefore, we answer the question that the direction to investigate and the subsequent investigation in the instant case are not in violation of Section 26(1) of the *Act*.

Question (ii) :

22. The mere presence of the Director Investigation or the other officials does not in any manner vitiate the proceedings. Section 22 of the *Act*, prescribes the quorum for the meeting. There is no embargo for the presence of the other officials. As a matter of fact, the process is under Section 26(1) of the *Act* is held to be a preparatory process and is not part of the decision making and as such, the mere presence of the other officials will not render the meeting invalid and we answer the question accordingly.

Question (iii) :



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23. As regards the question as to Cherry Picking, when the investigation is in progress, merely because some of the companies were not question and some companies who are not named have been chosen, the same will not be ground for interference at this stage. It would be premature and interdiction in the investigation to conduct an inquiry with regard to this contention at this stage. Thus, we answer the question that the question as to arbitrariness or malice or discriminatory treatment is premature at the stage of inquiry and investigation and we find it not to be a ground to interfere at this stage, leaving it open for the writ petitioner to agitate the same, if made out at the relevant point of time.

24. In the result, finding no merits, the Writ Petition is dismissed. There will be no order as to costs. Consequently, W.M.P.Nos.11792, 11793 and 11794 of 2023 are closed.

(S.V.G., CJ.)

(D.B.C., J.)

19.10.2023

Index : yes

Speaking order

Neutral Citation : yes

grs

To

1. The Secretary,
Ministry of Corporate Affairs,
4th Floor, A Wing, Shastri Bhawan,



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- New Delhi - 110 001.
2. The Director General,
Competition Commission of India,
"B" Wing, HUDCO Vishala,
14, Bhikaji Cama Place,
New Delhi - 110 066.
 3. The Secretary,
Competition Commission of India,
9th Floor, Office Block - 1,
Kidwai Nagar (East)
New Delhi - 110 023, India.



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**THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY, J.**

grs

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