IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.06.2023

PRONOUNCED ON : 03.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

A.Nos.3098, 3101, 3100, 3102, 3103, 3099, 3105, 3106, 3108, 3109, 3110, 3107, 3111 and 3113 of 2023
and
O.A.Nos.365, 366, 367, 457, 458, 459, 417, 418, 419, 475, 476, 478, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 495, 494, 496, 497, 498, 500, 502, 499, 501, 503, 521, 522, 523, 524, 526 and 527 of 2023
in
C.S.(Comm.Div).Nos.98, 120, 109, 124, 126, 127, 128, 129, 130, 131, 132, 133, 140 and 141 of 2023

A.No.3098 of 2023:

1.Google India Pvt. Ltd.,
Represented by its Managing Director
Corporate Identification No U72900KA2003PTC033028
With their registered address at:
No 3, RMZ Infinity – Tower E, Old Madras Road,
4th & 5th Floors, Bangalore
Karnataka 560016
Rep by Auth.Signatory Gitanjali Duggal
Residing at No.D-32, Panchsheel Enclave,
New Delhi – 110017. ... Applicant No.1/Defendant No.6

2.Google India Digital Services Pvt. Ltd.
Represented by its Managing Director
(CIN) U74999DL2017PTC376205
5th Floor, DLF Centre, Block-124,
Narindra Place, Sansad Marg,
New Delhi – 110001. ... Applicant No.2/Defendant No.7

vs

1.Matrimony.com Ltd.
Through their Authorised Signatore,
Mr Krishnan K (Vice President-Legal)
Corporate Identification No.L63090TN2001PLC047432
With their registered address at:
No.94 TVH Beliciaa Towers Tower II 5th Floor
MRC Nagar Raja Annamalaipuram Chennai
Tamil Nadu 600 028. ... Respondent No.1/Plaintiff

2.Alphabet Inc.
Represented by its Authorized Officer
1600 Amphitheatre Parkway Mountain View,
CA 94043, United States of America. ... Respondent No.2/Defendant No.1

3.Google LLC
Represented by its Authorized Officer
A Limited Liability Corporation
With their registered address at:
251 Little Falls Drive
Wilmington, Delaware 19808
United States of America. ... Respondent No.3/Defendant No.2

4.Google Asia Pacific Pte. Ltd.
Represented by its Authorized Officer
Unique Entity Number 200817984R
With their registered address at:
8 Marina Boulevard,

#05-02, Marina Bay Financial Centre
Singapore 018981. ... Respondent No.4/Defendant No.3

5.Google Payment Corp.
Represented by its Authorized Officer
1600 Amphitheatre Parkway Mountain View,
CA 94043, United States of America. ... Respondent No.5/Defendant No.4

6.Google Payments India Private Ltd
Represented by its Managing Director
(CIN) U72200DL2007PTC360455
5th Floor, DLF Centre, Block-124,
Narindra Place, Sansad Marg,
New Delhi – 110001. ... Respondent No.6/Defendant No.5

Prayer: Application is filed praying to reject the plaint in C.S. (Comm Div) No.98 of 2023 under Order VII Rule 11.

For Applicants : Mr.P.S.Raman
for M/s.Leela & Co.,
(in all applications)

For 1st Respondent
(in A.Nos.3098, 3101, 3100, 3102,
3103, 3099, 3105, 3106, 3108, 3109,
3110, 3111and 3113 of 2023) : Mr.P.Chidambaram,
Senior Counsel

: Mr.Sriram Panchu,
Senior Counsel

: Mr.Sathish Parasaran,
Senior Counsel

: Mr.Srinath Sridevan,
Senior Counsel

: Mr.R.Venkat Raman,

: Mr.Abir Roy,

: Mr.Anirudh Menon,

: Mr.S.K.Hari Narayanan
Mr.Sachin Menon
for M/s.Tatva Legal, Chennai

For 1st Respondent
in A.No.3107 of 2023 : Mr.Arun C.Mohan
for M/s.Brinda Mohan

COMMON ORDER

These applications are filed by defendants 6 and 7 in the main suit seeking rejection of the plaint.

2. The 1st respondent herein filed a suit seeking a declaration that payment policy of the applicants and other defendants relating to implementation of Google Play Billing System (GPBS) and User Choice Billing System vis-a-vis the Mobile Applications owned and operated by the 1st respondent in 'Google Play Store' as illegal and unenforceable.

3. The 1st respondent also sought for a declaration the definition of the

'Authorised Provider' and Clause 15.3 of the Developer Distribution Agreement as unconscionable, illegal and unenforceable. The 1st respondent also sought for a declaration that any charges levied by the applicants and other defendants under Google Play Billing System (GPBS) and Alternate Billing System/User Choice Billing System as illegal, void and unenforceable vis-a-vis the Mobile Applications owned and operated by the 1st respondent in 'Google Play Store'.

4. The 1st respondent also sought for a permanent injunction restraining the applicants and other respondents/defendants from removing, delisting the Mobile Applications owned and operated by 1st respondent in 'Google Play Store' for its refusal or failure to accept or subscribe to Google Payments Terms of Service-Seller (IN) posted on 02.06.2022 relating to implementation of the Google Play Billing System and User Choice Billing System.

<u>Averments found in the Plaint</u>:-

5.(i) The 1st respondent/plaintiff in all the applications are various mobile App Developers providing online services to people. The 1st respondent/plaintiff mobile apps are available in Google Play Store owned by applicants and other respondents. There are two major operating system in the Global Market namely 'Android (owned by Google)' and 'IOS (owned by Apple Inc.)'. As on 2022, the percentage of mobile phones running on the Android Operating System in India is 96%. As on today, the customers of the 1st respondent/plaintiff make payment for both subscription as well as In-App Purchases to the 1st respondent through Debit Card/Credit Card/Net Banking/UPI and a very nominal and a mutually agreed fee is paid to the System Providers/Payment Processors (viz., Razor Pay, etc.,) offering the above Payment Methods. The 2nd respondent/1st defendant is an American Multinational Technology Conglomerate Holding Company, Headquartered at California. The 2nd respondent is the parent company of the applicants and respondents 3 to 6.

5.(ii) The 1st respondent entered into a Developer Distribution

Agreement (hereinafter referred to as 'DDA' for brevity) with the 4th respondent for the purpose of listing its Mobile Apps in the Google Play Store. The 5th respondent/4th defendant is operating google play billing system and the same is a wholly owned subsidiary of the 3rd respondent/2nd defendant. The 5th respondent is a Service Provider facilitating payment transactions, that result in debiting purchase amount from the buyer's payment account and payment of funds to the seller's settlement account. By clicking the sign up button, the App Developer like 1st respondent is deemed to have signed and accepted the Google Payments Terms of Service-Seller (IN)/Seller Terms of Service Agreement ('Service-Seller Agreement'). The 1st applicant is a subsidiary of the 3rd respondent and it undertake marketing and promotion activities for certain products that are monetised by 1st defendant-company. The 2nd applicant/7th defendant operates as an online 'Payment Aggregator', who receive payments from customers, pool and transfer, the same to the merchants after a time period. The applicants and respondents 2 to 6 were collectively referred to as 'Defendants/Google Group' in the plaint averments.

5.(iii) Any App Developer in India like 1st respondent, who wishes to be enlisted in the Google Play Store, is required to accept all non-negotiable terms of 'DDA' of the 4th respondent. Refusal to accept the one-sided and arbitrary clauses therein would result in non-listing of the App of said App Developer in Google Play Store. In the year 2020, the defendants made the use of Google Play Billing System (hereinafter referred to as 'GPBS' for brevity) mandatory for processing payments for downloading Paid Apps, In-App Purchases etc. Failure to do so, will result in de-listing of concerned Apps from Google Play Store. On the basis of complaints made to it, the Competition Commission of India (hereinafter referred to as 'CCI' for brevity) by order dated 25.10.2022 directed the applicants and its sister concern not to restrict app developers from using any third-party billing/payment processing services for app download or in-app purchase. It was also made clear that Google shall not discriminate or otherwise take any adverse measures against App Developers using third party billing/payment processing services in any manner.

5.(iv) The applicants and its sister concern instead of choosing to comply with the directions of CCI innovatively found a method to circumvent the order by introducing 'Alternative Billing System/User Choice Billing' in addition to GPBS. In effect integration of GPBS by app developers is still mandatory in addition to User Choice Billing System. It is also made clear by the applicants and its sister companies that when a consumer chooses to use alternative billing system instead of GPBS, the standard service fee payable by the developer will be reduced by 4%. The service fee charged by Google is not a simple fee for payment processing but the same is utilised for investments across Android and Google Play, reflects the value provided by Android and Google Play. The applicants and its sister company made it clear that service fee charged by them is 15% for the first one million US Dollars revenue earned by the App Developer per year. Any earnings by the Apps Developer in excess of one million US Dollars will be charged at 30%. In case where alternative billing system is used for app purchase or in-app purchase, the service fee would be 11% to 26%.

5.(v) The change in payment policy introduced by the applicants and its sister concern subsequent to the order passed by the CCI would violate the provisions of Payment and Settlement Systems Act, 2007 (hereinafter referred to as 'PSS Act'). As a condition to list the apps developed by the App Developers in the Google Play Store, they have to agree to the terms and conditions in the DDA and its terms and conditions are frequently modified and amended at the sole instance and discretion of the applicants and its sisters concern.

5.(vi) The relationship between the App Developers like the 1st respondent and the applicants is governed by three agreements namely Developer Distribution Agreement (DDA), Developer Programme Policies and Google Payments Terms of Service-Seller (IN). GPBS is a proprietary billing system of the applicants and its sister concerns. In the said system, the App Developers create account with applicants and they remit the App Developers the payments collected from purchasers of the apps from Google Play Store or payment made for purchases of digital goods/services within app. In the process, the applicants and other respondents deduct its 'Service Fee' or commission for facilitating the process of collecting payments from users and remitting it to the App Developers' account. The applicants and the other defendants are performing the task of 'Payment Aggregators' within the meaning of PSS Act. The applicants and other defendants by interposing themselves into the Payment System, ensure collection of their unilaterally imposed charges. This would amount to co-mingling of revenue streams, which is prohibited by Reserve Bank of India guidelines. Section 10-A of PSS Act stipulates that a Bank or a System provider shall not impose any charge either directly or indirectly upon a person making or receiving a payment by using electronic modes of payment. Thus, the applicants and other defendants are statutorily restrained from imposing any charges to the person making payment through electronic modes of payment. Therefore, the applicants and defendants shall be restrained from violating the provisions of PSS Act.

5.(vii) Under the Reserve Bank of India guidelines, the payment to merchant shall not be later than on Td + 1 basis. However, Service-Seller Agreement of the applicants enable them to pay the amount to App Developers' account within the 15th day of following calendar month. The applicants and other defendants are blatantly violating the RBI guidelines and hence, deserves to be punished and prohibited from doing so. Under RBI guidelines, the Payment Aggregator is permitted to charge commission for payment processing at pre-determined rates. However, the applicants and other defendants intend to charge service fee of 15% to 30% and the same is arbitrary. It is also stated that as per the RBI guidelines, the settlement of funds with the merchants shall not be co-mingled with other business, if any, handled by the Payment Aggregators. In the case on hand, the applicants and other defendants charge at a flat rate of 15% to 30% under the guise of service fee and even according to them, the same is utilised towards Google Investment across Android and Google Play. Such co-mingling is prohibited under PSS Act. The applicants and other defendants are causing damage to the operation of the Payment Systems, which is protected and regulated by PSS Act. On account of RBI's inaction to issue appropriate directions to prevent such abuse by applicants, the 1st respondent requested this Court to pass appropriate orders under Sections 17 and 18 of PSS Act.

5.(viii) Since the applicants and other defendants are attempting to implement the one-sided and arbitrary payment policies and terms, the same shall be declared as illegal and they shall be restrained from taking any action, which would affect the continuity of 1st respondent's Apps in Google Play Store.

5.(ix) It is also stated by the 1st respondent in the plaint that Google Play Store controlled by the applicants and other defendants is indispensable for the App Developers like 1st respondent and taking advantage of the said dominant position, non-negotiable service fee was imposed on the 1st respondent, the conduct of the applicants and other defendants are unconscionable and arbitrary. On these pleadings, the 1st respondent/plaintiff laid the suit seeking the above said reliefs.

<u>Averments found in the applications to reject the plaint</u>:-

6.(i) The applicants/defendants 6 and 7 have come up with these applications seeking rejecting of the plaint on the ground that the subject matter of the suit is barred under Section 61 of the Competition Act, 2002 and consequently, the suit is not maintainable under Section 11 of the Commercial Courts Act, 2015. The cause of action found in the suit is rooted in alleged rights and entitlements arising out of the CCI's order dated 25.10.2022. The suit based on the averment that applicants and other defendants are attempting to circumvent the order passed by CCI, is expressly barred under Section 61 of the Competition Act, 2002. Hence, the suit is liable to be rejected under Order VII Rule 11(d) of the Code of Civil Procedure.

6.(ii) It was averred that the subject matter of the suit concerns with the compliance of directions issued by CCI under Section 27 of the Competition Act, 2002. The CCI did not find that service fee charged by the applicants is excessive, disproportionate. The adjudication of CCI under the Competition Act, 2002, operates in rem and hence, the suit is not maintainable before this Court.

6.(iii) The 1st respondent's allegation of non-compliance of PSS Act and the RBI guidelines cannot be the subject matter of the commercial suit. The suit is not maintainable under the PSS Act as Court cannot take cognizance of an offence punishable under PSS Act except upon a written complaint by an Officer of Reserve Bank of India. Under Clause 16.8 of DDA all claims arising out of the agreement will be governed by the laws of the State of California, United States of America and subject to the jurisdiction of Courts at Santa Clara, California. Therefore, the 1st respondent wrongly invoked the jurisdiction of this Court. Once, the terms of contract are agreed upon by the parties, they cannot turnaround and say the terms are onerous unless good and sufficient reasons are shown. Therefore, the 1st respondent cannot allege that the Courts of California are 'f*orum non conveniens*' when it consciously and voluntarily entered into the DDA Contract. The principle of unconscionable contract does not apply to commercial transaction where both the parties are business entities. The 1st respondent, who entered into contract conscious of its agreed terms including the exclusive jurisdiction clause cannot be permitted to indulge in forum-shopping in breach of terms of contract.

6.(iv) Without prejudice to the claim of the applicants on the question of jurisdiction, it was also averred that the prayer in the plaint was founded on implementation of UCB in compliance of order passed by CCI and the consequent changes to DDA. The applicants and the respondents 2, 3 and 6 are not signatories to the contract with the 1st respondent. Therefore, there is no cause of action as against the applicants and respondents 2, 3 and 6. As the plaint does not disclose cause of action against the applicants, the respondents 2, 3 and 6/Defendants 1, 2, 5 to 7, the same is liable to be rejected. On these averments, the applicants sought for rejection of the plaint.

Averments found in the counter affidavit of the 1st respondent:-

7.(i) The averments of the applicants that the 1st respondent is attempting to enforce the order passed by CCI is not correct. The Competition Commission of India is established to entertain and decide the matters pertain to anti-competitive agreements, which would cause an appreciable adverse effect on the competition within India, to prohibit enterprises from abusing its dominant position, to regulate the combinations which would cause an appreciable adverse effect on competition within the relevant market in India amongst others. The plaint does not contain any averments to seek any of the reliefs or remedies provided under the Competition Act, 2002. It is not the case of the applicants that CCI is empowered to entertain, decide or adjudicate upon the matters covered under the PSS Act or the Indian Contract Act, 1872. Therefore, the applicants shall be precluded from contending that the jurisdiction of this Court stood ousted by virtue of Section 61 of the Competition Act, 2002.

7.(ii) It has been consistently held by Courts in India that if an agreement is of such a nature that if permitted, it would defeat the provisions of any law, the same is unlawful and particularly violates Section 23 of the Contract Act, 1872. Under Section 9 of Code of Civil Procedure, the Civil Court has got jurisdiction to try all suits of a civil nature unless its jurisdiction expressly and impliedly barred. In the absence of any Special Forum/Tribunal formed under PSS Act to entertain petitions/complaints alleging breach or contravention of provisions of PSS Act, the jurisdiction of the Civil Court cannot be said to be ousted. This Court has jurisdiction to grant relief of declaration and injunction, which cannot be granted by Magistrates. It is also stated by the 1st respondent that the cause of action for entertaining complaint under Section 28 of PSS Act will arise only after the omission or commission of any offence under the said Act. On the other hand, the 1st respondent is before this Court seeking declaratory and injunctive remedies to prevent the defendants from committing the above breaches and contraventions. Hence, reliance on Section 28 of the PSS Act is wholly misplaced and unwarranted.

7.(iii) The averments of the applicants regarding exclusive clauses in the contract vesting exclusive jurisdiction to Courts at California cannot be made by the applicants as they are not party to the contract. The parties by private stipulation cannot oust the Courts of their jurisdiction and confer the jurisdiction on a Foreign Court, especially in cases where one of the parties to the contract had no option to negotiate such jurisdiction clause, except to sign on dotted line. Even as per the version of the applicants, 7 lakhs App Developers in India are listed in Google Play Store and forcing all such 7 lakhs developers to approach the Courts at Santa Clara by applying Californian Laws would have severe adverse impact on life and survival of Indian App Developers.

7.(iv) The allegation of the applicants that the principle of unconscionable contract does not apply to the commercial transaction cannot be accepted. It is not the allegation of the applicants that cause of action for the suit has not arisen within the territorial limits of this Court. The Clause 16.8 of DDA is not valid in the light of Section 28 of Indian Contract Act, 1872 and also the fact that a Foreign Court may not enforce the provisions of PSS Act.

7.(v) The allegations of the applicants as if, the plaint does not disclose cause of action against the defendants 1, 2, 5 to 7 is untenable in law as the plaint cannot be rejected in part as against some of the defendants. It is not the case of the applicants that absolutely there is no connection between the applicants and other defendants in the suit. Whether the applicants and other defendants are having role and connection with the subject matter of dispute is a matter for trial. The averment of the 1st respondent that all the defendants in the suit including the applicants are acting as a monolithic block to by-pass the PSS Act has to be taken at its face value while considering the applications for rejection of the plaint. On these pleadings, the 1st respondent/plaintiffs sought for dismissal of the applications for rejection of the plaint.

8. Heard the arguments of Mr.P.S.Raman, learned Senior Counsel appearing for the applicants and that of Mr.P.Chidambaram, learned Senior Counsel, Mr.Sriram Panchu, learned Senior Counsel, Mr.Sathish Parasaran, learned Senior Counsel, Mr.Srinath Sridevan, learned Senior Counsel, Mr.R.Venkat Raman, learned counsel, Mr.Abir Roy, learned counsel, Mr.Anirudh Menon, learned counsel, Mr.S.K.Hari Narayanan, learned counsel and Mr.Arun C.Mohan, learned counsel for the 1st respondent in A.Nos.3098, 3101, 3100, 3102, 3103, 3099, 3105, 3106, 3108, 3109, 3110, 3111, 3113 and 3107 of 2023.

9. **Salient features of the arguments made by the learned Senior Counsel for the applicants**:-

(A) There is no privity of contract between the 1st respondent/plaintiff and defendants 1, 2 and 5 to 7 including applicants. Therefore, the plaintiff has no cause of action against applicants and other defendants except defendants 3 and 4 to maintain a suit as a commercial dispute before the Commercial Division. Since the plaint is not maintainable against defendants 1, 2 and 5 to 7, the whole plaint is liable to be rejected.

(B) Breach of statutory obligation under Competition Act, 2002 and the Payment and Settlement Systems Act, 2007 cannot be treated as commercial dispute as defined under Commercial Courts Act, 2015 in the absence of the mercantile document or agreement involving the applicants.

(C) A reading of plaint as a whole would suggest the claim of the plaintiff in the present suit stems out of the order passed by Competition Commission of India. The learned Senior Counsel by taking this Court to Sections 3, 4, 42, 42 (A), 60, 61 and 62 of Competition Act, 2002, submits the main contention of the plaintiff that the agreement entered with defendants 3 and 4 is unconscionable and the same is the result of undue influence exerted by Google's dominant position is a matter which has to be gone into by CCI and as a consequence, the Civil Courts jurisdiction is ousted expressly under Section 61 of Competition Act, 2002 read with Section 11 of Commercial Courts Act, 2015.

(D) The allegation in the plaint that User Choice Billing System is violation of order passed by CCI is a matter which has to be agitated before CCI. It is also submitted by the learned Senior Counsel that the order passed by CCI operates in rem, however, the decree passed by the Civil Court in the cases like this operates in *personam*, therefore, the Civil Courts jurisdiction is deemed to be ousted and aggrieved parties shall be relegated to agitate their grievance before CCI.

(E) The Payment and Settlement Systems Act, 2007 is a self contained code and Reserve Bank of India is the Designated Expert Authority to oversee the implementation and enforcement of the PSS Act. Thus, when the Special Act provides for the Designated Authority to adjudicate the contraventions and violations of the said Act, the Civil Court's jurisdiction is impliedly barred. The learned Senior Counsel by taking this Court to Section 28 of PSS Act, submitted that no Court can take cognizance of an offence punishable under PSS Act except upon a written complaint by an Officer of Reserve Bank of India and therefore, the present suit filed by the plaintiff complaining violations of provisions of PSS Act, cannot be entertained by the Civil Court. The learned Senior Counsel further submitted that provisions of PSS Act is applicable only to the 2nd applicant/7th defendant in his capacity as a payment aggregator or system provider under PSS Act. Admittedly, there is no privity of contract between the 2nd applicant/7th defendant and 1st respondent/plaintiff. When PSS Act is not applicable to defendants 3 and 4 with whom the plaintiff entered into an agreement, the terms of such agreement cannot be tested in the light of provisions of PSS Act.

(F) The learned Senior Counsel by taking this Court to Clause 16.8 of Developer Distribution Agreement (DDA) submitted that in view of exclusion clause contained therein confining the disputes arising out of the agreement for adjudication before the Courts at Santa Clara, California, United States, the present suit filed before this Court is not maintainable. When parties with their eyes open entered into an agreement agreed to the jurisdiction of particular Court, they cannot turnaround and initiate a legal proceedings in some other forum. Therefore, it is the contention of the learned Senior Counsel that by virtue of the exclusive clause available in the agreement between the parties, this Court has no jurisdiction to entertain the suit. The learned Senior Counsel also submitted that the relationship between the parties in the present suit is governed by commercial considerations. The allegations of inequitable bargaining power cannot be raised in respect of commercial contract.

10. In support of his contention, the learned Senior Counsel relied on the following judgments:-

S. No.	Case Law	Proposition
1	***Watchdata Technologies Pvt. Ltd., Singapore vs. M/s.Sharon***	When two or more courts have jurisdiction parties by agreement

S. No.	Case Law	Proposition
	Solutions Ltd., reported in ***2012 SCC Online Mad 4983***.	can agree to vest jurisdiction on one court.
2	***Modi Entertainment Network vs. W.S.G.Cricket PTE. LTD.,*** reported in ***(2003) 4 SCC 341***.	No anti-suit injunction shall be granted in a case where parties agreed under a non-exclusive jurisdiction clause to approach a neutral Foreign Forum and be governed by law applicable to it.
3	***A.B.C.Laminart PVT. LTD., vs. A.P.Agencies, Salem*** reported in ***(1989) 2 SCC 163***.	When certain jurisdiction is specified in a contract, an intention to exclude all other courts may be inferred.
4	***Beoworld PVT. LTD vs. Bank & Olufsen Expansion*** – Judgment of Delhi High Court in ***I.A.No.4174 of 2020 in C.S.(COMM)No.122 of 2020***.	In an international contract, parties may agree to confer jurisdiction on Foreign Courts located in neutral venues.
5	***TradeComet.com, LLC vs. Google, Inc***, judgment of United States District Court for the Southern District of New York reported in ***693 F. Supp. 2D 370***.	The validity of Clause 16.8 of DDA was upheld by United States Court.
6	***Church of North India vs.***	When there is no express bar to the jurisdiction of the Civil Court

S. No.	Case Law	Proposition
	Lavajibhai Ratanjibhai reported in ***(2005) 10 SCC 760***.	under the scheme of the Act, the rights and liabilities under the Act and adjudication machinery for determining such rights and liabilities shall be considered.
7	***Koninklijke Philips Electronics N.V. vs. Rajesh Bansal*** reported in ***2018 SCC Online Del 9793***.	Abuse of dominant position under Section 4 of Competition Act is not a case that can be a subject matter of suit before Civil Court.
8	***Khetan Industries PVT. LTD., vs. Manju Ravindrapasad Khetan***, reported in ***1994 SCC Online Bom 163***.	When a Special Act establishes a separate machinery for enforcement of right under the Act, Civil Courts jurisdiction is impliedly barred.
9	***Abdul Rahman (Dr.) vs. Mohamed Syed*** reported in ***2016 SCC Online Mad 13131***.	When there is an express bar ousting jurisdiction of Civil Court in respect of any dispute or question required to be determined by a Tribunal under special enactment, civil suit is not maintainable.
10	***Telefonaktiebolaget LM Ericsson (PUBL) vs. Competition Commission of***	Whether one party abused its dominant position is solely within the scope of Competition Act and

S. No.	Case Law	Proposition
	India reported in ***2016 SCC Online Del 1951***.	the Civil Court cannot decide the same.
11	***Phulchand Exports Limited vs. O.O.O.Patriot*** reported in ***(2011) 10 SCC 300***.	Where experienced business men are involved in a commercial contract and the parties are not of unequal bargaining power the agreed terms shall be respected.
12	***K.C.Cinema vs. State of Jammu and Kashmir*** reported in ***2023 SCC Online SC 22***.	Whether an agreement between two persons of unequal bargaining power is unfair, unconscionable has to be decided on the facts and circumstances of each case.

11. **Salient Features of the arguments made by the learned Senior Counsel and other Advocates appearing for the 1st respondent/plaintiff**:-

(A) The plaint cannot be rejected as against some of the defendants or in respect of the portion of the suit claim. While considering the application under Order VII Rule 11 of Civil Procedure Code for rejection of the plaint, Court has to see whether the plaint is liable to be rejected as a whole. In the case on hand, the applicants and other defendants are sister concerns and acting as a monolithic block.

(B) Under Competition Act, the Competition Commission can only decide three matters namely anti-competitive agreement under Section 3, abuse of dominant position under Section 4 and regulation of combinations under Section 5.

(C) The averments in the plaint attracts provisions of other acts also. By virtue of Section 62 of Competition Act, the provisions of Competition Act is only in addition to provisions of any other law for the time being inforce. Therefore, the Civil Court can adjudicate on the violations of other provisions of the act.

(D) There is a specific allegation in the plaint that the provisions of PSS Act and the guidelines issued by Reserve Bank of India thereunder are violated by the defendants. The said dispute falls outside the purview of the

CCI.

(E) The relief of declaration prayed by the plaintiff in this suit cannot be granted by CCI and hence, Section 61 of Competition Act is not a bar to Civil Court to entertain the present suit.

(F) The doctrine of election does not apply when two remedies are complementary to each other. In the case on hand, the plaintiff have approached this Court highlighting the violations of provisions of PSS Act and Contract Act. Section 28 of PSS Act which prohibits a Court from taking cognizance of an offence punishable under PSS Act, except on complaint by RBI, cannot be pressed into service to say the civil suit is barred. Under PSS Act, there is no specific bar to Civil Court's jurisdiction, therefore, this Court can go into the question of violations of provisions of PSS Act.

(G) An agreement excluding the jurisdiction of Indian Courts and excluding the applicability of Indian Law is void under Section 28 of Indian Contract Act. Thus, Clause 16.8 of DDA which excludes jurisdiction of Courts in India cannot be enforced. Exclusion of jurisdiction of Indian Courts in a case where one of the party is an Indian entity and substantial part of the cause of action arose in India is against the public policy and therefore, violative of Section 23 of Indian Contract Act, 1872.

(H) Because of the exclusion of conflict of law provision under Clause 16.8 of DDA, the Courts in California, United States will not recognise the PSS Act and Indian Contract Act. When substantial portion of the cause of action arose in Indian Soil rejecting a plaint by relying on exclusive jurisdiction clause is not in accordance with law laid down by the Hon'ble Supreme Court.

(I) The exclusive jurisdiction under Clause 16.8 of DDA was found to be against the public policy by Federal Court of Australia and Supreme Court of Canada. While considering the application for rejection of the plaint, the Court can taking into consideration only the averments in the plaint and the plaint documents. The terms of DDA and Service-Seller agreement are unconscionable and illegal or arbitrary. In the case on hand, the applicants are charging 11% to 26% service fee when payments are made through UCB. In effect applicants are getting 11% to 26% service fee for doing no service.

(J) The Civil Court while deciding the violations of provisions of PSS Act and Contract Act, 1872 can incidentally decide certain questions which falls within the purview of CCI.

(K) By filing vakalat without protest under Order 5 Rule 10 of Original Side Rules, the applicants and other defendants submitted to the jurisdiction of this Court and therefore, they are estopped from questioning the jurisdiction now.

(L) The applicants cannot question jurisdiction of this Court without filing an application for revocation of leave, when plaintiff already obtained leave to sue under Clause 12 of Letters Patent.

(M) The new clause introduced by the defendants for charging service fee for every transaction is unilateral imposition and the same is not valid in the absence of mutuality.

12. In support of their contentions, the learned Senior Counsel and other counsel appearing for the 1st respondent/plaintiff relied on the following judgments:-

S. No.	Case Law	Proposition
1	***Madhav Prasad Aggarwal and others vs. Axis Bank Ltd. and others***, reported in ***MANU/SC/0878/2019***.	A plaint cannot be rejected Qua some of the defendants or portion of the claim.
2	***Telefonaktiebolaget LM Ericsson (PUBL) vs. Competition Commission of India*** reported in ***2016 SCC Online Del 1951***.	Pleading of same facts does not oust the jurisdiction of the Court where the remedies sought for are different.
3	***Nuziveedu Seeds Ltd. vs. Mahyco Monsanto Biotech (India) Pvt. Ltd.,*** reported in ***MANU/MH/0775/2020***.	Merely because question of abuse of dominant position is raised which can be decided only by CCI, it would not preclude the arbitral tribunal from deciding the money claim, which is not within the jurisdiction of CCI.

S. No.	Case Law	Proposition
4	***Saurabh Prakash vs. DLF Universal Ltd.,*** reported in ***(2007) 1 SCC 228***.	Power to award damages for breach of contract is not available to MRTP Commission.
5	***Bank of Rajasthan Limited vs. VCK Shares and Stock Broking Services Limited*** reported in ***(2023) 1 SCC 1***.	The Court shall normally lean in favour of upholding jurisdiction of Civil Court.
6	***S.J.S. Business Enterprises (P) LTD., vs. State of Bihar and others*** reported in ***(2004) 7 SCC 166***.	The suppressed fact must have an effect on the case.
7	***Swaraj Infrastructure Private Limited vs. Kotak Mahindra Bank Limited*** reported in ***(2019) 3 SCC 620***.	Prosecuting two remedies simultaneously under different acts would not amount to blowing hot and cold but would amount to blowing hot and hotter.
8	***Avitel Post Studioz Limited vs. HSBC PI Holdings (Mauritius) Limited*** reported in ***(2021) 4 SCC 713***.	When same set of facts lead to both the Civil and Criminal remedies parties can chose both and take part in both.
9	***Rajendra Sethia vs. Punjab National Bank*** reported in ***1991 SCC Online Del 55***.	Any agreement restricting the right of a party from having recourse to Indian Courts would

S. No.	Case Law	Proposition
		be void under Section 28 of Contract Act.
10	***Deborah Louise Douez vs. Facebook, Inc.*** reported in ***2017 SCC Online Can SC 74***.	Forum selection clause of facebook was held to be unenforceable due to inequality in bargaining power.
11	***EPIC Games, Inc vs. Google LLC*** reported in ***2022 FCA 66***.	The Clause 16.8 of DDA was considered by Federal Courts of Australia and found to be against the public policy.
12	***H.S.Deekshit and others vs. Metropoli Overseas Limited and others*** reported in ***MANU/SC/1403/2022***.	Only the averments in the plaint has to be taken into consideration while deciding the petition to reject the plaint.
13	***Dahiben vs. Arvindbhai Kalyanji Bhanusali (Gajra)*** reported in ***(2020) 7 SCC 366***.	The plaint averments and plaint documents alone are relevant for deciding a petition filed to reject the plaint.
14	***Gas Authority of India Limited vs. Indian Petrochemicals Corporation Limited and others*** reported in ***(2023) 3 SCC 629***.	Writ jurisdiction can be exercised when State in its contractual dealings failed to act with fairness.
15	***Periathambi Goundan vs. The District Revenue Officer,***	Merely because Civil Court has to incidentally go into the

S. No.	Case Law	Proposition
	Coimbatore, reported in ***93-LW-P.169***.	questions that fall under the purview of CCI, the jurisdiction of the Civil Court would not get ousted.
16	***Sejal Glass Ltd., vs. Navilan Merchants Pvt. Ltd.***, reported in ***MANU/SC/1098/2017***.	Where plaint survives against the certain defendants, it cannot be rejected.
17	***LIC of India vs. Consumer Education and Research Centre*** reported in ***(1995) 5 SCC 482***.	A clause in the LIC Policy restricting it to persons in Government or Quasi Government Organisation was held to be unconstitutional.
18	***Keshav Chander Thakur and another vs. Krishan Chander and others*** reported in ***2014 SCC Online Del 3092***.	While considering petition for rejection of the plaint defence taken in the written statement shall not be considered.

Discussions regarding effect of exclusion Clause 16.8 in Developer Distribution Agreement (DDA):-

13. It is the specific case of the applicants that as per Clause 16.8 of DDA, parties agreed to the jurisdiction of the Courts at Santa Clara, California, United States and therefore, the present suit before this Court is

not maintainable.

14. Per contra, it is the contention of the 1st respondent that exclusion of jurisdiction of Indian Courts and applicability of Indian Law is void under Section 28 of the Indian Contract Act, 1872. It is the specific case of the 1st respondent that one of the party to the contract is an Indian entity and substantial part of cause of action arose in India and hence, exclusion of jurisdiction of Indian Courts is against the public policy under Section 23 of the Indian Contract Act, 1872. It is also submitted on behalf of the 1st respondent that if 1st respondent filed a suit before the Courts at Santa Clara, California, there is no guarantee that the said Court would recognize Indian Law like Payment and Settlement Systems Act, 2007 and Indian Contract Act, 1872.

15. It is very well settled law that when two or more Courts are having jurisdiction to entertain a lis, parties by their agreement may confine the jurisdiction to any one of the Courts having jurisdiction to entertain the suit. However, parties by their agreement cannot confer jurisdiction on any one of the Court which does not possess one. There is no doubt, this principle is

applicable when all the Courts having jurisdiction to entertain the lis are Indian Courts, which are expected to apply Indian Law. However, when a contract is entered into between the parties, who are having Multi National Operations, the cause of action for a dispute arising out of contract may arise in various part of the Globe. In such cases, cause of action for the suit may arise in number of countries and courts situated in two or more countries may have jurisdiction to entertain the suit. A situation, where parties by entering into a private contract exclude the jurisdiction of all Indian Courts and all Indian Laws is the crux of the matter and validity of such contract is to be answered in this case.

16. In the case on hand, the 1st respondent in all cases are Indian App Developers, entered into a contract with respondents 4 and 5/defendants 3 and 4, who are having their Head Office at Singapore and United States respectively. The 1st respondent, who is an Indian App Developer having Head Office at India entered into an agreement with respondents 4 and 5, who are having head office in a Foreign Country.

17. In ***Rajendra Sethia vs. Punjab National Bank*** reported in ***1991 SCC Online Del 55 : AIR 1991 Del 285***, while considering the validity of similar exclusion clause contained in a contract, the Delhi High Court observed as follows:-

"16. Under Section 28 of the Contract Act, every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may, thus, enforce his rights is void to that extent. There are two exceptions to this section, which are not relevant for my purpose. Mr. Khanna said that in the guarantee, which the plaintiff executed in favor of Punjab National Bank at London, there was clause 20, which is as under:

"20. This guarantee is to be governed by and construed according to English Law and the Guarantor agrees to submit to the jurisdiction of the English Courts and it is understood and agreed that none of the terms and provisions of this Guarantee may be waived, altered, modified or amended except in writing to be signed for and on your behalf".

17. On the basis of this clause, Mr. Khanna said that this Court will have no jurisdiction in the matter. I am afraid, I cannot agree with Mr. Khann's submission. As noted above, under Section 20 of the Code, this Court has territorial jurisdiction to try the *present suit. When Section 28 talks of "usual legal proceedings in the ordinary tribunals" it refers to proceedings in this country. Any agreement that parties will not have recourse to Indian Courts would be void. It is no answer that an aggrieved party could file proceedings in England or in any other foreign country under agreement between the parties. Provisions of Section 20 of the Code cannot be set at naught like this taking shelter under S. 28 of the Contract Act. Further any agreement between the parties which provides that provisions of a statute shall not be applicable unless the statute itself gives such a right; would be opposed to public policy and void under Section 23 of the Contract Act as well. Thus, if the argument is that the agreement between the parties restricts any party absolutely from enforcing his rights made a contract by usual legal proceedings in this country which rights the party otherwise has under the statute, it cannot be sustained as the agreement would itself be void under Section 28 of the Contract Act."*

18. The validity of Clause 16.8 of DDA came up for consideration before the Federal Court of Australia in ***EPIC Games, Inc vs. Google LLC*** reported in ***2022 FCA 66*** and taking into consideration that there is no guarantee the Courts at Santa Clara, California would apply Australian Laws,

the Federal Court of Australia found that Clause 16.8 of DDA was opposed to public policy of Australia. The relevant observation of the Federal Court of Australia reads as follows:-

"*180. Seventhly, I accept that* ***Epic's*** *proceeding raises a question of considerable public interest.* ***Epic's*** *allegations concern the way in which Google operates its Android platform in Australia and a large number of Australian residents are affected by the outcome of the litigation.* ***Epic's*** *suit does not just concern its own position but explicity relies on the conduct of Google towards all Australian developers of apps on Android devices. It also raises the question of whether the use of forum selection clauses by Google (and hence other such entities) may itself be a contravention of Pt IV. Further, the markets involved are important markets in the Australian economy and the result of the litigation will have a significant impact in the Australian economy. There are therefore powerful policy reasons militating towards the conclusion that this suit should be decided in Australia.*

....

204. I do not regard that case as trivial. ***Epic*** *says that Google has made it difficult for developers to do anything but use the Google Play Store and to submit themselves to the 30% commission. One of the ways it says that it has done that is by* *making developers litigate in California under Californian law. I regard it as sufficiently arguable that the practical impact that has on many Australian developers will be to secure their obedience to the other restraints in the DDA. It is not to the point in such an analysis that the clause may be invalid under Pt IV (as Google now contends against its agreement) because the argument takes as its point of departure that may developers will be deterred from making such a challenge by cl 16.8. On this view, the competitive impact of the restraint emerges not from its legal efficacy but from its existence and status as a deterrent.*

*205. Likewise, there is no substance in Google's contention that **Epic** has not challenged that exclusive jurisdiction clause directly. Here the point was that the Further Amended Concise Statement challenged the choice of law clause and the exclusive jurisdiction clause together. Since they are both part of the same clause this is an underwhelming submission. In any event, even if there were anything in the argument I do not think that the exclusive jurisdiction clause can be fully understood without the choice of law clause by which it is accompanied. This is not just a clause requiring developers to litigate in California. It is a clause requiring developers to litigate in California under the substantive law applying in California which on the face of it exclude Australian law. It would be unrealistic to require these clauses to be challenged separately.*

*206. In any event, I am satisfied that **Epic** has challenged cl*

16.8 in a sufficiently direct and substantial fashion that it would be inappropriate to enforce cl 16.8 pending the trial of this case. This was the conclusion reached by Byrne J in Commonwealth Bank Australia v White [1999] VSC 262 ; 2 VR 681 (White) eg at [11], [89]. Google submitted that White was distinguished in Telesto Investments Ltd v UBS AG [2013] NSWSC 503; 94 ACSR 29 (Telesto). However, in Telesto there was no direct challenge to the exclusive jurisdiction clause and at [278] Sackar J cited White for the proposition that it may be a factor militating against the stay that the plaintiff attacks the exclusive jurisdiction clause itself but it is not enough for the plaintiff merely to attach the validity of the agreement containing it. In any event, this case appears to me to be on all fours with White."

19. In ***Deborah Louise Douez vs. Facebook, Inc.*** reported in ***2017 SCC Online Can SC 74***, the Hon'ble Supreme Court of Canada while considering the forum selection clause of facebook observed as follows:-

"54. Despite Facebook's claim otherwise, it is clear from the evidence that there was gross inequality of bargaining power between the parties. Ms. Douez's claim involves an online contract of adhesion formed between an individual and a multi-billion dollar corporation. The evidence on the record is that Facebook reported almost $4.28 billion in revenue in 2012 through advertising on its

social media platform. It is in contractual relationships with 1.8 million British Columbian residents, approximately 40 percent of the province's population. Ms. Douez is one of these individuals.

55. Relatedly, individual consumers in this context are faced with little choice but to accept Facebook's terms of use. Facebook asserts that Ms. Douez could have simply rejected Facebook's terms. But as the academic commentary makes clear, in today's digital marketplace, transactions between businesses and consumers are generally covered by non-negotiable standard form contracts presented to consumers on a "take-it-or-leave-it" basis (Pavlovi?, at p. 392).

....

62. Yet commentators recognize the practical reality that forum selection clauses often operate to defeat consumer claims (E. A. Purcell, Jr., "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992) 40 UCLA L. Rev. 423, at pp. 446-49). Given the importance of constitutional and quasi-constitutional rights, it is even more important that reverence to freedom of contract and party autonomy does not mean that such rights routinely go without remedy.

63. Overall, the public policy concerns weigh heavily in favour of strong cause.

(b) Secondary Factors

64. In addition to the strong public policy reasons favouring *strong cause, two other secondary factors also suggest that the forum selection clause should not be enforced. These factors are the interests of justice and the comparative convenience and expense of litigating in the alternate forum."*

20. In ***Lakhinarayan Ramniwas vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and others*** reported in ***MANU/WB/0038/1960 : AIR 1960 Cal 155***, a Division Bench of Calcutta High Court while considering the application for stay of the suit filed in Calcutta, India by relying exclusion clause in the contract between the parties conferring exclusive jurisdiction to Italian Courts observed as follows:-

> *"6. Though Clause 31 contained in those several contracts are valid, they cannot be pleaded as a bar to the jurisdiction of an Indian Court which otherwise has jurisdiction to try a suit instituted before it. The suit was instituted on the Original Side of this Court upon the allegation, inter alia, that a part of the cause of action arose in Calcutta. Leave under Clause 12 of the Letters Patent to institute the suit was duly obtained and the Court had undoubted jurisdiction to try the suit. The jurisdiction of the Court to try such a suit is vested in it by the Letters Patent and by the Constitution. Parties cannot by a private agreement, whether such agreement has been entered into in India or outside India, take away a jurisdiction*

which is vested in this Court to try the suit just as the parties could not by such agreement confer upon it jurisdiction to try a case which it had otherwise no jurisdiction to try. Clause 31 of the contract remains valid as a contractual stipulation, but it cannot be pleaded as a bar to the jurisdiction of the Court. When the attention of the Court in which the suit is instituted is drawn to a contractual stipulation of this kind, the Court may in the exercise of its discretion stay its hands & refuse to try the suit until the competent judicial authority to whose decision the parties have agreed to submit their disputes has pronounced its decision. The Court acts upon the principle that in general the Court will compel the parties to abide by their contracts. Instead of driving the defendant to a separate suit to enforce the covenant, the Court may for the purpose of preventing multiplicity of litigation enforce the contract summarily on an application made to it in the suit instituted before it. The prima facie leaning of the Court is that the contract should be enforced and the parties should be kept to their bargain. Subject to this prima facie leaning, the discretion of the Court is guided by considerations of justice. The balance of convenience, the nature of the claim and of the defence, the history of the case, the proper law which governs the contract, the connection of the dispute with the several countries and the facilities for obtaining even-handed justice from the foreign Tribunal are all material and relevant considerations. If on a consideration of all the circumstances of the case the Court comes to the conclusion that it will be unjust or *unfair to stay the suit, the Court may refuse to grant the stay asked for.*"

Emphasis Supplied

21. In the case law referred above in ***Rajendra Sethia vs. Punjab National Bank*** reported in ***1991 SCC Online Del 55 : AIR 1991 Del 285***, the Delhi High Court had taken the view excluding jurisdiction of Indian Courts and applicability of Indian Laws would be opposed to public policy. The Delhi High Court also had taken the view such clause in the contract not only hit by Section 23 of Indian Contract Act, 1872 but also hit by Section 28 of Indian Contract Act, 1872.

22. Section 28 of Indian Contract Act, 1872 reads as follows:-

*"28. **Agreements in restraint of legal proceedings, void.**- [Every agreement,-*

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.

*Exception 1.- **Saving of contract to refer to arbitration dispute that may arise**.-This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.*

*Exception 2.- **Saving of contract to refer questions that have already arisen**.-Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.*

*Exception 3.- **Saving of a guarantee agreement of a bank or a financial institution.**-This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a* *provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability."*

23. We are not concerned with the three exceptions provided to Section 28 in this case. The expression 'usual legal proceedings in the ordinary tribunals' used in Section 28 (a) of the Indian Contract Act, 1872 obviously refers to the Courts in India which applies Indian Laws. The settled legal proposition that when two or more courts are having jurisdiction, parties can confine the jurisdiction to any one of such courts is applicable only when such confinement is made in favour of a court in India. However, in the case on hand, Clause 16.8 of DDA by its sweep excludes all the Courts in India, therefore, it would amount to total restraint of legal proceedings in India. Such a restrictive clause totally excluding all the courts in India is certainly hit by Section 28 of Indian Contract Act, 1872 and hence, unenforceable.

24. Further Clause 16.8 of DDA can also held to be opposed to public policy of India and thereby, hit by Section 23 of Indian Contract Act, 1872 for the simple reason it not only excludes Indian Courts but it also excludes Indian Laws. The Clause 16.8 of DDA reads as follows:-

> *"All claims arising out of or relating to this Agreement or Your relationship with Google under this Agreement will be governed by <u>the laws of the State of California, excluding Californias conflict of laws provisions</u>."*

25. Therefore, it is clear that Indian Laws also excluded. If the Courts in India by relying the exclusion clause refused to entertain any *lis* arising under this contract, then it is clear that the Competition Act enacted by Indian legislature with the sole aim of preventing practices having adverse effect on competition will be of no use. The preamble to Competition Act reads that it is an Act to ensure freedom of trade carried on by participants in Indian market. Freedom of trade is a fundamental right available to Indian Citizens under Article 19 of the Constitution of India. The Competition Act, 2002 was passed with the main object ensuring the freedom of trade by promoting and sustaining competition. The Clause 16.8 of DDA extracted above by its sweep

excludes such an important piece of legislation while adjudicating the dispute relating to the contract which involves Indian Market players. In this connection, I also get support from decision of the Federal Court of Australia in ***EPIC Games, Inc vs. Google LLC*** reported in ***2022 FCA 66*** cited supra, wherein Australian Court emphasised the necessity for application of Australian Competition Law and its significant impact on Australian economy.

26. Admittedly, the applicants are not party to the contract which entered into between the 1st respondent and respondents 4 and 5. In view of the discussions made earlier, I hold Clause 16.8 of DDA which completely excludes the jurisdiction of Indian Courts and applicability of Indian Laws is opposed to public policy of India and thereby, hit by Section 23 of Indian Contract Act, 1872. I further hold such a total restraint on Indian Courts from entertaining any legal proceedings in respect of a dispute relating to contract is also hit by Section 28 of Indian Contract Act, 1872 as this case is not falling within any one of the exceptions to Section 28 of the Indian Contract Act, 1872.

<u>Discussion on ouster of jurisdiction of the Civil Court by Payments</u>

<u>and Settlement Systems Act, 2007</u>:-

27. The plaintiff made specific averments in the plaint stating that the applicants and the other defendants violated various provisions of PSS Act:

(a) Violation of Section 10(A) of PSS Act;

(b) Failure to comply with Settlement period as per RBI guidelines;

(c) Commission for payment processing not being charged at pre-determined rate as per RBI guidelines. Debit by the defendants from escrow account for the purposes not permitted under RBI guidelines;

(d) Violation of RBI guidelines which mandate that settlement of funds with merchants shall not be co-mingled with other business, if any, handled by payment aggregators.

28. The main contention of the applicants is that even assuming there are violations of provisions of PSS Act by the defendants, PSS Act is a complete code by itself and it designated Reserve Bank of India as an authority to oversee implementation and enforcement of PSS Act with power to adjudicate and also impose penalty and therefore, when specialized

authority is designated by the special enactment to go into the violations thereof. The Civil Court jurisdiction is impliedly ousted.

29. There is no express provision in PSS Act ousting the jurisdiction of Civil Court. The arguments of the applicant is that jurisdiction of the Civil Court is ousted by designation of an expert authority namely RBI for enforcement of provisions of Act. In order to infer implied ouster of Civil Court jurisdiction, the scheme of the Act has to be gone into. In this connection, the following provisions of PSS Act are very important. Sections 10 to 19 of PSS Act contained in chapter 4 of the Act give various powers to RBI to regulate and supervise payment Systems in India. Sections 17 and 18 of PSS Act empower Reserve Bank of India to issue various directions to the system participants including system provider by taking into consideration the health of the payment system. Section 19 of the PSS Act declares the directions of the RBI shall be complied by the person to whom directions are issued.

30. Section 17 of PSS Act, reads as follows:-

*"17. **Power to issue directions**.-Where the Reserve Bank is of the opinion that,- (a) a payment system or a system participant is engaging in, or is about to engage in, any act, omission or course of conduct that results, or is likely to result, in systemic risk being inadequately controlled; or*

(b) any action under clause (a) is likely to affect the payment system, the monetary policy or the credit policy of the country, the Reserve Bank may issue directions in writing to such payment system or system participant requiring it, within such time as the Reserve Bank may specify—

(i) to cease and desist from engaging in the act, omission or course of conduct or to ensure the system participants to cease and desist from the act, omission or course of conduct; or

(ii) to perform such acts as may be necessary, in the opinion of the Reserve Bank, to remedy the situation"

31. Section 24 of PSS Act, reads as follows:-

*"24. **Settlement of disputes**.-(1) The system provider shall make provision in its rules or regulations for creation of panel consisting of not less than three system participants other than the system participants who are parties to the dispute to decide the disputes between system participants in respect of any matter connected with the operation of the payment system.*

(2) Where any dispute in respect of any matter connected with

the operation of the payment system arises between two or more system participants, the system provider shall refer the dispute to the panel referred to in sub-section (1).

(3) Where any dispute arises between any system participant and the system provider or between system providers or where any of the system participants is not satisfied with the decision of the panel referred to in sub-section (1), the dispute shall be referred to the Reserve Bank.

(4) The dispute referred to the Reserve Bank for adjudication under sub-section (3) shall be disposed of by an officer of the Reserve Bank generally or specially authorised in this behalf and the decision of the Reserve Bank shall be final and binding.

(5) Where a dispute arises between the Reserve Bank, while acting in its capacity as system provider or as system participant, and another system provider or system participant, the matter shall be referred to the Central Government which may authorise an officer not below the rank of Joint Secretary for settlement of the dispute and the decision of such officer shall be final."

32. Section 26 of PSS Act, talks about penal consequences for violation of various provisions of the Act, reads as follows:-

*"26. **Penalties**.-(1)Where a person contravenes the provisions of section 4 or fails to comply with the terms and conditions subject to which the authorisation has been issued under section 7, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years or with fine which may extend to one crore rupees or with both and with a further fine which may extend to one lakh rupees for every day, after the first during which the contravention or failure to comply continues.*

(2) Whoever in any application for authorisation or in any return or other document or on any information required to be furnished by or under, or for the purpose of, any provision of this Act, wilfully makes a statement which is false in any material particular, knowing it to be false or wilfully omits to make a material statement, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which shall not be less than ten lakh rupees and which may extend to fifty lakh rupees.

(3) If any person fails to produce any statement, information, returns or other documents, or to furnish any statement, information, returns or other documents, which under section 12 or under section 13, it is his duty to furnish or to answer any question relating to the operation of a payment system which is required by an officer making inspection under section 14, he shall be punishable with fine which may extend to ten lakh rupees in respect

of each offence and if he persists in such refusal, to a further fine which may extend to twenty-five thousand rupees for every day for which the offence continues.

(4) If any person discloses any information, the disclosure of which is prohibited under section 22, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five lakh rupees or an amount equal to twice the amount of the damages incurred by the act of such disclosure, whichever is higher or with both.

(5) Where a direction issued under this Act is not complied with within the period stipulated by the Reserve Bank or where no such period is stipulated, within a reasonable time or where the penalty imposed by the Reserve Bank under section 30 is not paid within a period of thirty days from the date of the order, the system provider or the system participant which has failed to comply with the direction or to pay the penalty shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine which may extend to one crore rupees or with bothand where the failure to comply with the direction continues, with further fine which may extend to one lakh rupees for every day, after the first during which the contravention continues.

(6) If any provision of this Act is contravened, or if any default is made in complying with any other requirement of this Act, or of any regulation, order or direction made or given or condition

imposed thereunder and in respect of which no penalty has been specified, then, the person guilty of such contravention or default, as the case may be, shall be punishable with fine which may extend to ten lakh rupees and where a contravention or default is a continuing one, with a further fine which may extend to twenty-five thousand rupees for every day, after the first during which the contravention or default continues."

33. Section 28 of PSS Act, reads as follows:-

"28. Cognizance of offences.—(1) No court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by an officer of the Reserve Bank generally or specially authorised by it in writing in this behalf, and no court, lower than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any such offence:

Provided that the Court may take cognizance of an offence punishable under section 25 upon a complaint in writing made by the person aggrieved by the dishonour of the electronic funds transfer.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a Magistrate may dispense with the personal attendance of the officer of the Reserve Bank filing the complaint, but the Magistrate may, in his discretion, at any stage

of the proceedings, direct the personal attendance of the complainant."

34. Section 30 of PSS Act, reads as follows:-

*"30. **Power of Reserve Bank to impose fines**.-(1) Notwithstanding anything contained in section 26, if a contravention or default of the nature referred to in sub-section (2) or sub-section (6) of section 26, as the case may be, the Reserve Bank may impose on the person contravening or committing default a penalty not exceeding five lakh rupees or twice the amount involved in such contravention or default where such amount is quantifiable, whichever is more, and where such contravention or default is a continuing one, a further penalty which may extend to twenty-five thousand rupees for every day after the first during which the contravention or default continues.*

(2) For the purpose of imposing penalty under sub-section (1), the Reserve Bank shall serve a notice on the defaulter requiring him to show cause why the amount specified in the notice should not be imposed as a penalty and a reasonable opportunity of being heard shall also be given to such defaulter.

(3) Any penalty imposed by the Reserve Bank under this section shall be payable within a period of thirty days from the date

on which notice issued by the Reserve Bank demanding payment of the sum is served on the defaulter and, in the event of failure of the person to pay the sum within such period, may be recovered on a direction made by the principal civil court having jurisdiction in the area where the registered office of the defaulter company or the official business of the person is situated:

Provided that no such direction shall be made, except on an application made by an officer of the Reserve Bank authorised by it in this behalf.

(4) The Reserve Bank may recover the amount of penalty by debiting the current account, if any, of the defaulter or by liquidating the securities held to the credit of the defaulter or in accordance with the provisions of this Act.

(5) The court which makes a direction under sub-section (3) shall issue a certificate specifying the sum payable by the defaulter and every such certificate shall be enforceable in the same manner as it were a decree made by the court in a civil suit.

(6) Where any complaint has been filed against any person in any court in respect of the contravention or default of the nature referred to in sub-section (2), or, as the case may be, sub-section (4) of section 26, then, no proceeding for the imposition of any penalty on the person shall be taken under this section."

35. Section 32 of PSS Act, reads as follows:

*"32. **Act to have overriding effect.**—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

36. A reading of the above provisions would make it clear, RBI is an expert authority designated by the special enactment to regulate and supervise the payment system in India. In fact, the preamble of PSS Act reads as follows:

"An Act to provide for the regulation and supervision of payment systems in India and to designate the RBI as the authority for the purpose and for matters connected therewith or incidental thereto."

37. From the preamble of the PSS Act and the provisions there of, it is clear, RBI is the authority designated under the Act to consider the violation of Provisions of the Act by any system participant. By virtue of definition of the expression "system participant" under Section 2(1) (p), a system provider like 7th defendant is also a system participant. Therefore, in case of violation of provisions of the Act by system participants, it is for the RBI to issue

appropriate directions or take any other action including penal action as per the provisions of the Act. A healthy payment system is the lifeline of economy of the country. The expert designated authority namely RBI by exercising its power to regulate and supervise the payment system in India emulates the role of moderator in order to preserve the health of payment system. The Courts shall be very slow in interfering with the role of such an expert regulator because interference by a non expert, in some cases, will have adverse effect on the health of the system. In the case on hand, RBI is an expert body having power to issue directions, guidelines and orders to system participants for proper compliance of provisions of PSS Act and in case of non-compliance it has got power under Section 28 of the Act to give a complaint to Court to take cognizance of offence punishable under this Act for non-compliance.

38. If provisions of PSS Act, violations of which are made punishable, are violated, no other person except RBI can set the law in motion. No Court shall take congnizance of an offence punishable under PSS Act except upon the complaint in writing made by an Officer of RBI. Therefore, violations of certain provisions of PSS Act are made punishable and again RBI is the

designated authority to set penal law in motion. Section 24 of PSS Act also provides for settlement of disputes between the system participants and system provider. Such disputes shall be referred to RBI for its adjudication.

39. A close scrutiny of the above said provisions of PSS Act, make it clear that it is a complete code which designate an expert authority for enforcement of PSS Act. In such circumstances, there is no difficulty in coming to the conclusion that jurisdiction of the Civil Court is impliedly ousted by provisions of PSS Act.

40. In this regard, it would be appropriate to refer to the following observation of the Apex Court reported in ***Manu/SC/0317/1983: AIR 1983 SC 603*** in ***Titaghur Paper Mills Company Limited and others Vs. State of Orissa and others***, which reads as follows:

> *"12. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Water Works Co. v. Hawkesford(1) in the following passage:*

"There are three classes of cases in which a liability may be established founded upon statute..................................But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it...............the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

13. The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd.(2) and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co.(3) and Secretary of State v. Mask & Co.(4) It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

41. In view of the discussions made earlier, I hold that under the scheme of PSS Act, the jurisdiction of the Civil Court is impliedly ousted and consequently the 1st respondent/plaintiff is not entitled to maintain a suit before this Court, on the ground that certain provisions of PSS Act have been violated by the applicants and other defendants.

Discussion on the ouster of jurisdiction of Civil Court under Section 61 of the Competition Act, 2002:-

42. The main contention of the applicants is that the present plaint stems out of the order passed by CCI and the main issue urged by the 1st respondent/plaintiff is abuse of dominant position by applicants and its sister companies by taking advantage of monopoly enjoyed by its Online Platform Android. On the other hand, the main contention of the 1st respondent/plaintiff is that the unconscionable nature of the terms of agreement between the plaintiff and applicants' sister companies can be tested by a regular Civil Court in the light of the provisions of Indian Contract Act, 1872 and therefore, merely because there is a overlapping of jurisdiction, the suit cannot be treated as barred by provisions of Competition Act, 2002.

43. Section 61 of Competition Act, 2002 reads as follows:-

*"61. **Exclusion of jurisdiction of Civil Courts.-** No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the [Commission or the Appellate Tribunal] is*

empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

44. A reading of above provision would unambiguously suggest that there is an express bar of Civil Court's jurisdiction to entertain any suit in respect of any matter over which the Competition Commission or the Appellate Tribunal is empowered under Competition Act, 2002 to determine. Therefore, by scanning through the provisions of the Competition Act, 2002, it has to be decided what are all the matters over which the Competition Commission or the Appellate Tribunal are empowered to determine. In this regard, the following provisions of Competition Act, 2002 are relevant.

45. Section 3 of Competition Act, 2002 prohibits certain agreement which are anti-competitive in nature. The same reads as follows:-

*"3. **Anti-competitive agreements.**-(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of*

services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.- For the purposes of this sub-section,—

(a) "tie-in-arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other

than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict-

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export."

46. Section 4 of Competition Act, 2002 prohibits abuse of dominant position by any enterprise or groups which enjoys dominant position. The same reads as follows:-

*"4. **Abuse of dominant position**.- [(1) No enterprise or group shall abuse its dominant position.]*

(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group],-

(a) directly or indirectly, imposes unfair or discriminatory-

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.- For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory *condition or price which may be adopted to meet the competition; or*

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect,other relevant market.

Explanation.-For the purposes of this section, the expression-

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be

determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

[(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]"

47. Section 19 of Competition Act, 2002 empowers Competition Commission of India to inquire into any alleged contravention of provisions of Sections 3(1) and 4(1) of the Competition Act, 2002. The same 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 subsection (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.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:-

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services; or

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:-

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage,by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:-

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:-

(a) physical characteristics or end-use of goods;

(b) price of goods or service

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers;

(f) classification of industrial products."

48. Section 26 of Competition Act, lays down procedure for conducting enquiry on the complaints of anti-competitive agreements and abuse of dominant position by enterprises. The same reads as follows:-

"[26. ***Procedure for inquiry 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 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.

(3) The Director General shall, on receipt of direction under sub-section (1),submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub section(3) to the parties concerned:

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub- section (3) to the Central Government or the State Government or the statutory *authority, as the case may be.*

(5) If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(6) If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiriy to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.]"

49. A perusal of Section 26 referred above would suggest that on receipt of information regarding anti-competitive agreements or abuse of dominant position by enterprises, if Competition Commission finds *prima facie* case, shall direct the Director General appointed under Section 16 of the Act to conduct investigation. The Director General appointed under Section 16 of the Act is an Officer, who has got specialised knowledge and experience in investigation, accountancy, management, business, public administration, international trade, law and economics. Therefore, such an Officer is an expert specially appointed to go into the question of anti-competitive measures and abuse of dominant position by the enterprises to the detriment of healthy competition in India. On receipt of investigation report by the Director General, the Commission is entitled to conduct its own enquiry as provided under Section 26 of the Act and take a decision.

50. Section 27 of Competition Act, deals with kinds of orders that can be passed by Competition Commission, if it finds any contravention of Sections 3 and 4 referred above, the CCI may either direct the enterprise to

discontinue the agreement and not to re-enter the same or discontinue such abuse of dominant position. It can also impose such penalty which shall not be more than 10% of average turnover for the last three preceding financial year. The relevant provision reads as follows:-

> *"27. Orders by Commission after inquiry into agreements or abuse of dominant position.- Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:-*
>
> *(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;*
>
> *(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:*
>
> *[Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for*

each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher.]

[***]

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

[***]

(g) pass such other [order or issue such directions] as it may deem fit:

[Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.]"

51. Under Section 28 of the Act, the CCI is empowered to direct division of an enterprise enjoying dominant position and the same reads as

follows:-

*"28. **Division of enterprise enjoying dominant position**.- (1) The [Commission], may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.*

(2) In particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters, namely:-

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

(c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;

(d) [***]

(e) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;

(f) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;

(g) any other matter which may be necessary to give

effect to the division of the enterprise.

(3) Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser."

52. The CCI is not only empowered to pass final orders and it also empowered to pass interim orders including *exparte* interim orders under Section 33 of the Act, the same reads as follows:-

"[33. Power to issue interim orders.- Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.]"

53. Section 39 of the Competition Act, deals with execution of the orders passed by Commission, the same reads as follows:-

"39. Execution of orders of Commission imposing monetary

penalty.- (1) If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations.

(2) In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

(3) Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 (43 of 1961) and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income tax and sums imposed by way of penalty, fine, and interest under the Income–tax Act, 1961 (43 of 1961) and to the Commission instead of the Assessing Officer.

Explanation 1 – Any reference to sub-section (2) or sub-section (6) of section 220 of the income-tax Act, 1961 (43 of 1961), in the said provisions of that Act or the rules made thereunder shall be construed as references to sections 43 to 45 of this Act.

Explanation 2 – The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act, 1961 (43 of 1961) shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

Explanation 3 – Any reference to appeal in Chapter XVIID and the Second Schedule to the Income-tax Act, 1961 (43 of 1961), shall be construed as a reference to appeal before the Competition Appellate Tribunal under section 53B of this Act.]"

54. Section 42 of the Competition Act, declares if the order passed by the Commission under Sections 27, 28, 31, 32, 33, 43(a) are not complied, the same shall be treated as punishable with fine which may extend to Rs.1,00,000/- for each day of non-compliance subject to the maximum of Rs.10,00,00,000/-. In case of failure to pay the fine imposed under Section 42 Sub Section 2, the same is made punishable with imprisonment for a term which may extend to three years or with fine which may extent to Rs.25,00,00,000/- or with both.

55. Section 42 of the Act, empowers the Appellate Tribunal to award compensation. Section 53(a) of the Act, declares that National Company Law Appellate Tribunal constituted under Companies Act, shall be Appellate Tribunal for the purpose of the Act and therefore, an Appellate Forum is also provided for Competition Commission.

56. The expression 'Enterprise' is defined under the Act as follows by Section 2(h) of the Act:-

"2. (h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by

the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.-For the purposes of this clause,-

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;"

57. A reading of the above definition would suggest any person engaged in any activity relating to production, storage, supply, distribution, acquisition or control of articles or goods or the provisions of services of any kind will be treated as an enterprise.

58. A reading of the averment found in the plaint as a whole would suggest the present suit is mainly based on the allegation, the applicants and

its sister concerns namely Google Groups enjoys monopoly in providing Online Platform Android and by abusing its dominant position, it imposes unconscionable payment terms on the App Developers like 1st respondent/plaintiff, who solely depend on Android Online Platform for making their App available for general public. It is the specific averment of the plaintiff that 96% of the mobile phones in India running on Android Operating System owned by Google Group. The Android Operating System is the medium through which the App Developers reach their customers. In other words, if Google Group deny permission to app users to use its google play store, the app users may not be in a position to reach the customers. It is the main contention of the 1st respondent/plaintiff that by using this dominant position Google Group compels them to accept, its one sided payment policy which enable Google to collect 11% to 26% of earnings of App Developers as service fee without doing any services in respect of payment processing especially in cases where App Developer chose to use User Choice Billing System/Alternative Billing System.

59. A reading of above provisions of Competition Act would make it

amply clear that abuse of dominant position by an enterprise is a matter falls within the jurisdiction of CCI. The averments in plaint regarding insistence of payment through GPBS and collection of service fee even in cases of payment through alternative billing system etc., will attract scrutiny under Section 3(1) read with Section 4(1) of Competition Act, 2002.

60. The plaint also referred to an order passed by CCI directing Google not to restrict App Developers from using any third party billing/payment processing services for app purchase or in-app purchase. The CCI's order dated 25.10.2022 referred to in the plaint reads as follows:-

"a) 395.1. Google shall allow, and not restrict app developers from using any third-party billing/payment processing services, either for in-app purchases or for purchasing apps. Google shall also not discriminate or otherwise take any adverse measures against such apps using third party billing/payment processing services, in any manner.

b) 395.6. Google shall not impose any condition (including price related condition) on app developers, which is unfair, unreasonable, discriminatory or disproportionate to the services provided to the app developers.

c) 395.7. Google shall ensure complete transparency in *communicating to app developers, services provided, and corresponding fee charged. Google shall also publish in an unambiguous manner the payment policy and criteria for applicability of the fee(s).*

d) 396. The anti-competitive clauses of different policies of Google, as identified in this order, shall not be enforced by Google, with immediate effect."

61. It is also averred in the plaint that the Alternative Billing System/User Choice Billing System was introduced by Google only to circumvent or to side step the order passed by the CCI. In the plaint one of the prayer is to declare charges levied by the defendants under Google Play Billing System and Alternate Billing System/User Choice Billing System are illegal, void and unenforceable. Therefore, the order by CCI against the defendants appears to be one of the essential fact which constituted cause of action for the suit.

62. As discussed earlier, if order passed by CCI is violated, Competition Act itself provides for effective civil and criminal remedies.

63. Further, Competition Act is a special enactment enacted by parliament to deal with unhealthy practices having adverse effect on competition. The preamble portion of the Act reads as follows:-

> *"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."*

64. Therefore, Competition Act is a Special Enactment enacted by Indian Legislature to deal with abuse of dominant position by enterprises in Indian Economy. Ofcourse, under Indian Contract Act, Civil Courts are empowered to go into question of unconscionable nature of agreement entered between persons of unequal bargaining power. On the other hand, Competition Act is a special enactment enacted to deal with abuse of dominant position by an enterprise engaged in business. It is settled law Special Law will prevail over the General Law. The Competition Act is a special enactment which provides specialised adjudicatory mechanism in the

name of Competition Commission of India. Section 61 of Competition Act expressly barred the jurisdiction of Civil Court in respect of the matters which falls within the jurisdiction of CCI. Abuse of dominant position and imposition of terms of agreement by dominant enterprise are all matters which falls within the jurisdiction of CCI as per the scheme of the Act. Therefore, I hold Section 61 Competition Act expressly barred the jurisdiction of the Civil Court from entertaining suits based on the cause of action relating to abuse of dominant position by an enterprise.

65. An argument was advanced on behalf of the 1st respondent/plaintiff that CCI is not empowered to declare the discriminatory terms of agreement as void and therefore, merely because incidentally the Civil Courts are required go into the question of abuse of dominant position by the enterprises, the jurisdiction of the Civil Courts will not get ousted. In this regard, the decision in ***Periathambi Goundan vs. The District Revenue Officer, Coimbatore,*** reported in ***93-LW-P.169*** was pressed into service. However, a reading of Sections 27, 33, 39 and 42 of Competition Act referred above would suggest the Competition Commission is not only having power to order

discontinuance of agreement, it also has got power to direct not to re-enter such agreement.

66. Further, it has also got power to impose penalty if the orders of the Competition Commission are violated. The violation of order passed by CCI, will have penal consequence under the Act. Therefore, the remedy available under Competition Act is more comprehensive than the remedy available before the Civil Court. Violation of Competition Commission order is made as a punishable offence. Further, under Section 33 of Competition Act, the CCI has got power to grant interim order like a Civil Court. Therefore, this Court has no hesitation in coming to the conclusion that Competition Act is complete code in itself and it provides effective and comprehensive remedy before specialised forum. The orders of CCI is liable to be challenged in appeal before National Company Law Appellate Tribunal.

67. In these circumstances, there may not be any difficulty in holding the plaint filed by the 1st respondent/plaintiff is barred by Section 61 of Competition Act.

68. The above view of this Court has got support from a similar view expressed by the Delhi High Court. In ***Koninklijke Philips Electronics N.V. vs. Rajesh Bansal*** reported in ***2018 SCC Online Del 9793***., the Delhi High Court held that abuse of dominant position is solely within the scope of Competition Act and the Civil Court cannot decide the same. The relevant observation reads as follows:-

> *"44. In Telefonaktiebolaget LM Ericsson (PUBL) (supra) it was further held that the question whether there is any abuse of dominance is solely within the scope of the Competition Act and a civil court cannot decide whether an enterprise has abused its dominant position and pass orders as contemplated under Section 27 of the Competition Act. It was held that merely because a set of facts pleaded in a suit may also be relevant for determination whether Section 4 of the Competition Act has been violated, does not mean that a civil court would be adjudicating that issue. An abuse of dominant position under Section 4 of the Competition Act is not a cause that can be made a subject matter of a suit or proceedings before a civil court.*
>
> *45. This Court finds no ground to disagree with the view expressed by the learned Single Judge as noted herein before. Thus*

whether creating of a patent pool by the bigwigs of the industry getting together amounts to an anti competitive practice being misuse of the dominant position cannot be decided in the present suit. ...”

69. The above view of the Delhi High Court was taken following judgment passed in Telefonaktiebolaget LM Ericsson (PUBL) case. However, the judgment passed in Telefonaktiebolaget LM Ericsson (PUBL) case was subsequently overturned by the Division Bench of Delhi High Court in Telefonaktiebolaget LM Ericsson (PUBL) vs. Competition Commission of India reported in 2023 SCC Online Del 4078 on the ground, the cases of abuse of dominant position by patentee in exercise of their rights under Patents Act, 1970 is governed by Chapter-26 of Patent Act, which was introduced by a subsequent legislation. The Division Bench of Delhi High Court held that Patents Act, 1970 is a special enactment relating to the rights of the Patentee, the same will prevail over Competition Act, 2002. In the case on hand, the dispute is not relating to rights of patentee under Patents Act, 1970. Therefore, the observation of the Delhi High Court in ***Koninklijke Philips Electronics N.V. vs. Rajesh Bansal*** case cited supra, holds good in

respect of other civil suits not involving patent rights. In any event, this Court independently came to a conclusion that the present plaint is barred by Section 61 of Competition Act, 2002 for the reasons already discussed.

70. Under Section 27 of the Competition Act, 2002, the CCI is empowered to direct any enterprise which is guilty of abuse of dominant position to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position as the case may be. Therefore, it is very clear any order passed by CCI to discontinue abuse of dominant position or not to re-enter such agreement would operate in *rem*.

71. Even if the 1st respondent/plaintiff herein succeeds in the present suit, the Civil Court's decree will operate only in *personem* and such a decree will not prevent the defendants, who suffered the decree from entering into similar agreement with third parties. However in the light of the language used under Section 27 of the Competition Act, the order of CCI will act in *rem* and hence, the enterprise found to be guilty of abuse of dominant position will

be disabled from abusing dominant position. Since the Competition Act, 2002 provides a remedy which acts in *rem* this Court has no hesitation in coming to a conclusion that Section 61 of Competition Act, 2002 bars the jurisdiction of Civil Court.

72. In view of the discussions made above, the present suits filed by 1st respondent/plaintiff are barred by Section 61 of Competition Act. Since this Court comes to the conclusion that the suit is barred by statute, the arguments of learned counsel for 1st respondent by relying order 5 Rule 10 of Original Side Rules that the applicants by their conduct estopped from questioning jurisdiction cannot be accepted, as it is very well settled law, there cannot be an estoppal against statute.

73. Therefore, all the applications filed by defendants 6 and 7 seeking rejection of the plaint are allowed and consequently, all the plaints are rejected.

In Nutshell:-

(i) The Applications in **A.Nos.3098, 3101, 3100, 3102, 3103, 3099, 3105, 3106, 3108, 3109, 3110, 3107, 3111 and 3113 of 2023** are allowed.

(ii) Consequently, the plaints in **C.S.(Comm.Div).Nos.98, 120, 109, 124, 126, 127, 128, 129, 130, 131, 132, 133, 140 and 141 of 2023** are rejected.

(iii) In view of the rejection of the plaints, connected Original Applications in **O.A.Nos.365, 366, 367, 457, 458, 459, 417, 418, 419, 475, 476,478, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 495, 494, 496, 497, 498, 500, 502, 499, 501, 503, 521, 522, 523,524, 526 and 527 of 2023** are closed. No costs.

03.08.2023

Index : Yes / No
Speaking order:Yes / No
Neutral Citation:Yes / No
dm

S.SOUNTHAR, J.

dm

A.Nos.3098, 3101, 3100, 3102, 3103, 3099, 3105, 3106, 3108, 3109, 3110, 3107, 3111 and 3113 of 2023 in C.S.(Comm.Div).Nos.98, 120, 109, 124, 126, 127, 128, 129, 130, 131, 132, 133, 140 and 141 of 2023

03.08.2023