

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

% Judgment reserved on: 19.04.2023
Judgment delivered on: 24.04.2023

+ W.P.(C) 4599/2023 & CM APPL. 17575/2023

ALLIANCE OF DIGITAL INDIA FOUNDATION

..... Petitioners

versus

COMPETITION COMMISSION OF INDIA & ORS

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Abir Roy, Mr. T Sundar Ramanathan,
Mr. Vivek Pandey, Mr. Aman Shankar &
Ms. Sukanya Viswanathan, Advocates

For the Respondents : Mr. N. Venkataraman, ASG with Ms.
Aakanksha Kaul and Ms. Versha Singh,
Advocates for R-1.

Mr. Sajan Poovayya, Sr. Advocate with Mr.
Karan Singh Chandhiok, Ms. Avaantika
Kakkar, Ms. Deeksha Manchanda, Mr.
Kaustav Kundu, Ms. Ruchi Verma, Mr.
Tarun Donadi, Ms. Bhavika Chabbra, Ms.
Raksha Agarwal, Mr. Vijayendra Pratap
Singh, Ms. Sayobani Basu & Mr. Abhisar
Vidyarthi, Advocates for R-2 to 5.

Mr. Jayant Mehta, Sr. Advocate with Ms.
Sonam Mathur, Ms. Dinoo Muthappa, Mr.
Abir Roy, Mr. Dhruv Dikshit, Mr. Vivek
Pandey, Mr. Anchit Nayyar, Mr. Aman
Shankar and Ms. Sukanya Viswanathan,
Advocates for R-6 [Match Group Inc.].

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J.

1. The petitioner has filed the instant writ petition seeking the following prayers:-

“a) Hold that the CCI can validly invoke doctrine of necessity in this case for initiating non-compliance proceedings against Google and issue an appropriate order/ direction in the nature of writ of mandamus to Respondent no. 1 for timely adjudication of the interim relief application and the application under Section 42 of the Competition Act, 2002, as filed by the Petitioner; regarding non-effective compliance by Google of the CCI's final order dated 25.10.2022 and to keep UCB's implementation in abeyance till the adjudication by the CCI, and/or;

b) Issue an appropriate order/ direction providing interim relief to the Petitioner, directing the Respondent No. 2 to 5 to keep the implementation of Google's UCB in abeyance, pending adjudication by the CCI on Petitioners application and maintain the status quo (i.e no commission is to be charged when transaction happen via other payment processors mode (non GPBS mode) as it exists now”

2. The following facts shorn of all unnecessary details and germane and relevant to decide the dispute are as under:-

2.1 On 20.02.2020, an anonymous informant filed an information before the Competition Commission of India (hereinafter referred to

as “CCI”) under Section 19 of the Competition Act, 2002 (hereinafter referred to as “Act”) against Respondent No. 2 - 5 (collectively referred to as ‘Google’) (First Information). The CCI registered the First Information as Case No. 07 of 2020.

2.2 Thereafter, on 09.11.2020, the CCI issued a *prima facie* order under Section 26(1) of the Act in Case No. 7 of 2020 directing the Office of the Director General (DG) to conduct an investigation against Google.

2.3 Subsequently, on 29.06.2021, a second informant (Match Group Inc.) (Respondent No. 6 herein) filed information before the CCI against Google under Section 19 of the Act (Second Information). The Commission registered the Second Information as Case No. 14 of 2021. The same was followed by an application for interim relief filed by Alliance of Digital India Foundation (Petitioner) against Google on 06.10.2021 (First IRA) in Case No. 07 of 2020 and Case No. 14 of 2021, seeking ad-interim relief restraining Google from implementing its Payments Policy under Section 33 of the Act.

2.4 That thereafter, on 18.10.2021, Petitioner filed an information against Google under Section 19 of the Act (Third Information). The CCI registered the Third Information as Case No. 35 of 2021, which was finally clubbed by with Case Nos. 07 of 2020, 14 of 2021 vide its Order dated 02.11.2021.

2.5 Consequently, from 16.03.2022 till 01.09.2022, the proceedings

of these cases moved in full swing by filing of an investigation report by the DG, which was subsequently followed by its response filed by Google, and the detailed hearings conducted thereafter by the CCI. All such proceedings reached its final conclusion by CCI and the matters were reserved for orders.

2.6 After the conclusion of CCI oral hearings and when the final order was reserved, Google swiftly announced a user choice billing (UCB) pilot program for non-gaming app developers in India on 01.09.2022.

2.7 The CCI passed the final order in Case No. 07 of 2020, 14 of 2021 and 35 of 2021, which was challenged by Respondent Nos. 2 to 5 by filing a statutory appeal before the National Company Law Appellate Tribunal (NCLAT).

2.8 Therein, Google, on 25.01.2023, submitted its Compliance Report on its supposed implementation of the eight remedial directions given by the CCI.

2.9 To the said Compliance Report filed by Google, Petitioner filed three applications, one after the other, under Section 42 of the Act, before the CCI, mainly for causing an inquiry into the compliance report filed by Google alongwith certain other prayers. That all such applications filed before CCI on 31.01.2023, 06.03.2023, 28.03.2023 under Section 42 of the Act are still impending adjudication till date.

FACTS AS PER THE PETITIONER GIVING RISE TO APPLICATIONS UNDER SECTION 42 OF THE ACT:

3. The petitioner has approached this Court on the ground that the applications filed by the petitioner under Section 42 of the Act allegedly aggrieved by the non-compliance/violation of the Final Order dated 25.10.2022 passed by learned CCI, have not been adjudicated despite the urgent nature of reliefs sought.

4. The petitioner states that the applications under Section 42 of the Act have been necessitated since the directions passed by the CCI vide the Final Order dated 25.10.2022 have been contravened in a veiled manner, in that, the directions of the CCI to respondent nos. 2 to 5 to not create and launch an alternate billing system to the already existing billing system i.e. Google Pay, so as to ensure that the consumers and digital app developers like the petitioners have alternate methods of payment system, is being violated. According to the petitioner, the respondent nos. 2 to 5, though, are about to launch the User Choice Billing System (hereinafter referred to as “UCB System”), the said alternate bill paying system is a sham and the said respondents have not materially altered original commission system which was found to be discriminatory, keeping in view the finding that respondent nos. 2 to 5 are in a dominant position in the arena of Android ecosystem.

5. Petitioner apprehends that the proposed official launch of the UCB System will render the Final Order dated 25.10.2022 otiose

since under the garb of UCB System, Google is continuing with the very discriminatory practices which have been frowned upon by the CCI.

6. Mr. Abir Roy, learned counsel appearing for the petitioner submits that upon an information provided by the petitioner and respondent no.6 to the CCI, by virtue of the powers conferred under Section 19 of the Act, it conducted an inquiry and had rendered the judgment, after investigations, vide its Final Order dated 25.10.2022.

7. The directions of the CCI are encapsulated in paragraph 395 of its Final Order dated 25.10.2022.

8. According to Mr. Roy, the respondents nos. 2 to 5 were directed to allow and not restrict app developers from using any third party billing/payment processing services, either for in-app purchases or for purchasing apps, coupled with the fact that the respondents were also directed not to discriminate or otherwise take any adverse measures against such apps using third party billing/payment processing services, in any manner.

9. Learned counsel also submits that apart from prohibitive directions, respondent nos. 2 to 5 were also directed to not impose any condition (including price related condition) on app developers, which would be unfair, unreasonable, discriminatory or disproportionate to the services provided to the app developers. That apart, the respondents were also directed to ensure complete transparency in communicating to app developers, services provided and

corresponding fee charged. In fact, the respondents were also to publish, in an unambiguous manner, the payment policy and criteria for applicability of the fee(s).

10. Mr. Roy, learned counsel submits that despite such clear, unambiguous and prohibitive directions, respondent nos. 2 to 5 did not comply with such directions and in fact, violated the directions passed by the CCI. Learned counsel submits that it was on the basis of such violations that the necessity of filing of applications under Section 42 of the Act arose and was preferred by the petitioner before the CCI.

11. Learned counsel submits that though the applications were filed, till date the same are pending and not adjudicated upon by the CCI despite the extreme urgency in the nature of such applications. Learned counsel submits that the urgency for which the petitioner has preferred the present petition is that respondent nos. 2 to 5 are about to launch the UCB system on 26.04.2023 whereafter the applications under Section 42 of the Act, may well become infructuous.

12. Learned counsel further submits that keeping in view the aforesaid urgency and given the nature of violations/non-compliance of clear and unambiguous directions by the CCI, as also keeping in view that the said applications are not being adjudicated by the CCI, that the present petition, claiming the aforesaid relief of either directing the CCI to hear the applications and decide them expeditiously or in the alternative, restrain the respondent nos. 2 to 5

from launching UCB system till the CCI decides the aforesaid applications, has been filed.

13. On a pertinent question put across by the Court as to whether the prayer (b) could be maintainable before this Court without the CCI first coming to the conclusion as to whether any violation at all of its direction dated 25.10.2022 has occurred, the learned counsel submits that the petitioner would be satisfied in case this Court considers grant of prayer (a) and has thus, restricted his arguments.

14. Consequently, this Court had requested all the counsel to restrict their arguments and assist the Court with respect to prayer (a) only.

15. It has been informed by the parties that the CCI is now functioning only with two members and the appointment of the Chairperson to the CCI is awaited, which has been confirmed by the Mr. N. Venkataraman, learned ASG.

ARGUMENTS OF PETITIONER :

16. At the outset, Mr. Roy, learned counsel for the petitioner submits that the interpretation of Section 15 of the Act, insofar as the CCI is concerned, is no more *res integra* in view of the fact that this Court in ***Cadd Systems and Services Private Limited vs. Competition Commission of India*** reported in **AIR 2019 Del 194**, categorically has, after examining the decision in ***Mahindra and Mahindra Ltd. vs. Competition Commission of India*** reported in **2019 SCC OnLine Del 8032** as also the judgment rendered by the Hon'ble Supreme

Court in *B.K. Srinivasan and Others vs. State of Karnataka and Others* reported in (1987) 1 SCC 658 and *State of Gujarat vs. Utility Users Welfare Association* reported in (2018) 6 SCC 21, concluded, after examining the provisions of Section 15 of the Act, that the said provisions amply make it clear that no act or proceedings of CCI would be invalid by reason of any vacancy or defect in its Constitution.

17. Learned counsel submits that as a result of the aforesaid observation, the Coordinate Bench of this Court in *Cadd Systems (supra)* concluded that notwithstanding that a judicial member is required to be appointed at CCI, the order passed by CCI cannot be called into question.

18. Learned counsel heavily relied upon the aforesaid judgment to submit that in the present case, the ratio laid down in *Cadd Systems (supra)* applied on all fours and keeping in view the urgency, the CCI ought to be directed to adjudicate the applications under Section 42 as expeditiously as possible, preferably before 26.04.2023.

19. Mr. Roy, learned counsel also relied heavily upon the judgment of the Coordinate Bench of this Court in *Mylan Laboratories Limited vs. Union of India* reported in 2019 SCC OnLine Del 9070 to submit that the learned Single Judge had applied the Doctrine of Necessity keeping in view the judgment of the Hon'ble Supreme Court in *Election Commission of India vs. Dr Subramaniam Swamy* reported in (1996) 4 SCC 104 holding that the Doctrine of Necessity has to be

applied in such circumstances where the only way is to promote decision making rather than interdicting a judicial dispensation.

20. Learned counsel relies upon Paras 26,38,39 of the judgment of learned Single Judge in *Mylan Laboratories (supra)* and fairly submits that the judgment in *Mylan Laboratories (supra)* was rendered in respect of Intellectual Properties Appellate Board particularly Section 84(2) of the Trade Marks Act, 1999, regarding the constitution of its bench.

21. Learned counsel has also placed on record a compilation of judgments which have also been considered.

ARGUMENTS OF RESPONDENT NOS. 4 AND 5

22. Mr. Sandeep Sethi, learned senior counsel appears on behalf of respondents nos. 4 and 5 and vehemently opposes the submissions made by the petitioner. According to Mr. Sethi, learned senior counsel, Section 8 of the Act decides the composition of the Commission. Referring to sub-Section 1 of Section 8 of the Act, Mr. Sethi submits that by the usage of the word “*shall*”, the legislative intent is to ensure that the Commission would necessarily consist of a Chairperson and not less than two and not more than six other members makes it clear that the minimum quorum for composition of a competent commission would be minimum of three Members, including the Chairperson.

23. Mr. Sethi, learned senior counsel submits that any constitution less than three would therefore, be violative of provisions of sub-Section (1) of Section 8 of the Act. Mr. Sethi submits that at present, admittedly, there are only two members and the Chairperson is yet to be appointed. On that basis, Mr. Sethi submits that the Commission is incapable of adjudicating the application under Section 42 filed by the petitioner.

24. Dilating further on sub-section 1 of Section 8 of the Act, Mr. Sethi submits that employment of the word “*not less than two*” is couched in negative language and would imply that the composition of the Commission cannot be less than two members and the Chairperson, in all, three members. Learned counsel further submits in a novel argument that vacancy in the Commission could be between upwards of 4 to 7 and anything less than 7 upto 4 alone would be considered to be a vacancy. This argument is predicated on the provisions of Section 15 of the Act where under sub-section (a), the word “vacancy” has been employed. In other words, according to Mr. Sethi, learned Senior Counsel, the word “*vacancy*” employed in Section 15, would refer to any vacancy in the Constitution of CCI, if such vacancy is on account of vacancy of Members beyond the minimum constitution of 3 Members, including the Chairperson.

25. Mr. Sethi, learned senior counsel now invites attention of this Court to Section 22 of the Act to submit that as per sub-section 3 and primarily the proviso thereto, the “*quorum*” as prescribed for the purpose of meeting of the commission under Section 22, comprises

three members. Learned senior counsel submits that proviso to Section would be read as an exception to the main Section, in that, the quorum prescribed to be consisting of three members only, would be deemed to be mandatory and any quorum comprising less than three members would be invalid.

26. Learned senior counsel further submits that reading of Sections 8, 15 and 22 harmoniously, would bring to fore that the quorum of the CCI, even in adjudicatory process, has to be not less than three members. Learned senior counsel further submits that the legislative intent is clear and cannot be interpreted in any manner other than to uphold that the minimum quorum for a valid constitution of the Commission has to be necessarily three members, including the Chairperson.

27. Learned senior counsel further submits that this mandate would be across the board, whether in respect of any act or proceeding of the Commission as stipulated under Section 15 of the Act.

28. In aid of the aforesaid submissions, learned senior counsel also submits that the regulations to provide for such procedure is conspicuous by the absence of any provision in respect of the quorum to be constituted. Therefore, in his submission, if a statute provides for it, the Court need not look for any rule or regulation to provide for such quorum.

29. So far as Section 15 is concerned, Mr. Sethi submits that the vacancy referred to in that section, is obviously a vacancy which is in excess of the quorum as legislated, i.e., a vacancy beyond a minimum

quorum of three members including the Chairperson. In other words, learned senior counsel submits that no business can be transacted by a quorum consisting of less than three members. Mr. Sethi would prefer the Court reads the vacancy to be only beyond three members.

30. Mr. Sethi, Learned senior counsel, drawing analogy from provisions in other acts similar to Section 15 of the Act, relies upon the judgments of *Dr. Manbodh Pandey & Anr. Versus Chancellor and others* reported in **1990 SCC OnLine All 508**, Order dated 17.10.2019 by learned Single Judge of Bombay High Court in **Second Appeal Stamp No. 14061 of 2019** titled as *Larsen and Toubro Limited vs. Ms. Rekha Sinha*, and *Janta Land Promoters Private Limited vs. Union of India and Others* reported in **2020 SCC OnLine P&H 2030**, and largely submits that the quorum cannot be a matter of procedure when the same is prescribed by the statute itself. Minimum members of such a quorum cannot, as a matter of procedure, overcome the issue of the inherent lack of jurisdiction as contemplated and prescribed by the statute itself which is thus similar to facts in the present case and thus, even the Section 15 of the Act cannot come to the rescue of the petitioner for directing the CCI to pass orders when there is lack of jurisdiction as provided in the Act itself.

31. While relying upon *Lachmi Narain vs. Union of India* reported in **(1976) 2 SCC 953**, *Smt. Ujjam Bai vs. State of Uttar Pradesh* reported in **AIR 1962 SC 1621** and *State of Andhra Pradesh and Another vs. Dr. Mohanjit Singh and Another* reported in **1988**

(Supp) SCC 562, he further emphasizes on the language of Section 22 of the Act and submits that the same is couched in a peremptory, negative and mandatory nature while using the word “*shall*” for a Commission to be called as properly constituted Commission. He further submits that orders passed by a quorum lacking the inherent jurisdiction as prescribed by the statute cannot be ratified later by a subsequent acts or any provision thereto. In that, he submits that there is a rationale behind prescribing a quorum for the adjudicatory process to have a comprehensive interaction between the members of the quorum and the same cannot be efficiently achieved due to such inherent lack of jurisdiction when the quorum is not complete.

32. Relying upon the aforesaid judgments, Mr. Sethi, learned senior counsel submits as under:-

- (a) If the quorum is not complete, in that, comprising of three members, the rationale of decision is lost.
- (b) The lack of quorum, i.e., less than three members would tantamount to lack of jurisdiction of the CCI to decide the dispute.
- (c) If the CCI is not properly constituted, it yet again has no jurisdiction to decide any issue.

33. So far as the Doctrine of Necessity is concerned, learned senior counsel submits that such doctrine was not developed and propagated to violate the specific provisions of law, in that, as per the mandate of Section 8 read with Section 22 of the Act, a minimum quorum of three members, including the Chairperson, to conduct its business as per the

Act. Clarifying further, learned senior counsel submits that the Doctrine of Necessity cannot be a Rule of Law nor can be used as an answer to the lack of quorum as legislated by the Act. According to Mr. Sethi, Doctrine of Necessity would arise only in a situation where the quorum though complete, yet is found to be defective due to a member's disqualification and does not arise when the composition or quorum of the CCI is less than three members.

34. Mr. Sethi submits that the reliance placed by the petitioner on *Mylan Laboratories (supra)* does not come to the aid of the petitioner since in that particular case, the quorum as stipulated under the IPAB rules, was otherwise complete.

35. Learned senior counsel submits that the Doctrine of Necessity is not an elixir for all ailments of defect of vacancy or the constitution of CCI. Mr. Sethi submits that even otherwise, in the given facts of the present case, there is no urgency.

36. Learned senior counsel submits that the applications under Section 42 of the Act filed by the petitioner are predicated on an unsound and unfounded allegation on the respondent of not having complied with the directions of CCI *vide* the Final Order dated 25.10.2022. In fact, according to Mr. Sethi, the petitioners have not even challenged the Final Order dated 25.10.2022 and it is only the respondents nos. 2 to 5 have challenged certain findings of the same, even though they have complied with the directions so far as UCB system is concerned.

37. Learned senior counsel further submits that Section 42 of the Act does not authorize, in any case, the CCI to pass any interim orders. It is only in case an inquiry under Section 19 of the Act is pending adjudication, that the powers to pass interim orders under Section 33 of the Act can be invoked.

38. Predicated on the aforesaid submissions, Mr. Sethi submits that the applications under Section 42 of the Act are a gross abuse of the process of law and do not attract the Doctrine of Necessity.

39. Touching lightly upon the merits of the case, Mr. Sethi submits that so far as the challenge to the charges levied by the respondent nos. 2 to 5 is concerned, there is no finding against the respondent nos. 2 to 5 nor in favour of the petitioner as to whether such charges are discriminatory or restrictive in its nature. Having not challenged the said findings, which are favourable to the respondents, the said findings become final and binding against the petitioner, and that coupled with the fact that the petitioner has not challenged the Final Order dated 25.10.2022, the averments in application under Section 42 of the Act amounts to re-agitating an issue which is no more *res integra*. In other words, the petitioner is trying to re-agitate what was not only final but actually rejected by the CCI in its Final Order.

40. Referring to paragraphs 326 and 327 as also paragraphs 395.1 of the Final Order dated 25.10.2022, Mr. Sethi submits that so far as such directions were concerned, respondent no.2 to 5 have already

implemented and complied the same by virtue of the intending launch of UCB Pilot System on 26.04.2023.

41. Learned senior counsel also submits that having said that, the respondents have challenged the directions contained in the Final Order dated 25.10.2022 before the NCLAT.

42. On an overall conspectus, Mr. Sethi submits that the present petition is devoid of any merit, is an abuse of the process of law and ought to be dismissed *in limine* with exemplary cost.

ARGUMENTS OF RESPONDENT NOS.2 AND 3

43. Mr. Sajjan Poovayya, learned senior counsel appears on behalf of respondent Nos. 2 & 3. At the outset, learned senior counsel draws attention of this Court to the prayer made in the writ petition to submit that:-

- (a) The doctrine of necessity is invoked against an institution and not in respect of a particular case.
- (b) There is no material on record placed by the petitioner which would lead this Court to believe that the doctrine of necessity is to be invoked.
- (c) The petitioner was already aware that the User Choice Billing (UCB) System was already launched.

44. Learned senior counsel submits that the petitioner is aware that on merits, so far as the charges are concerned, the CCI had given a finding in favour of respondent nos. 2 and 3 and the same was never

challenged by the petitioner by filing a statutory appeal thereagainst. He submits that having not challenged the said finding, now to challenge the same by way of the present writ petition or even the application under Section 42 of the Act would amount to re-agitation of an issue which have been decided by the CCI. On that basis, learned senior counsel submits that the observations and findings reached by the CCI is final and binding upon the petitioner. Thus, neither the application under Section 42 of the Act nor the present petition is maintainable either on facts or on law.

45. Buttressing the aforesaid submissions, learned senior counsel, invited attention of this Court to Paras 327, 398, 399 and 400 of the Final Order dated 25.10.2022 passed by the CCI. Learned senior counsel submits that considering the findings reached and mentioned in the aforesaid paragraphs and having not challenged the same, the filing of the application under Section 42 is a bogey raised by the petitioner in order to pre-empt the respondents from launching the UCB Pilot System on 26.04.2023.

46. Learned senior counsel also submits that the fee was always a part of the monetization model which the petitioner was aware of and keeping in view of the aforesaid finding of facts, and not having raised an issue of the fee charged, the petitioner was precluded from now raising the false issue on that basis.

47. Learned senior counsel, however, further submits that in fact it is by virtue of the UCB System, that the penalty levied against the

respondents by CCI was decreased by it, from 10% to 7%. On that basis, learned senior counsel submits that, had there been any discrimination as alleged by the petitioner in launching UCB System, the CCI would not have decreased the penalty.

48. Learned senior counsel had referred to the judgment of *The Punjab University, Chandigarh vs. Vijay Singh Lamba and Others* reported in (1976) 3 SCC 344. Drawing strength therefrom, Mr. Poovayya, learned senior counsel submits, by referring to Section 22 of the Act, that the Members as stipulated to be a minimum of three, cannot be reduced to a number below three to constitute a valid Commission. For the same reason, learned senior counsel also relied upon the judgment rendered by the Supreme Court in the case of *J. Mohapatra and Co. and Another vs. State of Orissa and Another*, reported in (1984) 4 SCC 103, particularly to paragraph 12 in respect of the ratio laid down regarding what would constitute doctrine of necessity.

49. According to Mr. Poovayya, the doctrine of necessity cannot be stretched to also mean that a defective quorum can hear and decide disputes. Learned senior counsel submits that a defect in the constitution would go to the root of the jurisdiction and such lack of jurisdiction cannot be adequately covered by attempting to invoke the doctrine of necessity.

50. Learned senior counsel submits that petitioner is not remediless, in that, in case the petitioner was aggrieved by any finding of facts by

the CCI, a statutory appeal could have been availed of, which the petitioner failed to do. Learned senior counsel, though without admitting, stressed on the fact that the petitioner had a remedy available to him under Section 42A of the Act whereby the petitioner could seek compensation in case of contravention of the orders of the CCI. Learned senior counsel submits that having not undertaken such alternate efficacious remedy provided by the statute, the filing of applications under Section 42 is a gross abuse of the process of law. Having not availed of such remedy, the petitioner is now precluded from re-agitation of issues which have attained finality.

51. Learned senior counsel submits that having regard to the fact that an alternate remedy is available, the doctrine of necessity is neither invocable nor applicable to the facts of the present case and thus, the present writ petition ought to be dismissed.

ARGUMENTS OF RESPONDENT No.6:

52. Mr. Jayant K. Mehta, learned senior counsel appears on behalf of respondent No.6, who was one of the informants before the CCI when it was proceeding to conduct inquiry under section 19 of the Act. Mr. Mehta, learned senior counsel had generally supported the arguments addressed on behalf of the petitioner, since the petitioner as well as respondent No.6 were, *ad idem*, so far as the petition under Section 19, pending before the CCI, was concerned.

53. Mr. Mehta, learned senior counsel had argued primarily on the following two grounds:-

- (a) First, that the interpretation of Section 15 of the Act, as is the settled law, has to be taken on the face of the language employed in the said section, in that, unless there is an ambiguity in the language employed, the interpretation ought to be on the basis of plain reading;
- (b) Second, the judgment of this Court in *Cadd Systems (supra)* holds the field so far as the interpretation of Section 15 of the Act is concerned and, therefore, there is no requirement for this Court to consider the ratio laid down by any other judgment relied upon by the other side.

54. Mr. Mehta, learned senior counsel invites attention of this Court to Section 15 of the Act to submit that the opening sentence, that is, “*No Act or proceeding of the Commission shall be invalid merely by reason of...*”, would itself make it clear that the proceedings which would entail inquiry or any other proceeding, including that contemplated by Section 42, would not get vitiated merely because of lack of Composition or Quorum. In other words, learned senior counsel submits that since there is no bar or prohibition or even a mandate in the Act which specifies the minimum number of Members who would constitute a Bench, coupled with the plain language of Section 15 of the Act, the Bench consisting of two Members would be a valid Bench under the Act. Based thereon, Mr. Mehta, learned

senior counsel submits that the question of referring to the applicability of doctrine of necessity does not arise at all.

55. Mr. Mehta, learned senior counsel then referred to Article 227 of the Constitution of India to submit that as per the provisions of Article 227 (2) (b), it is clear that under this provision, the overall superintendence and control of the subordinate courts and the tribunals in the Territory of Delhi are directly under this Court. In other words, Mr. Mehta, learned senior counsel submits that this Court can and ought to, in the facts of the present case, direct CCI to take up and consider the applications under Section 42 of the Act filed by the petitioner. He submits that the overall power of general superintendence cannot be circumscribed or curtailed by doctrine of necessity.

56. Mr. Mehta, learned senior counsel further proceeded to differentiate the judgments which were relied upon by the other respondents to submit that, in none of those cases was Section 15 of the Act considered for interpretation at all. Learned Senior Counsel submits that it is trite that the judgment is an authority for the proposition that it considers, not what flows from it. Mr. Mehta, while refuting the judgments cited by the learned senior counsel for respondent nos. 2 to 5, specifically points out that the same suffers from the sheer lack of discussion and observation on the aspect of Section 15 and its incorporation into the Act. He further submits that the judgments cited are based on the consideration of different laws applicable on entirely different contexts and thus, the same cannot be

taken into consideration as a precedent for this Court to consider, since the same actually inflict violence on the intention of the legislature for incorporating Section 15 into the Act. In other words, learned senior counsel submits that the *ratio decidendi* in the cases relied upon by the other respondents are not at all applicable to the facts of the present case and as such cannot be considered by this Court.

57. By referring to the list of dates between 24.08.2022 and 01.09.2022, learned senior counsel submits that the UCB system was projected subsequent to the conclusion of the final arguments before the CCI. On that basis, Mr. Mehta submits that the argument of the other respondents that the CCI sanctified the UCB system, is without any merits.

**ARGUMENTS BY MR. N. VENKATARAMAN, LEARNED
ADDITIONAL SOLICITOR GENERAL OF INDIA FOR CCI:-**

58. At the request of Mr. Venkataraman, learned ASG, the opportunity to argue after the conclusion of arguments of the petitioner as well as the other respondents, was afforded.

59. Learned ASG has submitted that the CCI has no adversarial interest in respect of either the petitioner or the respondent and is merely a Regulatory and Adjudicatory Authority performing functions as prescribed by the Act. On that basis, learned ASG submits that the arguments on behalf of CCI may be taken only to further the aims and objects of the Act.

60. The following are the short and concise arguments as addressed by the learned ASG:-

- (a) Section 8 of the Act does not deal with the quorum and only constitution of CCI;
- (b) In so far as Section 22 of the Act is concerned, the proviso thereto has to be read with sub-section (3) alone and cannot be interpreted to mean that sub-section (3) or for that matter, its proviso, would control all the other Sections of the Act;
- (c) In case sub-section (3) along with the proviso therein to Section 22 is deemed to be a pre-condition to the provisions of the Act, then sub-section (2)(a) to Section 6 would be impossible to comply with and would be rendered nugatory. It is trite that sections/provisions in an enactment are to be interpreted harmoniously and any meaning repugnant thereto ought to be repelled. This is in context of the timeline as prescribed in sub-section (2)(a) of Section 6 of the Act. The thrust being on the flexibility of the Commission to give effect to the provisions of Section 6 of the Act.
- (d) In so far as the arguments in respect of Section 15 are concerned, the interpretation by Mr. Sandeep Sethi, learned senior counsel that the word 'vacancy' used in Section 15 of the Act would imply a vacancy only

beyond three Members cannot be read into Section 15 keeping in view the provisions of Section 8 of the Act, particularly, sub-section (1) to Section 8 of the Act.

- (e) The case of *Dr. Manbodh Pandey (supra)* relied upon by the respondents is not identical and distinguishable on facts and thus, not applicable.
- (f) Learned ASG has categorically contended that the CCI is functional and the question of applicability of the doctrine of necessity to consider the applications under Section 42 of the Act filed by the petitioner may not even arise for consideration.

61. On the basis of the aforesaid arguments, learned ASG submits that the above arguments have been addressed purely as a neutral party by the CCI, leaving for this court to render its interpretation and interplay of various provisions of this Act, which would be taken as a guiding factor by the CCI.

62. On a query by this Court on the alternate relief as provided under Section 42A of the Act to persons such as the petitioner and thereby disentitling the petitioner from pursuing his remedies under Section 42 of the Act is concerned, Mr. Mehta learned senior counsel submits that firstly, Section 42A does not emasculate the right to specific performance and secondly, does not contemplate disentitlement of the petitioner or any such person to the other remedies available in the Act. Drawing attention to the opening words

of Section 42A, Mr. Mehta submits that it is clear that the provisions under Section 42A are in addition to and not in derogation of, nor depriving the petitioner from redressing its grievances on the basis of Section 42 of the Act.

63. In rebuttal, Mr. Roy, learned counsel for the petitioner reiterates his arguments and adopts the arguments addressed by Mr. Jayant K. Mehta, learned senior counsel appearing for respondent no.6.

ANALYSIS AND CONCLUSION:

64. This Court has heard the submissions made on behalf of the respective parties and considered the ratio laid down in various judgments passed by the Hon'ble Supreme Court as well as the judgments delivered by the Division Bench of this Court as well as other High Courts.

65. On an overall appreciation of the submissions as also the judgment relied upon, this Court is of the opinion that what falls for consideration before this Court is:-

- (a) *Whether the CCI is validly constituted presently with two members to continue its adjudicatory roles?*
- (b) *What is the effect of Section 15 of the Act?*
- (c) *If the aforesaid questions are answered in the affirmative, whether, in the present case, would there remain any requirement to apply the principles of doctrine of necessity at all?*

66. Since questions (a) and (b) framed above are interrelated, this Court would first deal with them.

67. In order to appreciate and consider the aforesaid two questions, it would be apposite to extract Section 15 of the Act which is as under:-

“15. No act or proceeding of the Commission shall be invalid merely by reason of—

- (a) any vacancy in, or any defect in the constitution of, the Commission; or*
- (b) any defect in the appointment of a person acting as a Chairperson or as a Member; or*
- (c) any irregularity in the procedure of the Commission not affecting the merits of the case.”*

A plain reading of the aforesaid provision brings to fore that it contemplates two different functions of CCI which would be governed by the said Section, namely an “act” or “proceeding”. It is manifest that the “act” contemplated, would obviously be distinguishable from the “proceeding”, in that, a “proceeding” would be relatable to adjudicatory powers exercised by the CCI and anything other than an adjudicatory process would be covered by the word “act” which could mean regulatory or administrative powers of the CCI. Moreover, it is trite that when an enactment uses the word “or”, it clearly indicates that the same ought to be read disjunctively, meaning thereby, that the saving clause of section 15 would equally apply to adjudicatory/judicial powers of the CCI. So read, the

intention of the Legislature to ensure that the adjudicatory functions of the CCI does not get impeded for defect arising out of vacancy or constitution arising out of vacancy, becomes clear.

68. Keeping the aforesaid interpretation and interplay of the aforesaid words, it is clear that any adjudicatory process wherein there is a vacancy or any defect in the constitution of the Commission would not invalidate the proceedings of CCI. It is trite that a statutory interpretation ought to be based on plain reading of the Section itself unless there is any ambiguity which would entail reliance upon extraneous materials. This Court gathers support of the aforesaid interpretation from the judgment rendered by a Coordinate Bench of this Court in *Cadd Systems (supra)* whereby the provisions of Section 15 were called for interpretation. Learned Single Judge of this Court had categorically concluded, after considering the judgment of *Mahindra and Mahindra (supra)*, that the provisions of Section 15 make it amply clear that no “act” or “proceedings” of the CCI would be invalid by reason of any vacancy or defect in the constitution. Learned Single Judge further observed, in the facts of that case, that though there was a requirement of a judicial member to be appointed to CCI, however, the orders passed by the CCI pending such appointment could not have been called into question. Learned Single Judge also relied upon the judgment of the Hon’ble Supreme Court in *B.K. Srinivasan (supra)* to conclude that the challenge to the defects of constitution of statutory bodies or defects of procedure which have not led to any substantial prejudice, cannot be countenanced. Learned

Single Judge pertinently observed that interdicting the CCI from passing final orders would effectively bring its functioning to a standstill and cannot be held to be in furtherance of the provisions of the Act.

69. This Court is of the considered opinion that the aims and objects of a particular enactment ought to be interpreted in a manner so as to ensure that the object desired to be fulfilled by the legislature by such promulgation are taken to its logical conclusion. In other words, merely because of a defect or a vacancy in the constitution of the CCI, the CCI cannot be considered as a statutory authority not having jurisdiction to adjudicate the complaints or other proceedings pending before it. Any interpretation, other than the aforesaid, would render the provisions of Section 15 otiose and which could not possibly be the intention of the Legislature either.

70. It is also necessary to consider that the provisions of Section 15 are clearly enabling and as such ought to be given the correct impetus to reach a logical conclusion while interpreting the powers of CCI in respect of its powers of adjudication. It is trite that an enabling provision is engrafted by the Legislature to overcome any inability which may accrue to statutory authorities like the CCI, while acting in furtherance of the aims and objects of the Act. In other words, it is to obviate the difficulties which may arise accruing on account of vacancy or defect in the constitution of the CCI, that such enabling sections are engrafted.

71. It would also be apposite to extract the provisions of Section 8 which are as under:-

“8. Composition of Commission

(1) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

(3) The Chairperson and other Members shall be whole-time Members.”

From a plain reading of the aforesaid provision, it is clear that there is no prescription as to what would be the minimum number of members who would constitute a valid quorum. As such, the argument that the Act prescribes a minimum number of members who would validly constitute the quorum, so far as the adjudicatory role of the CCI is concerned, is without any legs to stand.

72. Further to the aforesaid, this Court has generally considered various provisions of the Act in general and has observed that there is no provision which prescribes minimum number of members who would validly constitute a quorum of CCI in its adjudicatory proceedings. It is trite that Courts cannot read into an enactment,

something which is conspicuous by its absence. Moreover, the Court has to assume that if there is any absence of a provision, the legislature in its wisdom thought it appropriate not to engraft the same. In that, the preamble of the Act provides the foundation for engrafting and promulgation of such provisions for the Act. The same is reproduced herein:-

“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.”

The reason is not far to see, in that, it is presumed that the Legislature, while promulgating an enactment, takes into consideration not only any other Act, but is also presumed to be aware of the rationale behind and objects sought to be achieved by the enactment, and it is only thereafter that the legislature promulgates any enactment. It is well settled that the Doctrine of *Cassus Omissus* cannot be applied to fill any apprehended lacuna in an enactment.

73. It is also clear from the plain reading of Section 8 that what is contemplated is the composition of the commission and not quorum, meaning thereby the composition of the commission would consist of the Chairperson and not less than two and not more than six other

members who are to be appointed by the Central Government. It would be apposite to extract Section 22 of the Act, which is as under:-

“22. Meetings of Commission

(1) The Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations.

(2) The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote:

Provided that the quorum for such meeting shall be three Members.”

It is clear from the above that the composition of the CCI itself has no nexus with the word “*quorum*” as employed in the proviso to sub-section 3 to Section 22 of the Act. Moreover, the word “*quorum*” as used in proviso to sub-section 3 is in respect of meetings of the commission, which are not relatable to the adjudicatory proceedings of the CCI. It is for that reason that the proviso prescribes a “*quorum*” for any meeting to be consisting of three members mandatorily. The provisions of Section 22 appear to be purely in respect of administrative action to be undertaken by the commission and have no nexus with the adjudicatory process, inasmuch as, no adjudicatory

process can be rendered by a decision of majority of the members present and voting, which could be comprehensible only in context of a meeting, which does not have entrapment of an adjudicatory process. Clearly an adjudicatory process would involve an application of mind and determination of issues in the judicial sense.

74. In view of the aforesaid observation, the arguments of Mr. Sandeep Sethi, learned senior counsel in respect of quorum being complete only if three members of the CCI, including the Chairperson, constitute the same, is untenable. For the same reason, the argument of Mr. Sethi, learned senior counsel that the word “*vacancy*” used in Section 15 read with sub-section 3 of Section 22 of the Act mean that the word “*vacancy*” would be applicable only and only if the vacancy is in respect of members more than three and less than seven, would also be untenable, considering the plain language of both the Sections. Though the argument, at the first blush, appears to be logical, however, in view of the fact that the provisions of Section 22 are not relatable to the adjudicatory process at all, the interpretation sought to be given to the word “*vacancy*” in Section 15, by reading the proviso to sub-section (3) to Section 22 of the Act into it, would also stand rejected.

75. The other argument of Mr. Sethi, learned senior counsel was that if there is a lack of quorum, it would entail, firstly, loss of rationale which is inherent in a decision and secondly, lack of quorum would constitute lack of jurisdiction. On that basis, learned senior counsel submitted that an improperly constituted CCI would have no

jurisdiction to decide any issue. The said submission, ostensibly, was predicated on the fact that the minimum quorum of CCI is three members relying upon the proviso to sub-section 3 to Section 22 of the Act. The aforesaid argument in the opinion of this Court would be untenable for the reason that this Court has already concluded that the word “*quorum*” employed in proviso to sub-section 3 to Section 22 has no nexus with the adjudicatory process of the CCI and is limited only to its administrative acts. Considering the aforesaid, the submission that the constitution of CCI less than three members would create lack of jurisdiction of CCI as an adjudicatory authority, would fail.

76. In view of the aforesaid analysis, this Court is of the considered opinion that the provisions of Section 15 act as a saving clause in regard to a situation where a vacancy or a defect in constitution of the CCI would arise and any such vacancy or defect in the constitution would not invalidate any proceedings so far as the adjudicatory powers of the CCI is concerned. Accordingly, the aforesaid two questions (a) and (b) as framed by this Court, are answered in the affirmative.

77. Now to deal with question (c) as framed by this Court.

78. So far as the issue regarding doctrine of necessity is concerned, learned counsel for all the parties have vehemently addressed arguments in support of their contentions. The said submissions were also buttressed by a number of judgments on what constitutes doctrine

of necessity, its applicability and as to whether in the facts of the present case it was applicable.

79. Having regard to the definition of what constitutes doctrine of necessity as rendered by the Hon'ble Supreme Court in *J. Mohapatra's (supra)*, it is clear that it is only when an adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide, may be required to adjudicate if there is no other person who is competent or authorized to adjudicate or if a quorum cannot be formed without him or if no other competent Tribunal can be constituted, that the doctrine of necessity may become applicable. The Hon'ble Supreme Court has also held that in such cases, the principles of natural justice would have to give way to the necessity, for otherwise there would be no means of deciding the matter and the machinery of justice or administration would break down.

80. Having regard to the aforesaid position of law, clarified by various judgments of the Hon'ble Supreme Court, on the doctrine of necessity, this Court has to now consider whether the same would be applicable at all.

81. The arguments rendered by learned senior counsel for the respondent nos. 2 to 5 would make an attempt to bring the issues raised by the petitioner in his application under Section 42 of the Act and the proceedings sought to initiate thereon, within the bar of doctrine of necessity. According to the learned senior counsel for the

respondents, predicated on the basis that there is a lack of quorum due to vacancy of a member constituting the quorum (minimum being 3 including the Chairperson), the deficiency would be considered as lack of jurisdiction and as such the doctrine of necessity cannot be applied in the facts of the present case. It was also urged that the present quorum of two members, therefore, does not constitute a legally valid constitution of CCI at all. In other words, it was only if the quorum or constitution comprising of three members was holding proceedings at present, with any of such members earning disqualification in terms of the ratio laid down by the Hon'ble Supreme Court, that the doctrine of necessity could be invoked. The upshot being that the doctrine of necessity would clearly not be invocable in a case where the CCI comprises of members less than three.

82. So far as the submissions of Mr. Sajan Poovayya, learned senior counsel in regard to touching upon the merit and findings of the CCI in respect of monetization model of respondent nos. 2 to 5 in context of maintainability of applications under Section 42 is concerned, the same are left for consideration of the CCI leaving the rights of the parties reserved.

83. This Court is in agreement with the submissions of Mr. Sajan Poovayya, learned senior counsel that the doctrine of necessity is in respect of an institution and not a particular case. However, since this Court has answered questions (a) and (b) in the affirmative, no useful

purpose would be served in addressing the arguments urged on behalf of respondent nos. 2 and 3.

84. The reliance of Mr. Poovayya, learned senior counsel on the judgments of *The Punjab University (supra)* and *J. Mohapatra (supra)* have already been considered above.

85. The next submission of Mr. Poovayya, learned senior counsel on the aspect of the petitioner having an alternative efficacious remedy in terms of provisions of Section 42A of the Act are concerned, Section 42A opens with the words, “*Without prejudice to the provisions of this Act.....*”, which would clearly indicate that the mechanism for compensation etc. as stipulated under Section 42A is clearly in addition to and not in derogation of any other provision of the Act. Section 42A clearly does not commence with a *non obstante* clause and therefore would not override the other provisions of the Act. Thus, the said contention is rejected for the aforesaid reasons.

86. Learned senior counsel had also submitted that the petitioner was already aware of the UCB Pilot system even prior to the filing of the applications under Section 42 of the Act and therefore the urgency as alleged by the petitioner in respect of the intended launch of the UCB Pilot system on 26.04.2023, would not entitle the petitioner from invoking the doctrine of necessity. Keeping in view of the conclusions already drawn by this Court in respect of invoking of doctrine of necessity, the requirement to consider disputed factual aspects is not

necessary in the present proceedings under Article 226 of the Constitution of India.

87. In the present case, none of the learned senior counsel appearing on behalf of the respondents, at all submitted that the members who presently comprise the CCI are disqualified for any reason. Having regard thereto, the question of examining whether the doctrine of necessity is or is not applicable to the present case does not arise at all.

88. Moreover, according to Mr. N. Venkataraman, learned ASG, the CCI is constituted in accordance with the provisions of the Competition Act, 2002 and is very much functional and also simultaneously carrying out adjudicatory functions.

89. In view of the above, there is no impediment, legal or otherwise, in directing the CCI to take up the applications under Section 42 of the Act, as filed by the petitioner, for hearing and considering the same in accordance with law on or before 26.04.2023. Accordingly, the petition stands disposed of in above terms.

90. It is made clear that the observations made herein are only to the extent of deciding the present *lis* before this Court and shall not tantamount to any expression on the merits of the case and the same is therefore, without prejudice to the rights and contentions of all the parties, to be taken at an appropriate proceeding.

TUSHAR RAO GEDELA, J.

APRIL 24, 2023/Āj

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