Reserved on	:	23.04.2024
Pronounced on	:	30.04.2024

A.No.4191 of 2023 in
C.S.No.183 of 2023

P.VELMURUGAN, J.

This application has been filed by the fourth defendant in the suit under Order VII Rule 11 of CPC seeking to reject the plaint in C.S.(Comm.Div) No.183 of 2023.

2 The learned Senior Counsel for the applicant/D4 would submit that on 20 April 2023, Matrimony.com Limited filed a commercial suit bearing C.S. (Comm.Div.) No. 98 of 2023 before this Court seeking inter-alia, a permanent injunction restraining Google from removing or delisting the mobile apps owned and operated by Matrimony.com Limited from the Google Play Store, and a declaration that certain clauses of the Developer Distribution Agreement (in short "DDA"), incorporating the Developer Program Policies ("DPPs") and Google Payments Terms of Service-Seller (IN) ("Service Agreement"), are unenforceable. Thereafter, in May and June, 2023, 13 other app developers also filed commercial suits bearing C.S. (Comm.Div.) Nos. 120, 109, 124, 126, 127, 128, 129, 130, 131, 132, 133, 140 and 141 of 2023 before this Court making identical allegations and seeking similar reliefs. The aforesaid 14 commercial suits are collectively connected suits. On 26 May 2023, this Court passed an interim order in C.S (Comm. Div.) No.120 of 2023 *inter alia* granting an interim injunction restraining Google from delisting the apps owned and operated by Info Edge (India) Limited ("Info Edge") from the Play Store. The interim injunction was conditional on Info Edge (a) paying to Google an interim service fee (at 4% of its gross monthly revenues), (b) furnishing to Google accounting information on a monthly basis and (c) paying to Google the balance of the applicable service fee (over and above the interim 4% service fee) if the suit is decided in Google's favour. On 6 June 2023, Google filed applications under Order VII Rule 11 of the CPC seeking rejection of the connected suits. Now the plaintiff filed the present commercial suit against the defendants seeking relief similar to the relief sought by other app developers in the Connected Suits and on the same day, the learned Single Judge of this Court granted an interim injunction on the basis of the interim orders passed in the connected suits.

2.1 On 03.08.2023, this Court allowed rejection applications and the connected suits were rejected on, *inter alia*, the following grounds:

A. Abuse of dominant position by an enterprise is a matter that falls within the exclusive jurisdiction of the Competition Commission of India ("CCI") and Section 61 of Competition Act, 2002 ("Competition Act") expressly bars the jurisdiction of civil courts in respect of subject matters.

B. The Reserve Bank of India ("RBI") is the appropriate authority to look into the allegations pertaining to violations of the Payment and Settlement Systems Act, 2007 (in short " the PSS Act") and the RBI Guidelines dated March 17, 2020 for regulation of Payment Aggregators and Payment Gateways.

The learned Single Judge of this Court held that the plaints in the Connected Suits were barred by law under Order VII, Rule 11(d), CPC in view of the express ouster of civil court's jurisdiction under the Competition Act, and implied ouster under the PSS Act, as against which, 13 of the 14 app developers filed appeals and the Division Bench of this Court upheld rejection of connected suits passed by the learned Single Judge of this Court. Thereafter 12 app developers have filed Special Leave Petitions against the order of the Division Bench and even though the Hon'ble Supreme Court admitted the SLPs, but declined to grant any injunction/interim reliefs to the 12 app developers.

2.2 The learned Senior Counsel would further submit that the present commercial suit survives solely due to its belated filing in comparison to the filing dates of the connected suits, which are similar in scope, relief, and facts to the present commercial suit. The prayers sought by the app developers in the connected suits closely mirror the prayers sought in the present commercial suit. The allegations in the present commercial suit have already been addressed and rejected by the Division Bench Judgment. Therefore it is clear that the allegations raised in the present commercial suit mirror those that have already been categorically rejected in the Division Bench Judgment and as such, the Division Bench Judgment, which upheld the rejection of the connected suits under Order VII Rule 11(a) and (d) of the CPC, is squarely applicable to the present commercial suit.

2.3 Further repackaging the allegations in present Commercial Suit cannot save it from the same outcome as the Connected Suits. It is imperative to recognize that mere differences in drafting style, coupled with cosmetic changes and the insertion of references to certain sections of the Indian Contract Act, cannot obfuscate the fundamental similarities between the present Commercial Suit and the connected suits. Despite attempts to repackage the allegations, the core substance of the claims and the reliefs sought for remain strikingly similar and nearly identical to those in the Connected Suits. The Plaintiff's endeavor to present its suit as distinct is merely a superficial attempt and a closer examination reveals that the essence of the allegations, centered around the defendants' alleged abuse of dominant position and imposition of unfair conditions, mirrors the grievances raised and rejected in the connected suits. This overlap extends to the relief sought, including injunctions against delisting of apps and declarations regarding the legality of certain clauses in the DDA. Moreover, the strategic insertion of references to certain sections of the Indian Contract Act does not alter the basic premise of the case, which revolves around alleged violations of competition law and PSS Act.

2.4 It is a settled law that plaintiffs cannot make bare allegations by the way of clever and ingenious drafting to get over the bar of civil court's jurisdiction under a special statute. In essence, any differences in drafting style and the selective use of legal provisions do not change the underlying reality that the Plaintiff's suit is essentially a replica of the connected suits. A bare perusal of the purported Commercial Suit conclusively establishes that the cause of action is rooted either in alleged rights and entitlements arising out of the

CCI order or based on allegations of non-compliance with the CCI Order by one or the other of the named defendants. A suit based on such a cause of action is expressly barred under Section 61 of the Competition Act which clearly ousts the jurisdiction of civil courts in respect of matters that the CCI or the Appellate Tribunal. The National Company Law Appellate Tribunal (in short "**NCLAT**") are empowered to determine by or under the Competition Act. In due exercise of its statutory powers under the Competition Act, the CCI has specifically examined the reasonableness of the service fee charged and did not find any violation with respect to either the right to collect service fee or the reasonableness of such fee. After its investigation, CCI did not arrive at a finding that the service fee charged is excessive, disproportionate or that such fee cannot be charged at all. Notably, these findings of the CCI on the service fee have not been appealed, and have, therefore, attained finality and the same cannot be challenged in a surreptitious manner as has been done by way of the present Commercial Suit.

2.5 It is well settled that when a right or liability is established by a statute, that very statute not only defines the right and liability but also provides the mechanism for enforcing them. The CCI was specifically established to address competition-related issues. Since the Plaintiff's remedies lie within the purview of the Competition Act, Section 9 of the CPC does not give them an absolute right to file civil suits, much less in the commercial jurisdiction. It is settled that the right under Section 9 of CPC is not absolute. A civil suit can be ousted and barred by a law, either expressly or by necessary implication . Even otherwise, it is well recognised that the jurisdiction of civil courts is impliedly barred where a statute (i) provides a right to sue, (ii) lays down the procedure for exercise of such right, and (iii) establishes a separate machinery for enforcement of such right. This principle applies with greater force in the context of the Competition Act, which provides the right to seek redressal for abuse of dominant position, lays down the procedure for exercise of such right and expressly ringfences matters under Competition Act from the scrutiny of civil courts. Therefore, the jurisdiction of civil courts is barred in matters relating to the Competition Act.

2.6 Section 11 of the Commercial Courts Act precludes a commercial court from entertaining or deciding any suit or application thereunder where the jurisdiction of the civil court is either expressly or impliedly barred under any other law. In this case, the cause of action, if any, arises out of the enforcement of the CCI Order and the institution of the suit is therefore expressly barred under Section 61 of the Competition Act. On this basis, this Court ought to reject this suit for want of jurisdiction and vacate the Ad-Interim Order. The allegation of violation of particularly Section 10A of the PSS Act and RBI Guidelines, can only be adjudicated by the RBI, which is the designated regulator under the PSS Act. The jurisdiction of the civil courts to adjudicate on such allegations is impliedly barred by the PSS Act. The PSS Act is a self-contained code which provides a complete machinery for regulation of payment systems in the country. The PSS Act defines the rights of parties, their corresponding obligations and the consequences of breach in case of a violation of the same. The PSS Act provides for a mechanism of adjudication of disputes between parties. For such purposes, the PSS Act identifies the RBI as the designated expert authority for overseeing the implementation and enforcement of the PSS Act. The provisions of the PSS Act make it clear that the PSS Act is a complete code, which provides a separate adjudicatory mechanism for all alleged violations of the PSS Act. As such, the jurisdiction of Civil Courts is impliedly barred. The provisions of PSS Act indicate the overwhelming power of RBI as designated authority to permit regulated entities to start, continue, and prevent as well as terminate any rights and obligations under the PSS Act. Further, it provides finality to the decisions of RBI and Central Government on various issues. For non-compliance, the PSS Act confers RBI alone with the power to impose civil and criminal levies in the form of fine and penalty, respectively, for contravention of the PSS Act. The PSS Act ensures ring-fencing of actions before courts with respect to the subject matter and permits such actions only if they have been initiated through RBI. Section 32 specifies that the PSS Act will have an overriding effect. Even otherwise, because the RBI is designated as the expert authority, which exercises powers to regulate and supervise payment systems in India, courts should defer to the expert regulator to avoid any adverse impact on the health of the payment systems in India. In this view, the jurisdiction of civil courts is impliedly ousted and consequently, the Plaintiff is not entitled to maintain the present Commercial Suit before this Court, on the ground that certain provisions of PSS Act and directions issued thereunder have allegedly been violated**.**

2.7 The allegations of unconscionability, *inter alia,* under Section 16 of the Indian Contract Act are also based on the existence of an alleged economic dominance of Defendants. This dominance can only be ascertained by the CCI under the Competition Act. In this specific case, the allegation of abuse of dominance before the CCI even included a claim that Defendants had imposed unfair contractual terms under Section 4(2)(a)(i) of the Competition Act through "higher bargaining power" - which is a mirror image of the claim that the Plaintiff now tries to assert under Section 16 of the Contract Act. In any event, no relationship, be it physical, fiduciary, emotional, mental has been pleaded in the plaint which attracts Section 16 of the Indian Contract Act. The only influence asserted is the determination based on economic analysis by CCI and not one based on those indicated under Section 16. 2. Order VI, Rule 4 of CPC requires a party to plead necessary particulars when making allegations such as undue influence.

2.8 By intertwining allegations under the Indian Contract Act, and the abuse of dominance, the Plaintiff is complicating the core issues before this Court. It is imperative to recognize this tactic and consider the core contentions in the plaint, which are based on (i) alleged non-compliance of the directions passed by the CCI in its CCI Order and (ii) alleged abuse of dominance by Defendants. The law laid down by the Hon'ble Supreme Court in ***Charu Kishor Mehta (Supra)*** squarely applies, given that the Plaintiff is attempting to keep the specialized sectoral regulators (CCI and RBI) at bay by making vague and unsubstantiated allegations. The essence of the plaint lies in the alleged non-compliance with the CCI Order and Defendants' purported abuse of dominance. If these central allegations are removed from the plaint, no valid cause of action would remain.

2.9 Therefore the present commercial suit is liable to be rejected at the threshold.

3 Learned Senior Counsel for the first respondent/plaintiff would submit the Plaintiff owns and operates the online video streaming platform 'Disney-+Hotstar" which is made available through the mobile application "Disney+Hotstar" and through the website. To list and enable users to download Disney-+Hotstar application on their Android mobile devices from Google Play Store, the Plaintiff has accepted the click-wrap, online, nonnegotiable, unilaterally imposed contract terms i.e. Google Play Developer Distribution Agreement ("DDA"), Google Payments Terms of Service — Seller (IN), Developer Terms of Service for Alternate Billing System) administered by the various Defendants / Google entities. The Plaintiff invokes various provisions of the Indian Contract Act, 1872 challenging the specific clauses being imposed by Google on the Plaintiff as *void ab initio* as they are in violation of Indian law, defeat the provisions of law, are opposed to public policy, and therefore are unconscionable, unlawful, illegal, and unenforceable.

3.1 The Plaintiff seeks in para 51 of the Plaint, declaratory and injunctive reliefs, including striking down of the said clauses in the click-wrap, online, non-negotiable, unilaterally imposed contract terms between the Plaintiff and the Google entities. At the outset that the instant plaint and suit are unique vis-a-vis other plaints which have been dismissed by the Single Judge and which dismissal has been upheld by the Division Bench.

3.2 The instant suit and plaint specifically seeks, *inter alia,* a relief of setting aside clause 16.8 of the DDA between the Plaintiff and the Defendant / Google entities which relief is not found or present in the other plaints. The reference and finding of validity of clause 16.8 both in the Single Judge Judgment and the Division Bench Judgment was as an answer to the defense by Google while arguing the lack of territorial jurisdiction of this Court in entertaining the suit. The Plaintiffs in the other suit had to satisfy as far as territorial jurisdiction is concerned and to that extent, para 43-45 of the instant plaint are an answer to the same issue raised by Google in their rejection application in the instant case as well. However, as far as the instant plaint is concerned, the Plaintiff has, in addition to satisfying the territorial jurisdiction of this Court, it has challenged the subject-matter validity of clause 16.8 and a specific relief in para 51(i)(e) to strike down the said clause 16.8 in the DDA between the Plaintiff and Google entities is asked for. There is no bar in law or otherwise for this Court to not entertain relief claimed in para 51(1)(e) and no averment has been raised under Order VII Rule 11 by Google that the relief asked for in para 51(i)(e) is barred by any law. Thus, the suit is clearly maintainable as far as prayer 51(i)(c) is concerned. However, exhaustive arguments on the maintainability of prayers 51(i)(a)-5 1(i)(d) were not submitted since it was submitted before the this Court that due to the maintainability of the prayer 51(i)(e) in respect of clause 16.8 of the DDA itself, the rejection application deserves to be dismissed.

3.3 The application under Order VII Rule 11 is not maintainable as the relief in para 51(i)(e) seeking striking down of clause 16.8 of the DDA is not barred by law. It is trite law that the plaint cannot be rejected in part, since one of the reliefs sought by the Plaintiff is not barred by law, it may not be necessary to show how the other prayers sought in the plaint are not barred by law. The reliefs prayed for in para 51(i)(e) of the plaint cannot be granted by the Competition Commission of India ("CCI") under the Competition Act, 2000 and that this Court alone has the jurisdiction to grant reliefs prayed for in para 51(i)(e). It is not necessary at this stage to show how the other prayers and causes of action asserted in the plaint are also not barred by law. The Plaintiff has challenged Clause 16.8 of the DDA which: (a) applies only the laws of State of California to all disputes that may arise under the DDA (ii) mandates the Plaintiff to submit to the exclusive jurisdiction of the federal or state courts located within the county of Santa Clara, California, in the United States of America, and (if) at the same time, allows Google alone to sue the counterparty for injunctive relief in any jurisdiction. Such a provision ousting the laws and jurisdiction of Indian courts is in violation of Section 28 of the Indian Contract Act, 1872. In this regard, paras 35 and 36 of the Plaint clearly show the specific challenge to strike down clause 16.8 of the DDA. The Single Judge has held as follows:

> *"26...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

3.4 The Division Bench Judgment upheld these findings of the Single Judge Judgment and the plaint cannot be rejected in part; (ii) if any part of the relief is maintainable, Plaint cannot be rejected; and (iii) the Plaint must be read in its entirety without any addition or subtraction. These findings have not been stayed in the SLPs pending against the Division Bench Judgment. Therefore the plaintiff's its challenge to Clause 16.8 of the DDA and consequently relief in para 51(1)(e) of the Plaint - of declaring the said clause illegal and striking it down — is clearly maintainable. Accordingly, considering the relief at para 51(i)(e) of the Plaint is clearly maintainable as held by the Single Judge Judgment and the Division Bench Judgment, and since it is settled law that the Plaint cannot be partially rejected, the rejection application is not maintainable.

3.5 The learned Senior Counsel would further submit that in order to assess if a suit is barred by law, the Plaint must be read in its entirety without any addition or subtraction. While the fourth defendant tried to show that paras 93 to 95 of the InfoEdge Plaint are identical to paras 46 to 48 of the instant

Plaint, it failed to show any para in the InfoEdge Plaint which is identical or even similar to assertions in para 35 and 36 of the instant Plaint. The assertions in para 35-36 of the Plaint and the relief claimed in para 51(i)(e) cannot be subtracted from the Plaint to assess its maintainability. In this regard, it is pertinent to note that Google has not pleaded in the rejection application that the prayer in para 51(i)(e) to strike down Clause 16.8 is barred by law for lack of subject- matter jurisdiction. It has only pleaded that territorial jurisdiction of the entire suit is barred by clause 16.8, which assertion of Google has already been rejected by the Single Judge Judgment and the Division Bench Judgment. It is submitted that Google has not raised any ground that this Court lacks subject matter jurisdiction to adjudicate the challenge of Clause 16.8 of the DDA *per se,* under Competition Act or PSS Act. Google has not shown any finding in the Single Judge or Division Bench Judgment that the prayer to strike down Clause 16.8 is barred by law or fails to state a cause of action. The Single Judge and Division Bench Judgments consider validity of Clause 16.8 not because of assertions in paras 93 to 95 of the other suits or any prayer to strike down Clause 16.8 but because of the preliminary objection to territorial jurisdiction raised by Google invoking Clause 16.8. If the Single Judge and Division Bench Judgments understood the other suits has seeking a relief to strike down Clause 16.8, 4 they would not have rejected the plaints. The Plaint in the other suit do not seek a prayer to strike down clause 16.8.

3.6 Additionally, the fact that the present suit is materially different from the previous suits is evident from the comparison of the prayers in the present and the previous 14 suits. Illustratively, the key difference between the present suit and the previous suit are: a. The previous suits do not specifically challenge or seek a striking down of Clause 16.8 of the DDA (jurisdiction clause in its entirety). b. The previous suits have no relief for declaring Clause 2.1 of the Developer Terms of Service for Alternate Billing System (which makes adoption of Alternate Billing Choice subject to approval by Google) as void. c. Clause 3.4 of the DDA (which empowers Google to impose Service unilaterally) read with the Service Fee modification and Clause 4 of the Payments Policy (which imposes anti-steering provisions) have not been specifically challenged in the previous suits.

3.7 In the present suit, the Plaintiff has affirmatively challenged the validity of Clause 16.8 of the DDA in the contract between Plaintiff and the Google entities and sought a relief to declare the said clause as void and strike it down. In the previous suits, submissions qua Clause 16.8 of the DDA were made for the limited purpose of adjudicating whether this Court had territorial jurisdiction to decide the suit or not. However, in the present case apart from establishing the territorial jurisdiction of the this Court, the Plaintiff has challenged the validity of Clause 16.8 of the DDA *per se*. Thus, the subject matter of the present suit has a specific challenge to the validity of Clause 16.8 of the DDA and a declaratory prayer to strike down the illegal clause from the contract between the Plaintiff and the Defendants, which is absent in the other suits.

3.8 Evidently in the previous suits, there was no submission on behalf of the plaintiffs therein to strike down Clause 16.8 of the DDA in a *per se* challenge. In fact, neither the Defendants/Google nor the Single Judge or the Division Bench understood InfoEdge/other Plaintiffs to make such a submission or seek a *per se* declaratory relief against Clause 16.8 of the DDA. The Single Judge and the Division Bench had no occasion to consider the challenges to the various clauses of the Agreements especially Clause 4 of the Payments Policy, Clause 2.1 of the Alternative Billing System and Clauses 3.4 and 16.8 of the DDA. Thus, at the minimum adjudication must be *de novo* for these prayers. Therefore the contentions of the fourth defendant that by clever drafting the Plaintiff has created an illusory cause of action, must be rejected. Further, considering there is a *per se* challenge to clause 16.8 of the DDA, in light of the Single Judge and Division Bench Judgment, this Court would be required to frame an issue to the said effect. The fourth defendant has not cited any statute or judgment that shows that the said challenge to Clause 16.8 of the DDA or the relief that the said clause is void, is barred by law. Therefore the suit is very well maintainable in law and the application under Order VII Rule 11 is liable to be rejected. In support of his contentions, the learned Senior Counsel for the plaintiff relied on the following decisions:

1. ***Shri. Satya Pal Gupta vs. Shir Sudhir Kumar Gupta (batch)*** *reported in* ***2016 SCC OnLine Del 2502***
2. ***K.Thakshinamoorthy and another vs. State Bank of India*** *reported in* ***2001 (1) CTC 594***
3. ***Geetha vs. Nanjundaswamy and others*** *reported in* ***2023 SCC OnLine Sc 1407***
4. ***Municipal Corporation of Delhi vs. Gurnam Kaur*** *reported in* ***(1989) 1 SCC 101***

4 Heard the learned Senior Counsel on either side and perused the materials available on record.

5 The main contention of the learned Senior Counsel for the applicant/D4 is that the suit claim is barred under Competition Act and PSS Act.

The identical reliefs were sought for by some parties and the applicant filed for rejection of plaint and this Court allowed the application accepting the contention of the applicants and rejected the plaint. Challenging the same, the aggrieved parties filed an appeal before the Division Bench of this Court and the Division Bench confirmed the order of the learned Single Judge. Aggrieved against the order of the Division Bench of this Court, the respondents/plaintiffs in that applications filed SLP before the Hon'ble Supreme Court, which has not stayed the order of the Division Bench, which itself clearly shows that the suit is also identical with other suits.

6 Further mere adding prayer i.e. to declare the clause 16.8 in the DDA as null and void, which is against the public policy, may not be the sole ground to maintain the suit. Mere clever drafting of the plaint will not give any right for them to maintain the suit and the learned Senior Counsel further argued that since the prayer sought for by the plaintiff in the connected suit is the mirror prayer sought for in the present suit. The subject matter of the suit is expressly barred under Competition Act and impliedly barred under PSS Act, since the present suit is also identical.

7 But, However, the learned Senior Counsel for the first respondent/ plaintiff has contended that the prayer in the present suit is unique than the other suits, which were rejected by this Court in the applications filed by the applicants. In the instant suit there is specific relief to set aside the Clause 16.8 of DDA between the plaintiff and the defendant/Google entity, which relief is not found in the earlier suits. In the present suit the plaintiff challenged the validity of Clause 16.8 of DDA and in the earlier suits it is absent. Therefore the order passed in the earlier suits by the learned Single Judge as confirmed by the Division Bench and now pending before the Hon'ble Supreme Court is nothing to do with the present suit.

8 Further the main contention of the learned Senior Counsel for the first respondent/plaintiff is that the present suit is materially different from the previous suits, which is evident from prayer sought for in the present suit and the previous 14 suits. Previous suits are not asked for striking of clause 16.8 of DDA. Previous suits have no relief for striking of clause 2.1 the Developer Terms of Service for Alternate Billing System and the clause 3.4 of the DDA read with “Service Fee” and they have not been specifically challenged in the previous suits. The main contention of the learned Senior counsel for the plaintiff that this subjects matters cannot be decided by the CCI and also does impliedly bar under PSS Act and the plaint has to be either rejected in-toto or it has to be tried for the prayer. The plaint cannot be rejected in part if the plaintiff is entitled to maintain the suit for granting any one of the reliefs.

9 Now the core question to be decided is that whether the plaint is expressly or impliedly barred by jurisdiction of the Civil Court and whether the suit claim is expressly and impliedly barred by any law and all the reliefs sought for by the plaintiff can be adjudicated before the CCI.

10 If the suit is barred by law, all the reliefs sought for in the plaint can be adjudicated by CCI then the suit is not maintainable and if the suit is not barred by law and all the reliefs cannot be granted by CCI then the suit is maintainable. It is useful to refer Order VII Rule 11(d) CPC and Section 11 of the Commercial Courts Act,2015 and Sections 3, 4, 19, 26, 61 of Competition Act, 2002.

"Order VII Rule 11(d) CPC:

***Rejection of plaint** – where the suit appears from the statement in the plaint to be barred by any law;*

Section 11 of Commercial Courts Act, 2015:

Bar of jurisdiction of Commercial Courts and Commercial Divisions

Notwithstanding anything contained in this Act, a Commercial Court o r a Commercial Division shall not entertain or decide any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

Section 3, 4, 19, 26, 61 of Competition Act, 2002:

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.

(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.

(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.

Abuse of dominant position

***4.** (1) No enterprise shall abuse its dominant position.*

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise.—-

(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,

(b) limits or restricts—

(i) production of goods or provision of services or market therefore; 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; 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.

Inquiry into certain agreements and dominant position of enterprise

19. *(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 a complaint, 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;

(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

Procedure for inquiry on complaints under Section 19

***26.** (1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, 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.*

(2) 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.

(3) Where on receipt of a complaint under clause (a) of sub-section (1) of section 19, the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary.

(4) The Commission shall forward a copy of the report referred to in sub-section (2) to the parties concerned or 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 relates on a complaint and such report recommends that there is no contravention of any of the

provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director General.

(6) If, after hearing the complainant, the Commission agrees with the recommendation of the Director General, it shall dismiss the complaint.

(7) If, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.

(8) If the report of the Director General relates on a reference made under sub-section (/) and such report recommends that there is no contravention of the pro visions of this Act, the Commission shall invite comments of the Central Government or the State Government or the statutory authority, as the case may be, on such report and on receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a prima facie case.

(9) If the report of the Director General referred to in sub-section (2) 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.

Exclusion of jurisdiction of civil courts

***61.** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission 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."*

11 A careful perusal of the plaint, counter affidavit filed by the respondents and oral arguments and writ submissions on either side and the documents annexed, shows that admittedly all the plaintiffs in the earlier suits are members of the Association in which plaintiff is also a member and they have filed application before the CCI and now the dispute is pending with CCI. Once the subject matters are lying before CCI and CCI is the statutory authority to decide those issues, the subject matter is expressly bared under Competition Act and impliedly bar under PSS Act.

12 The first respondent/plaintiff also accepted that the parties to the agreement i.e. some of the aggrieved parties viz. the plaintiffs in some of the previous suits, who are the members of the Association of the present plaintiff have filed application before CCI and CCI also entertained the applications. It is to be noted that the CCI has not rejected those applications referring clause 16.8 in DDA that the Court or the authority of the California alone has got jurisdiction, however CCI has not raised territorial jurisdiction and they entertained the applications. Therefore once CCI empowered to decide all the issues, the suit is expressly barred under Section 61 of the Competition Act and also impliedly bar under PSS Act.

13 Even though one of the main grounds raised by the first respondent/plaintiff is that they have not challenged clause 16.8 of the DDA and sought to declare the same as null and void in the earlier suits, but, whereas, once CCI has entertained those applications and they have not questioned or disputed the territorial jurisdiction, mere clever drafting of the plaint will not give jurisdiction to the Civil Court to decide the matter, since this suit is expressly and impliedly barred. Therefore the contention of the learned Senior Counsel for the first respondent/plaintiff is not acceptable.

14 It is settled proposition of law at the time of deciding application under Order VII Rule 11 CPC, the Court has to see only the averments made in the plaint and without addition or omission the plaint has to be considered in-*toto* and not the defence taken by the defendant and it is also settled proposition of law the plaint cannot be rejected in part either it can be rejected in-toto or can be entertained and if the Court can grant any of the reliefs and the plaint cannot be rejected in part.

15 There is no quarrel with the settled proposition of law as decided in decisions referred to by the learned Senior Counsel for the first respondent/plaintiff. However, in this case, especially when the plaintiff challenged clause 16.8 of DDA, but once CCI already entertained the application, question of challenging the said clause before the Civil Court would not arise. Therefore the contention of the learned counsel for the first respondent/plaintiff is not acceptable.

16 The dispute pending before CCI, which has got power to decide the relevant issues and therefore once CCI has got jurisdiction and entertained the complaint/claim to decide the issues, jurisdiction of civil Court is expressly barred under the Competition Act. Other aspects impliedly bar under PSS Act. Therefore, the allegation of the plaintiff that abuse of dominant position by an enterprise is a matter that falls within the exclusive jurisdiction of the CCI and hence, the jurisdiction of civil Court is expressly barred under Section 61 of Competition Act.

17 As far as other allegations are concerned, the Reserve Bank of India is the authority to look into the same under PSS Act and the Civil Suit is impliedly bar. This Court finds from the reading of the entire plaint the dispute raised in the present suit is expressly and impliedly bar under Competition Act and PSS Act. It is also settled proposition of law that mere clever drafting of the plaint will not create any right to the party to invoke civil jurisdiction.

18 Therefore, under these circumstances, this Court finds that subject matters are expressly barred by Competition Act and impliedly bar under PPS Act.

19 For the foregoing reasons and observations, the application stands allowed and the plaint in C.S (Comm Div).No.183 of 2023 is hereby rejected.

30.04.2024

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P.VELMURUGAN, J.

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Pre-Delivery Orders in

A.No.4191 of 2023 in

C.S.No.183 of 2023

30.04.2024