IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.10.2021

DATE OF DECISION : 06.01.2022

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
AND
THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

W.A.No.529 of 2018

M/s MRF Limited
rep. by its Company Secretary
Mr.Ravi Mannath
124, Greams Road
Chennai 600 006 .. Appellant

-vs-

1. Ministry of Corporate Affairs (MCA)
   rep. by Secretary to Government
   Government of India
   5th Floor, A Wing
   Shastri Bhawan
   New Delhi 110 001

2. Competition Commission of India (CCI)
   rep. by its Secretary
   No.18-20, The Hindustan Times House
   Kasturba Gandhi Marg
   New Delhi 110 001

3. Additional Director General (DG)
Competition Commission of India
B Wing, HUDCO Vishala
14, Bhikaji Cama Place
New Delhi 110 066

4. All India Tyre Dealers' Federation (AITDF)
865/32, Guru Nanak House
S.P.Mukherjee Marg
New Delhi 110 006

5. M/s Apollo Tyres Ltd.,
6th Floor, Cherupushpam Building
Shanmugam Road
Kochi 682 031

6. M/s CEAT Ltd.,
No.463, Dr.Annie Besant Road
Worli
Mumbai 400 030

7. M/s J.K.Tyres and Industries Ltd.,
Jaykaygram, P.O Tyre Factory
Kankroli
Rajasthan 313 342

8. M/s Birla Tyres Ltd.,
Birla Building, 8th Floor
No.9/1, R.N.Mukherjee Road
Kolkata 700 001

9. Automotive Tyre Manufacturers' Association (ATMA)
PHD House (4th Floor), Opp.Asian Games Village
Siri Fort Institutional Area
New Delhi 110 016 .. Respondents

Appeal filed under Clause 15 of the Letters Patent against the order dated 06.03.2018 made in W.P.No.35255 of 2015.

For Appellant	::	Shri.G.Masilamani Senior Counsel for M/s Mani Sundargopal
For Respondents	::	Mr.V.Chandrasekaran Central Government Panel Counsel for R1 Shri N.Venkataraman Additional Solicitor General assisted by Mr.P.J.Rishikesh for R2 & R3 Mr.Ragavendra Ross Divakar for R4 Shri P.S.Raman Senior Counsel for M/s Abishek Jenasenan for R6 Shri AR.L.Sundaresan Senior Counsel for Mr.P.V.Balasubramanian for M/s BFS Legal for R9 No appearance for RR 5,7 & 8

JUDGMENT

T.RAJA, J.

Having suffered an order of dismissal of its writ petition, M/s MRF Limited has brought this writ appeal, challenging the correctness of the impugned order passed by the learned single Judge.

2. Shri G.Masilamani, learned Senior Counsel appearing for the appellant pleaded that the fourth respondent-All India Tyre Dealers' Federation, hereinafter referred to as "the AITDF" sent a representation dated 28.11.2013 to the first respondent-Ministry of Corporate Affairs, hereinafter referred to as "the MCA" and the said representation was forwarded by the MCA to the second respondent-Competition Commission of India, hereinafter referred to as "the CCI" on 16.12.2013. The representation alleged that when natural rubber price increased, the tyre prices were increased in a concerted manner by the domestic major tyre manufacturers, however, when the price of natural rubber decreased, the tyre prices were not reduced by the domestic major tyre manufacturers and as such, they indulged in price parallelism and cartelization. In order to support the said allegations, the AITDF mentioned some unauthenticated natural rubber prices for certain years, instead of showing the rubber board price. Neither the actual tyre price nor the year or the name of the company were mentioned in the said representation. Without even showing any proof of price parallelism, the allegation of cartelization under Section 3 of the Competition Act, 2002 cannot stand up.

3. Shri G.Masilamani, continuing his arguments, contended that it is common knowledge that to make a comparison, there must be minimum two parameters. While arriving at the price parallelism between the opposite parties, who are 5 in number, the tyre prices of each of the opposite parties are necessary. Similarly, for price comparison, inter se tyres of inter se tyre producers are also necessary. In the representation given by AITDF, only one parameter, namely, rubber prices increase and decrease alone were given, but the actual tyre prices of none of the opposite parties were stated. Therefore, without the actual tyre prices of opposite parties, the allegation of AITDF, namely, concerted increase of tyre prices, price parallelism and cartelization were not at all made out even prima facie. With only one parameter, namely, the rubber prices for certain years, no comparison can be made without the actual prices of tyres of opposite parties. Learned Senior Counsel further contended that the above representation failed to qualify to be a reference under Section 19(1)(b) of the Competition Act, as it does not conform to Regulation 2(j) read with Regulation 10(2), 11(2) and 15 of the Competition Commission of India (General) Regulations, 2009. The CCI, by order dated 7.1.2014, asked the MCA and the AITDF to address

preliminary arguments. The CCI, noticing the statement made by the representative of the MCA that they have no further submission to make in this regard, allowed the prayer of the MCA for exemption from further proceedings. Thereafter, the CCI, having heard the fourth respondent-AITDF and the ninth respondent-Automotive Tyre Manufacturers' Association, passed the order dated 24.6.2014 impugned in the writ petition under Section 26(1) of the Competition Act directing the Additional Director General, the third respondent herein to conduct an investigation in the matter.

4. Questioning the action of the MCA in forwarding the letter dated 16.12.2013 to the CCI as a sheer non application of mind, it has been argued that it was not a valid reference, for the simple reason that the said reference failed to contain even the basic minimum requirement of the allegedly offending actual tyre prices. Shri G.Masilamani, finding fault with the MCA for forwarding the representation of the AITDF dated 28.11.2013 to the CCI to take suo motu action against the major tyre manufacturers for not reducing the prices of tyres, also contended that a mere mentioning of

Section 19(1)(b) shall not satisfy the requirement of law relating to reference, because the MCA has acted like a post office mechanically, therefore, the letter dated 16.12.2013 cannot be considered as a reference, muchless, a valid reference within the meaning of Section 19(1)(b) of the Competition Act read with Regulations 10 and 11 of the Competition Commission of India (General) Regulations. Moreover, the word 'reference' is defined under Regulation 2(j). Therefore, it shall comply with the mandatory regulations framed under this Act. Further, not even one word is written about the violation of Section 3 of the Competition Act while forwarding the letter. Besides, no names of the tyre producers were mentioned against whom action was to be taken. When the forwarding letter failed to contain the word 'reference', the forwarding of the letter by MCA, being an executive action, to set in motion a reference under the Competition Act, the MCA ought to have recorded some reasons in support of the purported reference. But the MCA not only failed to give any reason, but also equally failed to refer to any fact or situation to implicate the opposite parties for violation of Section 3 of the Act. When Regulations 11 and 12 have not been complied with by the MCA, the MCA ought to have

seen and followed the earlier reference made by the Central Government under the Monopolies and Restrictive Trade Practices Act in respect of the same subject matter for the earlier period of years, which ultimately shows that the proper manner of making reference was not made. When the statutory procedures for making reference both under the Monopolies and Restrictive Trade Practices Act and the Competition Act are similar in nature, the failure to make a proper reference, as per the procedure prescribed in the Regulations by law, had rendered the reference invalid as per Regulation 15(3). In support of his submission, he has also relied upon the judgments of the Apex Court in *Narayan Dass Indurakhya v. Sate of Madhya Pradesh, (1972) 3 SCC 676* and in *K.K.Ahuja v. V.K.Vora and another, (2009) 10 SCC 48*.

5. Continuing his arguments, Shri G.Masilamani argued that it is not a case where minor/inconsequential procedural requirements had been omitted to be complied with inadvertently, while substantial procedural requirements had been complied with, but the entire procedural Regulations 10, 11, 12, 14, 16 and 23 had been ignored by the MCA, CCI and the

Secretary to CCI, as a result they acted like persons above the law, when the CCI being the creature of the same statute cannot ignore the statutory Regulations framed by it and finally approved by Parliament. Learned Senior Counsel further argued that when the reference itself is totally invalid, non est in the eye of law, all actions done on the non-existing reference shall be without jurisdiction, for the simple reason that if a particular thing is to be done in a particular way, it shall be done in that way or not at all. In support of his submission, he has referred to a judgment of the Apex Court in *A.R.Antulay v. R.S.Nayak and another, (1988) 2 SCC 602*. Again finding fault with the CCI, Shri G.Masilamani contended that the allegation of AITDF that the opposite parties abnormally increased the prices and failed to decrease the prices of their tyres are not at all made out, failure to furnish the actual tyre prices of the opposite parties which were material fact and furnishing of wrong facts to their knowledge was a punishable violation of Section 44(a) and (b) of the Competition Act, as a matter of fact, the CCI ought to have directed the AITDF to furnish the actual tyre prices and verify the same before passing the order under Section 26(1). Without doing so, the CCI had formed a prima facie opinion without

the most essential and fundamental fact, namely, actual tyre prices of opposite parties and wrongly arrived at the price parallelism and cartelization. Again emphasising that it was impossible to make a comparison of the prices of tyres without the actual prices of tyres, he has argued that the AITDF and the CCI had boiled empty vessels to cook the opposite parties. Again to bring his case under Regulation 15(3), it has been argued that the reference was not even signed by the Joint Secretary as required in Regulation 11(2), as it was signed by the Director. Therefore, when the statutory regulation prescribes a particular thing to be done in a particular way, it shall be done in that way or not at all. When no person other than the Joint Secretary can sign the reference, it cannot be delegated to anyone by the Joint Secretary, because even such a delegation is not found in the note sheet. Even the forwarding note does not contain anything, therefore, this would not constitute a valid reference. Moreover, the said reference does not comply with the Regulations 10(1) and 11(2), hence, it should be rejected as invalid under Regulation 15(3). Giving an illustration, it has been argued that generally when the Court makes a reference to the larger Bench or higher Court, always it involves application

of mind indicating clearly what is required to be done. Even when the Government makes a reference under the Industrial Disputes Act to the Labour Court, a clear issue is framed for adjudication. Whereas, in the present case, without the reference being signed by the competent officer, the reference made without any statement of fact suffers from incurable defect and therefore is hit by Regulation 15(3).

6. Coming to the order passed under Section 26(1), Shri G.Masilamani submitted that when there was no valid reference in law, the order dated 24.6.2014 passed by the CCI invoking Section 26(1) of the Competition Act is without any legal sanctity. The reasons given in the order impugned are also totally arbitrary and perverse, hence, the same is liable to be interfered with. Taking support from the judgment of the Apex Court in *Competition Commission of India v. Steel Authority of India Limited and another, (2010) 1 SCC 744*, it was contended that the Apex Court has held that the order under Section 26(1) shall contain reasons, whereas the reasons given by the CCI under Section 26(1) are fundamentally wrong, therefore, the same cannot stand to the scrutiny of

this Court. Again it was contended that the order under Section 26(1) cannot be supported by a counter affidavit of the CCI. Raising objection to the production of Director General's report, Shri G.Masilamani argued that when the writ petition was admitted on 30.10.2015, investigation by the Director General and the CCI enquiry were permitted to go on, however, passing of final order alone was stayed. In March/April 2016, investigation by the Director General was completed and the final report was submitted to the CCI. However, on 6.3.2018, the writ petition was dismissed. Consequently, on 7.3.2018, writ appeal was filed. On 8.3.2018, this Court passed an interim order directing the CCI to keep the report in a sealed cover in the event of passing final order pending disposal of the writ appeal. Thereafter, on 1.9.2021, when the appeal was taken up for final hearing, arguments were completed on 9.9.2021. Only on 11.9.2021, the Director General's non confidential version of full investigation report was served by way of paper book on the counsel for the appellant, without the leave of the Court, as an additional document. Therefore, no reference to the contents of the Director General's report can be made, for the simple reason that any finding or observation by this Court on the report of the Director

General would jeopardize the prospect of statutory appeal under Section 53-B of the Competition Act to be filed before the National Company Law Appellate Tribunal. Learned Senior Counsel also requested this Court not to refer to the report or place reliance on the contents of the Director General's report while disposing of this writ appeal, as it is subsequent to the order passed by the learned single Judge. Moreover, it was not even placed before the learned single Judge, therefore, what was not part of the pleadings before the learned single Judge, cannot be taken up for consideration by this Appeal Court, that too, without the leave of this Court.

7. Again assailing the approach adopted by the learned single Judge, Shri G.Masilamani submitted that the findings of the learned single Judge that the CCI had suo motu power, therefore, the order impugned can be upheld, were not correct, inasmuch as the CCI had referred in the order that it was exercising the power of MCA's reference under Section 19(1)(b) and not the suo motu power. Besides, in the counter affidavit to the writ petition also, the CCI had specifically stated that the order was passed on the MCA's reference. When in the counter affidavit the exercise of suo motu power

was not taken, the question of the CCI taking suo motu action is untenable. When the MCA's reference failed to contain the details required under the Regulation 10(1) and 10(2), these details are mandatorily required to be furnished in a reference so as to enable the CCI to arrive at a prima facie opinion and also to enable the opposite parties to understand the accusation made against them so that they can fairly defend their case effectively. Again, as contended earlier, learned Senior Counsel pleaded that due to non-compliance of the Regulations 10, 12, 14 and 15, the reference has become invalid under Regulation 15(3) by operation of law, therefore, when there is no reference at all, the CCI cannot exercise the jurisdiction on the non-existing reference under Section 26(1). Again pinpointing to the alleged error committed by the learned single Judge, learned Senior Counsel contended that the observation of the learned single Judge that defective reference or improper reference is not on jurisdictional issue, may not be the correct approach. Referring to Regulation 40 and Section 15(c), it was contended that when these provisions cannot override the invalidity stipulated under Regulation 15(3), the learned single Judge, it is contended, failed to consider whether the Regulations are mandatory or directory,

although this issue was specifically raised. When Regulation 15(3) stipulates penal consequence for non-compliance of Regulations 10, 11 and 13, Section 15(c) cannot be considered out of context, as, in the present case, Section 15(c) is inapplicable, he added. Again assailing the impugned order passed by the learned single Judge, it was contended that the reasoning given by the learned single Judge that no prejudice would be caused to the parties by a mere direction to investigate and their rights are not affected, is unjustifiable. When the prejudice caused by the order to investigate cannot be called in question till the final order is passed by CCI under Section 27 of the Competition Act and when the punishment is also imposed, the observation of the learned single Judge that the parties are at liberty to raise all their objections before the Director General and before the Commission at the time of inquiry before passing final order, is legally not permissible in law. A compendious reading of Sections 26(1) and 41(2) read with Regulation 21(7) and (8) shall disclose all opportunities to object are subject to the pure discretion of the Commission and the Director General. Assailing one of the impugned observations made by the learned single Judge that no prejudice is caused on account of the order under

Section 26(1) on the reference, since it is only at the investigation stage, it has been contended that the entire process of investigation by the Director General and the inquiry by the CCI are the same procedure which may result in punishment, therefore, in the absence of reasonable opportunity for the person likely to be affected by the finding of the Director General, the learned single Judge ought not to have come to the conclusion that no prejudice is caused on account of the investigation being proceeded against them. Finally, highlighting on the principles of res judicata, it has been argued that when a similar issue relating to June-July, 2011 was already adjudicated by the CCI and dismissed by the order dated 30.10.2012, the very same issue now raised in the defective reference cannot be once again adjudicated. This aspect has been overlooked by the learned single Judge. Hence, for all these reasons, learned Senior Counsel pleaded that the impugned order passed by the learned single Judge is unsustainable in law and calls for interference in this appeal.

8. Shri P.S.Raman, learned Senior Counsel appearing for the sixth respondent-M/s CEAT Limited, supporting the appellant, argued that on an

earlier occasion, when the same complaint was made, the CCI, considering no merits therein, dismissed the same. When the very same AITDF made a complaint against the tyre manufacturers before the MCA, the same was forwarded by the Ministry to the Monopolies and Restrictive Trade Practices Commission. However, consequent upon the repeal of the Monopolies and Restrictive Trade Practices Act, the matter stood transferred to the CCI under Section 66(6) of the Competition Act. In the said complaint dated 28.12.2007, the AITDF alleged that the tyre manufacturers were indulging in anti-competitive activities. Yet another allegation was that since the behaviour of domestic tyre manufacturers has been anti-competitive/anti-consumer and they have been indulging in various trade malpractices which had a direct bearing on the revenue of the State exchequer, on receipt of information, the erstwhile Monopolies and Restrictive Trade Practices Commission ordered an investigation into the same and subsequently, when the matter was transferred to the CCI, after giving its thoughtful consideration to all the facts and circumstances of the case, an order was passed on 22.6.2010 under Section 26(1) of the Competition Act holding that there is no sufficient evidence to hold the

violation by the tyre companies viz., Apollo, MRF, JK, Birla, CEAT tyres. When the CCI has already dismissed a similar complaint, the AITDF once again cannot repeat the same false complaint, based on which the MCA cannot make a reference under Section 19(1)(b) without complying with Regulations 10(2), 10(3) and 11(2). When Regulation 11(2) says that it shall be signed by the Joint Secretary, it gives more importance to the reference going to be made. When Regulation 10(2) makes it mandatory that the information or reference referred to in sub-regulation (1) shall contain the statement of facts, the details of the alleged contravention of the Act, together with a list enlisting all documents, affidavits and evidence, as the case may be, in support of each of the alleged contraventions, and the same shall be duly verified by the person submitting it, placing reliance on the judgment of the Apex Court in *Bijay Kumar Singh v. Amit Kumar Chamariya, (2019) 10 SCC 660* to say that if an act is required to be performed by a private person within a stipulated time, the same would ordinarily be mandated. But when a public functionary is required to perform a public function within a time frame, the same will be held to be jurisdictional unless the consequences thereof are specified. Again referring

to the judgment of the Apex Court in *Annamalai University represented by its Registrar v. Secretary to Government, Information and Tourism Department and others, (2009) 4 SCC 590*, Shri P.S.Raman pleaded that the Apex Court held in the said judgment that a subordinate legislation when validly made becomes a part of the Act. Similarly, in the present case, the Competition Commission of India (General) Regulations, 2009 were framed in exercise of powers conferred under Section 64 of the Competition Act, therefore, Section 15(c) or Regulation 40 may not operate in cases covered by Regulation 15(3). When Section 15(c) states that no proceedings of the Commission shall be invalidated by reason of any irregularity and Regulation 40 states that failure to comply with any requirement of these regulations shall not invalidate any proceedings, cannot operate in cases covered by Regulation 15(3), which states that the defective investigation shall be treated as invalid. Therefore, if Section 15(c) or Regulation 40 is applied to all cases, then, it will render Regulation 15(3) redundant, otiose and useless. Referring to the judgment of the Apex Court in *Ravindra Ramachandra Waghmare v. Indore Municipal Corporation and others, (2017) 1 SCC 667*, Shri P.S.Raman argued that the Apex Court in that case

has held that in case of two apparently conflicting provisions, the fundamental approach is to find out which of the two apparently conflicting provisions is more general and which is more specific. In the present case, it is apparent that Regulation 15(3) is a more specific provision providing for specific outcome. In cases of violation of specific procedure and that Section 15(c) and Regulation 40 are both general provisions, that must be held to deal with the case of violation of other regulations, where no consequence is provided. Coming to the reference made by the Central Government, Shri P.S.Raman argued that the reference made by the Central Government is an invalid one, because the Central Government has merely forwarded a letter received from the AITDF without applying its mind to the facts of the case. Secondly, the Central Government has merely acted as a post office and the reference has been signed by the Director, which is a clear violation of the mandatory Regulation 11. A perusal of Regulation 11 shows that the reference sent by the Government of India to the CCI has not been signed and authenticated by an officer not below the rank of Joint Secretary, but instead by a Director. On receipt of the alleged reference from the Central Government, the Secretary has not scrutinized the same.

Since it has not been signed by the competent officer, the reference ought to have been returned back to the Central Government for rectification of the defects, as per Regulation 15(2), which has not been done. Therefore, Regulation 15(3) will come into effect and the reference will necessarily have to be declared as invalid. Moreover, the consequential order dated 24.6.2014 passed by the CCI under Section 26(1) is illegal and this has been overlooked by the learned single Judge. Hence, the appeal deserves to be allowed, he pleaded.

9. Shri AR.L.Sundaresan, learned Senior Counsel appearing for the ninth respondent-Automotive Tyre Manufacturers' Association (ATMA) argued that the ninth respondent is a non profit company registered under Section 25 of the Companies Act and it has not been involved in the conduct or management of the affairs or day to day operation of any of its members. Learned Senior Counsel also stated that the ninth respondent has always conducted all its affairs within the parameters of all applicable rules, regulations and laws. On behalf of the tyre industries in India, the ninth respondent carries on legitimate and positive functions including conducting

seminars about technical and other advances in industry identifying competition problem with products facilitating therein all legal and other administrative issues, etc. Referring to Regulation 10, ShriAR.L.Sundaresan argued that the said regulation mandates that any information or reference under Section 19 of the Act shall categorically state the name of the person giving information or reference with the postal address in India for delivery of summons or notice by the Commission, telephone number, fax number, email address, if available, legal name and address of the enterprise alleged to have contravened the provisions of the Act. The information or reference shall also contain the statement of facts, details of the alleged contravention of the Act together with a list enlisting all documents, affidavits and evidence, as the case may be, succinct narrative in support of the alleged contraventions, relief sought for. When these are all the requirements as mandated by the Regulations, when the MCA forwarded the letter dated 16.12.2013 to the CCI without adhering to the requisites under Regulation 10, it goes without saying that the first respondent failed to provide the legal name and address of the enterprise alleged to have contravened the provisions of the Act. When the MCA did not provide the details of the

alleged contravention of the Act, list of documents, affidavits and evidence, in support of each of the alleged contraventions during the hearing before the CCI and also sought exemption from the future proceedings, the MCA has acted in gross violation of Regulation 10. Besides, Regulation 11(2) mandates that the reference shall be signed and authenticated by an officer not below the rank of Joint Secretary to the Government of India or an equivalent officer. In the present case, reference was signed by the Director under the approval from the Joint Secretary, that would not suffice the requirement of Regulation 11(2), therefore, it is not a valid reference under Section 19(1)(b) of the Competition Act. Even as per the note sheet, approval has been accorded for forwarding the letter and not for making of the reference. Moreover, the CCI failed to appreciate that there was no/enough material under the reference to form a prima facie opinion.

10. Again referring to Regulation 15, Shri AR.L.Sundaresan argued that as per Regulation 15, each reference or information received is to be scrutinized by the Secretary to the CCI to check whether it conforms to general regulations and in case there are any defects, the same ought to be

communicated to the parties within a reasonable period of time and the parties are granted a specific time period to clear the defects. As per Regulation 15(3), if the said defects are not cleared within the stipulated time period, the reference or information shall be treated as invalid. In the present case, he pleaded that the Secretary to the CCI failed to adhere to Regulation 15 and did not inform the MCA of the defects in the reference. Instead, the Secretary erroneously placed the reference before the CCI. Therefore, placing the invalid reference in front of the CCI without curing the defects, is a violation of Regulation 15(3), which is mandatory in nature. When a specific effect or consequence is provided in a particular provision, the same must be given effect to. Therefore, the order passed by the CCI is liable to be set aside on the ground of non-compliance of Regulation 15(3). On the other hand, the reliance placed by the CCI on Regulation 40 is fully misplaced and cannot apply in respect of specific consequences set out in Regulation 15(3). Any other interpretation would render the procedural provisions otiose and meaningless. Similarly, the reliance placed on Section 15(c) is also untenable, because Section 15(c) deals with the procedure of the Commission itself and the Commission begins its procedure with the

order under Section 26(1) and not before that stage. The issues raised in the writ petition and in the present writ appeal pertain to non-compliance of the procedures to be followed by the appropriate authority while making a reference. Therefore, Section 15(c) had no nexus to the procedure for making a valid reference. Hence, the pre-Section 26(1) stage has no applicability and has to be disregarded. When there is no specific tyre manufacturer's name in the letters dated 11.9.2013 and 28.11.2013, the CCI has selectively chosen five domestic tyre manufacturers when they were not even named in the letters/reference. Therefore, directing the Director General to investigate into the complaint is arbitrary and biased one, which is hit by Article 14 of the Constitution of India.

11. Again assailing the complaint made by the AITDF, Shri AR.L.Sundaresan pleaded that the AITDF had written letters to the MCA that were forwarded to the CCI with unsubstantiated statements and allegations. The present litigation undertaken by the AITDF is nothing but retaliation of the closure of the earlier matter before the CCI. The AITDF, he pleaded, for the past few decades had made numerous unsubstantiated

representations to various Ministries against tyre manufacturers on baseless reasons. The instant information is also without any substantial evidence, therefore, there is no merit in the reference.

12. Shri N.Venkataraman, learned Additional Solicitor General appearing for the respondents 2 & 3, heavily urging this Court to dismiss the writ appeal on the ground that the appellant has not come to this Court with clean hands and also for abusing the process of the Court, inasmuch as they have committed an act of forum shopping, explained that when this Court listed the appeal on 1.9.2021 and started hearing the case on a day to day basis regularly, the ninth respondent-ATMA, while participating in the proceedings before this Court, surreptitiously filed the Writ Petition No.9903 of 2021 before the Delhi High Court on 6.9.2021 with a specific prayer, among others, to furnish the copies of the reports of the Tariff Commission for the financial years 2015-16 and 2019-20 before releasing the final order in Reference Case No.8 of 2013, which is kept in a sealed cover as per the directions of this Court dated 8.3.2018. Earlier, when the ninth respondent-ATMA approached the CCI with an application dated

21.7.2021 praying for furnishing of the aforementioned two reports, the said request was rejected by the CCI on 3.8.2021 on the ground that the Reference Case No.8 of 2013 was closed since a final adjudication order has been passed in the matter and thereupon the same has been kept in a sealed cover, as per the direction issued by this Court on 8.3.2018. Having been aggrieved by the said order, the ninth respondent-ATMA filed the above writ petition before the Delhi High Court and when the Court, finding no merits, sought to dismiss the writ petition, the ninth respondent withdrew the same.

13. Learned Additional Solicitor General, continuing his arguments, further stated that the MCA forwarded the letter dated 16.12.2013 to the CCI along with a copy of the representation dated 28.11.2013 received from the AITDF for appropriate action. As per Regulation 11(2) of the Competition Commission of India (General) Regulations, 2009, a reference shall be signed and authenticated by an officer not below the rank of a Joint Secretary to the Government of India. As per the prevailing practice, the letter is issued by the Central Government under the signature of the Under

Secretary/Director after approval of the competent authority. In the present case, the reference has been properly issued to the CCI with the prior approval of the Joint Secretary to MCA, therefore, the reference signed has duly complied with Regulation 11(2).

14. Again replying to the contention of defective and invalid reference, the learned Additional Solicitor General stated that after receipt of the reference from the MCA, the same was registered as Reference Case No.8 of 2013. On 7.1.2014, the CCI permitted the MCA, AITDF and the ATMA to address preliminary arguments. On the request made by the ninth respondent-ATMA, on 11.2.2014, the CCI permitted them to inspect the documents filed in the matter. Thereafter, they were heard at length and granted time to file written submissions on 5.3.2014. Again the CCI sought the response of the ATMA on 8.5.2014 and again on 12.6.2014, the CCI considering the reply of the ninth respondent, passed an order on 24.6.2014 under Section 26(1) holding that the CCI is of the prima facie opinion that the case required investigation by the Director General to find out the presence of any agreement or understanding within the meaning of Section

3 of the Competition Act within the market players and the role of the Association to maintain/increase the tyre prices.

15. Arguing further on the reference, the learned Additional Solicitor General contended that the allegation that the reference has not complied with the conditions mentioned in Regulations 10, 11, 12, 14, 16 cannot be pressed into service without reading sub-regulation (5) of Regulation 15. The arguments of the appellant that in case the defects are not removed by the party concerned, as per the provision of sub-regulation (2) of Regulation 15, the reference shall be treated as invalid, has been rightly answered by sub-regulation (5) of Regulation 15 stating that nothing contained herein above shall preclude the Commission from using the reference in any manner as may be deemed fit for inquiring into any possible contravention of any provision of the Act. Again referring to Section 15(c) of the Competition Act, the learned Additional Solicitor General contended that no act or proceeding of the Commission shall be invalid merely by reason of any irregularity in the procedure of the Commission not affecting the merits of the case. Again as per Regulation 40, the failure to comply with any

requirement of these regulations shall not invalidate any proceeding merely by reason of such failure, unless the failure has resulted in miscarriage of justice. In the present case, a conjoint reading of Section 15(c) read with Regulations 15(5) and 40 would indicate that the reference cannot be held as invalid.

16. Moving to the order passed under Section 26(1) by the CCI, it has been heavily contended that the Hon'ble three-Judge Bench of the Apex Court in *Competition Commission of India v. Steel Authority of India Limited and another, (2010) 10 SCC 744* has held clearly that the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter and it does not effectively determine any right or obligation of the parties to the lis and it would not affect the rights of the parties and therefore is not appealable. Concluding his arguments, the learned Additional Solicitor General submitted that the issue to be adjudicated in the representation of the AITDF dated 28.11.2013 to the MCA was that when the natural rubber price increased, the tyre prices were increased in a concerted manner by the

domestic tyre manufacturers, however, when the price of natural rubber decreased, the tyre prices were not reduced by the domestic major tyre manufacturers and as a result, they are indulging in price parallelism and cartelization. That issue has to be decided not by this Court, but by the CCI after receiving the report on completion of the investigation to be made from the Director General. When admittedly, during the pendency of the writ petition before the learned single Judge, investigation was already completed and thereupon the report of the investigating officer was submitted before the Commission and thereafter all the parties have also taken part in the proceedings before the Commission and had advanced their arguments and thereafter, final order alone is to be passed by the Commission, in the event of passing the final order, the party going to be aggrieved, can work out their remedy in the manner known to law before the Appellate Tribunal under Section 53-A of the Act. Therefore, when the investigation was over and the report had already been submitted, the question going to be gone into by this Court whether the reference is valid and the order passed by the CCI under Section 26(1) is valid or not, has become only academic. Therefore, the writ appeal shall be dismissed by

directing the CCI to pronounce the order that has already been submitted before this Court in a sealed cover.

17. Based on the arguments advanced by Shri G.Masilamani, learned Senior Counsel appearing for the appellant, Shri N.Venkataraman, learned Additional Solicitor General appearing for the respondents 1 & 2, Shri P.S.Raman, learned Senior Counsel appearing for the sixth respondent, Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the ninth respondent, this Court frames the following issues for adjudication:-

(i) Whether the reference made under Section 19(1)(b) of the Competition Act is invalid and non est in law?

(ii) Whether the order dated 24.6.2014 passed by the Commission under Section 26(1) of the Competition Act, shall be liable to be quashed?

(iii) Whether the complaint/reference made by the fourth respondent-AITDF is hit by the principles of res judicata?

(iv) Whether Regulation 15(3) is mandatory or directory?

(v) Whether the conduct of the ninth respondent-ATMA in approaching the Delhi High Court for the relief would amount to forum shopping?

18.1. Issue Nos.(i) & (iv): This writ appeal has been brought before

this Court by the unsuccessful writ petitioner-M/s MRF Limited praying to set aside the order passed by the learned single Judge, dismissing the writ petition on the following three counts:-

18.2. Firstly, the power of the Competition Commission of India (CCI) to go into the merits of the allegations in the reference as well as the information is within its domain as the original adjudicating authority, with which the writ Court is not expected to interfere at the preliminary stage, because the CCI being the fact finding authority shall be left free to find out the truth of the allegations after conducting a proper inquiry. Therefore, the interference at the stage of investigation would certainly amount to usurping the original jurisdiction of such authority, unless the interference is so warranted for want of jurisdiction.

18.3. Secondly, the impugned order directing a mere investigation will not cause any prejudice to the parties, as their rights are not affected or finally determined in the said order.

18.4. Thirdly, the Competition Commission of India owes a public duty to protect the interest of the consumers, more particularly, when there was a serious allegation that the writ petitioner and the supporting parties

forming a cartel, increase the prices of tyres whenever the price of natural rubber goes up, but when there is a corresponding reduction in the price of rubber, they did not reduce the prices of tyres.

19. Shri.G.Masilamani, learned Senior Counsel appearing for the appellant, assailing both the orders passed by the Commission and the learned single Judge, emphatically appealed to this Court that no valid reference was made under Section 19(1)(b) of the Competition Act, because the MCA, while forwarding the letter dated 16.12.2013 to the CCI, has miserably failed to adhere to the mandatory requirements under Regulations 10, 11, 12, 14, 16 & 23, therefore, the reference violates the basic requisites of the General Regulations, as a result, the consequence emerging from Regulation 15(3) making the defective reference is void, has not been appreciated by the Competition Commission and the learned single Judge, therefore, the impugned order is liable to be set aside by allowing this appeal.

20. At the outset, it may be mentioned that Regulation 15(3) cannot

be read in isolation keeping aside Regulation 15(5), Regulation 40, Section 15(c) and Section 19. For better appreciation, Regulation 15 of the Competition Commission of India (General) Regulations is extracted hereunder:-

> "R.15. Procedure for scrutiny of information or reference.–(1) Each information or reference received in the Commission shall be scrutinized by the Secretary to check whether it conforms to these regulations and the defects, if any, shall be communicated to the party within a reasonable time not exceeding, –
>
> (a) fifteen days in case of an information or reference received under clause (b) of sub-section (1) of section 19 of the Act; or
>
> (b) seven days in case of a reference received under section 21 or subsection (1) of section 49 of the Act.
>
> (2) The information provider referred to in clause (a) of sub-section (1) of section 19 of the Act or the Central Government or the State Government or the statutory authority referred under clause (b) of sub-section (1) of section 19 or in sub-section (1) of section 49 of the Act, as the case may be, shall, on receipt of the communication about the defects under sub-regulation (1), remove the defects within:-

(a) thirty days of receiving the intimation in case of an information or reference under clause (b) of sub-section (1) of section 19 of the Act; or

(b) fifteen days of receiving the intimation in case of a reference under section 21 or sub-section (1) of section 49 of the Act.

(3) In case the defects are not removed by the Central Government or the State Government or the statutory authority or the concerned party, as the case may be, as per the provision of sub-regulation (2), the information or the reference or the application connected therewith shall be treated as invalid:

Provided that the Central Government or the State Government or the Statutory Authority or the concerned party shall be entitled to file fresh information, reference or application for consideration by the Commission together with applicable fees.

(4) In the event of the information having been treated as invalid under sub-regulation (3), the fee paid on such information shall stand forfeited.

(5) Nothing contained herein above shall preclude the Commission from using the contents of such information or reference in any manner as may be deemed fit, for inquiring into any possible contravention of any

provision of the Act:

Provided that the time taken in removing the defects in such references shall not count towards the period of sixty days provided for giving of opinion by the Commission in sub-section (2) of section 21 or sub-section (1) of section 49 of the Act, as the case may be."

(emphasis supplied)

21. A careful reading of Regulation 15 would clearly show that each information or reference received in the Commission shall be scrutinized by the Secretary whether it conforms to the regulations and the defects shall be communicated to the party. In case the defects are not removed by the party, as per sub-regulation (3) of Section 15, the reference or the information or the application shall be treated as invalid. The proviso to the said sub regulation further says that either the State Government or the Central Government or the concerned party shall be entitled to file a fresh information or reference for consideration by the Commission. However, sub-regulation (5) of Regulation 15 says that nothing contained therein above shall preclude the Commission from using the contents of such information or reference in any manner as may be deemed fit, for inquiring

into any possible contravention of any provision of the Act. Since the sub-regulation (5) starts with the expression that nothing contained therein above shall preclude the Commission from using the contents of such information or reference in any manner as may be deemed fit, for inquiring into any possible contravention of any provision of the Act, it shall be meant and understood that the operation of sub-regulation (5) is notwithstanding the impact of sub-regulation (3) of Regulation 15, therefore, the operation of Regulation 15(5) would empower the CCI to consider the contents of the information or reference in any manner as it deems fit to inquire into any possible violation of the provisions of the Act, notwithstanding the operation of Regulation 15(3).

22. Besides, this regulation is further fortified by the application of Regulation 40, which is extracted as under:-

> "R.40. Effect of non-compliance.–Failure to comply with any requirement of these regulations shall not invalidate any proceeding, merely by reason of such failure, unless the Commission is of the view that such failure has resulted in

miscarriage of justice."

A mere reading of the above regulation vividly shows that even the failure to comply with any requirement of these regulations shall not invalidate any proceeding unless the Commission is of the view that such failure has resulted in miscarriage of justice. Admittedly, the merits of the case of the appellant has not been shown to have resulted in miscarriage of justice, inasmuch as, when the MCA, on receipt of the representation dated 28.11.2013 from the AITDF, forwarded the same under Section 19(1)(b) of the Act to the Secretary, CCI, who, after taking it as Reference Case No.8 of 2013, permitted the ninth respondent-ATMA to inspect the documents filed in the matter and also heard the AITDF and ATMA at length on 5.3.2014 and granted them liberty to file the written statements, nowhere, any party to the proceeding has complained that any prejudice has been caused to them. Therefore, pressing into service Regulation 15(3) to hold that the reference shall be treated as invalid is far-fetched. Again, for better appreciation, Section 15(c) of the Competition Act is extracted hereunder:-

> "S.15. Vacancy, etc. not to invalidate proceedings of Commission.-- No act or proceeding of the Commission shall be invalid merely by reason of—

(c) any irregularity in the procedure of the Commission not affecting the merits of the case."

A cursory reading of the above provision also clearly tells us that any irregularity in following the procedure of the Commission again will not make the proceedings of the Commission invalid, unless such irregularity in the procedure affects the merits of the case.

23. As we have already highlighted above, when the CCI, on 11.2.2014, permitted the ninth respondent-ATMA to inspect the documents filed in the matter and again on 5.3.2014, having heard the AITDF and ATMA at length by granting them further time to file the written statements, rightly considered the documents on record on 8.5.2014, again decided to seek the response of the ninth respondent to the submissions made by AITDF. Moreover, the CCI has considered the rejoinder submissions of ATMA. Finally, the CCI has passed the direction under Section 26(1) of the Act on 24.6.2014, therefore, there is no iota of prejudice said to have been suffered by the appellant or the supporting private respondents. Therefore, in our considered opinion, a conjoint reading of Regulation 15(3), Regulation 15(5), Regulation 40 and Section 15(c) will certainly make the

Regulation 15(3) as directory, but not mandatory.

24. If the makers of the law intended to hold that any defective reference is invalid under Regulation 15(3), they would not have brought in Regulation 15(5). Moreover, Section 15(c) of the Competition Act and Regulation 40 of the Competition Commission of India (General) Regulations would not have been made available. Since these three provisions have been added, in our considered opinion, although Regulation 15(5) operates notwithstanding Regulation 15(3), Section 15(c) and Regulation 40 empower the CCI, an expert body, would function as a market regulator, to consider whether the defective reference carries any merit for further adjudication. Therefore, what becomes invalid under Regulation 15(3) is only the form of reference and not what the reference contains in terms of information, because when the AITDF alleged that the appellant along with four other tyre manufacturers control over 90% of the tyre production in India by engaging in dominant position through price parallelism, they raise the prices of tyres and tubes on the pretext of increase in the price of natural rubber, but the subsequent reduction in this raw

material was not followed by the corresponding decrease in the prices of tyres and tubes, the non-passing of the benefit of reduction in the prices of major raw materials would have a serious impact on the common public, therefore, to find out whether such allegation is true or untrue, the CCI is duty bound to inquire into the said delicate issue irrespective of the argument whether the reference is defective or valid, by virtue of the conjoint reading of Section 15(c) of the Act and Regulations 15(3), 15(5) and 40 of the Regulations.

25. Similarly, a reading of Section 19, which is given as under,

> S.19. Inquiry into certain agreements and dominant position of enterprise..-- (1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
>
> (a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
>
> (b) a reference made to it by the Central Government or a State Government or a statutory authority.

shows that the following three modes are used by the CCI to inquire into any alleged contravention of the Act, namely,

(a) by exercising its suo motu power;

(b) on receipt of information under Section 19(1)(a);

(c) on receipt of reference under Section 19(1)(b).

Prior to 2007, Section 19 contained the expression 'receipt of complaint'. But after 2007, the expression 'complaint' was substituted by the expression 'information' and therefore, what is provided to CCI under Section 19(1)(a) or 19(1)(b) is only an information, but not a complaint. When the CCI is invested with the suo motu power, while exercising the suo motu power, the CCI may receive information from any person and as such, when the CCI received the present reference dated 16.12.2013 under Section 19(1)(b) of the Act, it proceeds further under Section 26(1), which says that if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause investigation to be made into the matter. Now under Section 26(1), after receiving information under Section 19(1), the CCI is legally duty bound to form a prima facie case. While considering the scope of Section 26(1), the Apex Court in *Competition Commission of*

India v. Steel Authority of India Limited, (2010) 10 SCC 744 has held vividly that the order or direction issued under Section 26(1) after forming a prima facie opinion is a direction simpliciter to cause an investigation in the matter and it does not effectively determine any right or obligation of the parties to the lis, because it passes the interim order or direction at the preliminary stage without recording a finding which would bind the parties and it would not make the direction as an order which affects the rights of the parties and therefore, is not appealable.

26. When it is the allegation made by the AITDF that the appellant/writ petitioner, joining hands with his cartel group, unfairly decides the price fixation of tyres and tubes, as a result, the common men at large are put to immense prejudice, whether such allegation is correct or incorrect, the CCI constituted for the exclusive purpose alone can go into this issue, for which the investigation has been ordered and that investigation for some procedural lapses cannot be interdicted. In this context, we may refer to the judgment of the Apex Court in *Maharashtra State Board of Secondary and Higher Secondary Education and another v.*

Paritosh Bhupeshkumar Sheth and others, (1984) 4 SCC 27, wherein it has been held that the Court should, as far as possible, avoid any decision or interpretation of a statutory provision, which would bring about the result of rendering the system unworkable in practice. The relevant paragraph-29 of the said judgment reads thus:-

> "29. Far from advancing public interest and fair play to the other candidates in general, any such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely

idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice. It is unfortunate that this principle has not been adequately kept in mind by the High Court while deciding the instant case."

27. When the above ratio clearly shows that it is important for the Court to avoid any decision or interpretation of a statutory provision which would bring about the result of rendering the system unworkable in practice, whether the arguments advanced by Shri G.Masilamani, Shri P.S.Raman, and Shri AR.L.Sundaresan, learned Senior Counsel appearing for the respective parties to interfere with the impugned order on the ground of applying Regulation 15(3) to hold that the defective reference shall be treated as invalid, required to be tested on the anvil of Regulation 15(3), Regulation 15(5), Regulation 40 of the Competition Commission of India (General) Regulations, 2009 read with Section 15(c) of the Competition Act, 2002?

28. Moreover, coming to the issue whether the Regulations are mandatory or directory in nature, it has been the consistent effort of the respective learned Senior Counsel appearing for the appellant, sixth and ninth respondents that the reference made by the MCA to CCI is defective, for the reasons that while making the reference to CCI, the entire procedure contemplated under Regulations 10, 11, 14, 16 & 23 have been ignored by the MCA and ignoring the same, once again the CCI also acted above the law, because the reference was not signed by the Joint Secretary as required under Regulation 11, as it was signed only by the Director. Therefore, the respective learned Senior Counsel appearing for the appellant, sixth and ninth respondents emphasized that when the statutory regulations prescribe a particular thing to be done in a particular way, it shall be done in that way, therefore, the reference would become non est by virtue of Regulation 15(3).

29. In our considered opinion, a conjoint reading of Regulation 15(3), Regulation 15(5), Regulation 40 and Section 15(c) would indicate the clear wisdom of the Legislature that the non compliance of the regulations in each

case shall not invalidate the proceedings initiated by the CCI. Only in two situations, namely, if there is an irregularity or non compliance of the procedures affecting the merits of the case, Regulation 15(3) will come into operation. Secondly, if there is any irregularity or non compliance of the procedures or regulations resulting in miscarriage of justice alone, Regulation 15(3) will take effect. In all other cases not affecting the merits of the case or causing miscarriage, the non compliance of the regulations will not invalidate the proceedings before the CCI. The Apex Court, while dealing with the issue of public importance, in *Charles Sobraj v. Superintendent, Central Jail, Tihar, New Delhi, (1978) 4 SCC 104* and in *Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81*, has held as follows:-

> "Issue of public importance, enforcement of fundamental rights of large number of public vis-a-vis the constitutional duties and functions of the State, if raised, the Court treat a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings."

Again in *Suchidanand Pandey v. State of West Bengal, (1987) 2 SCC 295,*

the Apex Court has observed as follows:-

> "61. It is only when Courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the Courts, especially the Supreme Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions of remedying the hardships and miseries of the needy, the underdog and the neglected. It will be second to none in extending help when such is required. But this does mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

30. The above well settled legal position clearly tells us that it is a settled legal position that construction of rules or procedures which promotes justice has to be preferred, because, rules and procedures are the handmaid of justice and not its mistress, therefore, it shall not override the object of securing the ends of justice. The Apex Court in *The State of*

Punjab and another v. Shamilal Murari and another, (1976) 1 SCC 719 has settled this issue holding that while dealing with procedural law, we must always remember that procedural law is not to be a tyrant, but a servant, not an obstruction, but an aid to justice. This legal position has been reiterated by the Apex Court in yet another decision in *Smt.Rani Kusum (Smt.) v. Smt.Kanchan Devi, (2005) 6 SCC 705*. More importantly, conflict between the procedural law and the substantial law has been resolved by the Hon'ble Supreme Court in *Zolba v. Keshao and others, (2008) 11 SCC 769*, wherein the Hon'ble Supreme Court, quoted with approval its earlier decision in *Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC* 344, holding thus:

> "21. It has been clearly held that the provisions including the proviso to Order 8 Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision, but having

regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory, because the rule in question has to advance the cause of justice and not to defeat it. Similarly, the rule of procedure are made to advance the cause of justice and not to defeat it. Therefore, in the present case, the strict interpretation would defeat the object of the Act and justice."

31. Therefore, in the light of the above legal position, in our considered opinion, when there was an allegation in the representation dated 28.11.2013 addressed by the AITDF to the MCA that when natural rubber price increased, the tyre prices were increased in a concerted manner by the domestic major tyre manufacturers, however, when the price of natural rubber decreased, the tyre prices were not decreased by the domestic major tyre manufacturers and they had indulged in price parallelism and cartelization, affecting perpetually the innocent common public in the nation, the CCI, having been empowered to look into such serious allegation, cannot be prevented by relying only on Regulation 15(3) alone.

32. In the case on hand, after entertaining the reference made to it by the Central Government under Section 19(1)(b) and after forming a prima facie opinion that a prima facie case exists for inquiry by the Director General, the Commission has passed the order dated 24.6.2014 under Section 26(1) of the Act impugned in the writ petition, in paragraphs 16 to 18, observing as follows:-

> "16. Thus, not passing on benefit of reduction in prices of major raw materials/ inputs, prima facie, indicates lack of competition and some sort of understanding between the players especially in the replacement market and of the period subsequent to year 2011-12. In view of the foregoing, the commission is prima facie of the opinion that this case requires investigation by DG to find out the presence of any agreement or understanding within the meaning of section 3 of the Act between the market players (OP 1 to 5) and the role of the association i.e., OP 6 to maintain/ increase the prices.
>
> 17. The Secretary is directed to send a copy of this direction passed under section 26(1) along with copy of the information of the office of the

DG. DG shall investigate the matter about violation of the provisions of the Act along with cases mentioned above. In case the DG finds Ops in violation of the provision of the Act, it shall also investigate the role of the persons who at the time of such contravention were in charge of and responsible for the conduct of the business of the opposite parties. The report of DG be submitted within 60 days from receipt of the order.

18. Nothing stated in this order shall tantamount to a final expression of opinion on merit of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein."

33. When the said order was put to challenge before the writ Court under Article 226, the learned single Judge, framing a point for consideration as to whether the impugned order passed under Section 26(1) of the Act is liable to be interfered with, for the reasons mentioned in the order, answered against the appellant/writ petitioner holding that the order under Section 26(1) based on the reference does not result in civil consequences, because it is only an administrative order ordering further

investigation not affecting the interest of the parties in any manner; that the order for investigation does not attract any civil consequences nor it determined the issues raised against the parties finally; that certain procedural lapses that took place while arriving at such prima facie view will not make the entire proceedings invalid; that during the pendency of the writ petition, investigation has already been completed and all the parties have taken part in the investigation and that the report of the investigating officer was submitted before the CCI and only final order alone is to be passed by the CCI, therefore, it is for the parties to face the order and thereafter to work out their remedy, if the order goes against them.

34. In this context, it is pertinent to extract Section 26 of the Competition Act, which reads as follows:-

> S.26. Procedure for inquiry under section 19.-- (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

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

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

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

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the

report referred to in sub- section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

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

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

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

in accordance with the provisions of this Act.

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

35. A reading of the above provision shows that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter. As rightly observed by the learned single Judge, an order for investigation passed under Section 26(1) is a preliminary order and does not give room for conclusion on the allegation made against the erring party except for forming an opinion with regard to the existence of a prima facie case. On the other hand, orders passed under Section 26(2), 26(6) are final orders closing the matter by coming to a conclusion that no prima facie case exists even at the threshold view of the matter or when the Director General,

after investigation, makes recommendation to the effect that there is no contravention and such recommendation is agreed by the Commission. Therefore, under both circumstances, a final order is passed closing the matter. On the other hand, after inquiry, if the Commission finds that there is a contravention, it will issue appropriate direction and impose penalty on the erring party. Thus, the said order is again a final order passed under Section 27.

36. Now in this case, when the Competition Commission has proceeded to order investigation after forming an opinion that a prima facie case exists, the rights of the parties cannot be complained of being affected in any manner at this stage, because the order for investigation does not attract any civil consequences, inasmuch as it does not determine the issue raised against the parties finally. Although certain procedural lapses take place while arriving at such a prima facie opinion, that itself will not make the entire proceedings invalid, because the parties are given opportunities to take part in the investigation and thereafter to submit their objections before the Commission, to enable the Commission to arrive at a just and proper

conclusion and pass a final order under Section 27. Further, receiving of complaint/information in the form of reference and ordering investigation on the same after forming a prima facie opinion that there exists a prima facie case, are undoubtedly an administrative action at a preliminary stage. Therefore, at this stage, any interference will only allow the parties to escape from the investigation itself, which would ultimately defeat the object sought to be achieved by the Act. This is for the reason that they are entitled to place relevant materials before the investigating authority and show that the allegations are baseless. They can also take part in the proceedings before the Commission and contest the matter after filing of the report by the investigating authority. Therefore, in our considered view, the view taken by the learned single Judge that the writ Court cannot interfere with the preliminary order directing investigation on the ground of procedural lapses either in making the reference or entertaining the same, does not call for any interference by this Court.

37. Secondly, during the pendency of the writ petition before the learned single Judge, the investigation had already been completed,

thereafter, the report of the investigating officer was also submitted before the Commission and all the parties have taken part in the proceedings and have advanced their arguments. Now, therefore, the final order alone is to be passed by the Commission. At this stage, no one can pre-judge whether the report submitted by the investigating agency is going in favour of A or B party. Therefore, the parties should receive the report made ready in the sealed cover and proceed further in the manner known to law. The issue Nos.(i) & (iv) are answered against the appellant, accordingly.

38. Issue No.(ii): The allegations of the AITDF in the representation dated 28.11.2013 to the MCA were that the opposite parties, having control over 90% of the tyre production in India, are engaged in abusing their dominant position through price parallelism under the aegis of cartel association – Automotive Tyre Manufacturers' Association (ATMA) and also raising the prices of tyres and tubes on the pretext of increase in the price of natural rubber and other inputs, but the subsequent reduction in the price of the raw material has not been followed by the corresponding decrease in the price of tyres, resulting in huge loss to the innocent public.

Giving an example that in 2011-12, when natural rubber price shot up to Rs.240/- per kg, the increase in the tyre price was at 18 to 25%. But when natural rubber price dropped to Rs.145/- per kg in 2013-14, there was no corresponding drop in the tyre price. Based on this representation, the AITDF sought for suo motu action against the domestic tyre manufacturers alleging that none of the leading domestic tyre manufacturers rolled back their tyre prices even after steep drop in the raw material prices. Based on the same, the MCA, through their communication dated 16.12.2013, forwarded the copy of the above representation dated 28.11.2013 under Section 19(1)(b) of the Competition Act to the CCI with a request that the matter may be inquired into for appropriate orders. The CCI, in its meeting held on 7.1.2014, directed the MCA and the AITDF to address preliminary arguments. At this stage, ATMA filed an application on 30.1.2014 seeking for inspection of the documents and the CCI also allowed the request of ATMA for inspecting the documents. Thereafter, when the matter was taken up by the CCI on 18.1.2014 for inquiry, the MCA stating that they have no further submissions to make in the proceedings, sought exemption from further proceedings and the same was allowed. Subsequently, after

considering the written submissions made by the AITDF and the ATMA, the CCI proceeded to pass an order under Section 26(1) on 24.6.2014 holding that the CCI is prima facie of the opinion that the case requires investigation by the Director General to find out the presence of any agreement of understanding within the meaning of Section 3 of the Competition Act between the market players and the role of the Association to maintain/increase the prices.

39. Moreover, whether the order or direction issued under Section 26(1) of the Competition Act is appealable or not, is concerned, the said issue is no longer res integra. While considering the very same issue, the Apex Court in *Competition Commission of India v. Steel Authority of India Limited, (2010) 10 SCC 744* has held vividly that the order or direction issued under Section 26(1) after forming a prima facie opinion is a direction simpliciter to cause an investigation in the matter and it does not effectively determine any right or obligation of the parties to the lis, because it passes the interim order or direction at the preliminary stage without recording a finding which would bind the parties and it would not make the direction as

an order which affects the rights of the parties and therefore, is not appealable. It is pertinent to extract paragraphs 37 to 39 of the said judgment as follows:-

> "37. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made

appealable under Section 53-A of the Act.

38.In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

39. Wherever, in the course of the proceedings before the Commission, the Commission passes a direction or interim order which is at the

preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable."

40. The above ratio clearly shows that the order passed by the Commission under Section 26(1) is not amenable to writ jurisdiction, as it does not affect the rights of the parties and it also does not effectively determine any right or obligation of the parties to the lis. The direction issued under Section 26(1) being inquisitorial, preparatory and preliminary in nature, the same does not affect the rights of any party, because it is departmental in nature and does not cause any prejudice giving rise to civil consequences. Moreover, the order going to be passed by the Commission under Section 26(2) being a final order putting an end to the information received in any one of the specified modes, is only appealable. Therefore, the issue No.(ii) is also answered against the appellant.

41. Issue No.(iii): One of the arguments of the appellant for invocation of the principles of res judicata was that in the past, a similar allegation of price parallelism and cartelization was made unsuccessfully against the appellant by the AITDF to the MCA, who in turn forwarded the same to the erstwhile MRTP Commission during the year 2008 in RTPE No.20 of 2008 and finally the CCI, in its order dated 30.10.2012, held that there was no contravention of the provisions of the Competition Act by the tyre manufacturers. While so, in the present order impugned in the writ petition, the CCI cannot entertain the very same frivolous allegation, as it is hit by the principles of res judicata.

42. But this argument does not merit consideration for one good reason. The AITDF made a complaint against the appellant and others relating to the year 2011-12, 2012-13 and 2013-14. Since the present complaint is not related to 2008, whereas it alleges that the appellant and others have indulged in cartelization during the period from 2011-12 to 2013-14 by indirectly determining the sale of tyres and tubes in the domestic market contravening the provisions of Section 31 read with Section 33 of

the Competition Act, the CCI is empowered to inquire into the fresh complaint for each year, for, Section 27 of the Competition Act empowers the CCI to pass an adjudicatory order for each year of cartelization. Let us extract the relevant Section 27 for better appreciation as follows:-

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

abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher.

(c) [Omitted by Competition (Amendment) Act, 2007]

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

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

(f) [Omitted by Competition (Amendment) Act, 2007]

(g) pass such other or issue such directions as it may deem fit.

Provided that while passing orders under this

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

43. A close and careful reading of the proviso to Section 27 supports the arguments of the respondents 2 & 3 that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher. Therefore, the principles of res judicata may not apply, inasmuch as the expression 'for each year of the continuance of such agreement', the CCI is empowered to investigate the complaint of cartelization, as it concerns with

each year. Moreover, if the CCI taking up the complaint for the year 2008, finding want of acceptable evidence, dismissed the complaint for the year 2008, it does not mean that the same CCI is precluded from entertaining a fresh complaint for the next year against the same producer or distributor, trader, etc., by virtue of Section 27. When the Act permits the CCI to initiate action on the complaint of cartelization independently for each year, the argument of the appellant on the principles of res judicata cannot be accepted. This issue is also answered against the appellant, accordingly.

44. Issue No.(v): Coming to the issue whether the filing of the subsequent Writ Petition No.9903 of 2021 by the ninth respondent before the Delhi High Court would amount to forum shopping, it is seen from the records that the ninth respondent made an application dated 21.7.2021 before the CCI, the second respondent herein seeking a prayer to issue the copies of the reports of the Tariff Commission for the financial year 2015-16 and financial year 2019-20. The said request was turned down, because final adjudication order has been passed and the same is directed to be kept in a sealed cover as per the order dated 8.3.2018 passed by this Court.

Questioning the same, the above writ petition was filed before the Delhi High Court under Article 226 on 6.9.2021 after this Court started hearing of the present writ appeal. When this Court has directed the final order to be kept in a sealed cover and accordingly, the CCI also has complied with the order by keeping the above order in a sealed cover, instead of approaching this Court, discreetly approaching the Delhi High Court with the writ petition would amount to abuse of the process of law, for the simple reason that what shall not be done directly cannot be done indirectly. (See the judgments in *Taylor v. Taylor, (1875) 1 Ch D 426, Nazir Ahmad v. King Emperor, (1936) 38 BomLR 987 & A.R.Antulay v. R.S.Nayak, (1988) 2 SCC 602).* When this Court has directed the aforementioned order to be kept in a sealed cover, diluting the said direction and trying to get an order from another forum would tantamount to browbeating not only this Court, but also the process of law, therefore, the writ appeal brought up by this appellant in partnership with unclean respondents shall fail.

45. While dealing with the said issue, the Apex Court in *Kamini Jaiswal v. Union of India and another, (2018) 1 SCC 156,* relying upon the

judgment in *Union of India v. Cipla Ltd., (2017) 5 SCC 202,* has held as follows:-

> "27. This Court considered various categories of forum shopping in *Union of India & Others v. M/s Cipla Ltd., & another,* (2017) 5 SCC 262. Even making allegations of a per se conflict of interest require the matter could be transferred to another Bench, has also been held to be another form of forum hunting. This Court has considered various decisions thus :
>
> 148. A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. This occurred in Rajiv Bhatia v. State (NCT of Delhi) (1999) 8 SCC 525. The respondent mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not

interfere with the order passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of the child granted by the Delhi High Court to the respondent mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping."

46. However, Shri AR.L.Sundaresan, learned Senior Counsel appearing for the ninth respondent-ATMA, refuting the said allegation of forum shopping and misuse of the process of Court, submitted that after filing an application dated 21.7.2021 before the CCI in Reference Case No.8 of 2013 for procuring the copies of the two reports prepared by the Tariff Commission, the CCI passed an order on 3.8.2021 dismissing the said application stating that the Commission has already concluded the proceeding and passed a final order that has been kept in a sealed cover as per the direction given by this Court in the appeal. Therefore, left with no other recourse, Writ Petition No.9903 of 2021 was filed before the Delhi

High Court, because the Delhi High Court was having the jurisdiction and secondly, the prayer of the ninth respondent was to get copies of the said two reports to bring on record the entirety of the facts and circumstances. Besides, the ninth respondent, on an earlier occasion, also filed a writ petition before the Delhi High Court in respect of the very same Reference Case No.8 of 2013. In the said writ petition No.6881 of 2016 questioning the locus standi of S.P.Singh, the same was dismissed on 7.9.2017 on the ground that the CCI had already completed the inquiry. Therefore, the objections and claim of forum shopping are completely misplaced and untenable. It was also justified that there is no possibility of conflicting judgments even if the writ appeal and the writ petition at Delhi High Court are allowed or if both are dismissed, inasmuch as the prayer for consideration of both the above reports before releasing the final order, will no way conflict the proceedings before this Court and finally the ninth respondent has been provided with the copies of the said reports by the DPIIT and the grievance also has been addressed. Since the ninth respondent-ATMA, supporting the appellant, has approached the Delhi High Court, they are part of forum shopping. Now the truth of this matter

shows that when this Court has directed by its order dated 8.3.2018 to keep the final adjudicating order in a sealed cover before this Court, approaching the Delhi High Court for releasing the two reports of the Tariff Commission for the financial years 2015-16 and 2019-20 is nothing but browbeating the Court of law and also coming to the Court with unclean hands. For such conduct also, the appeal shall fail. Hence, this issue is also answered against the appellant.

47. In view of the same, since the investigation as ordered by the CCI has already been completed and the report of the investigating officer has also been submitted before the Commission and all the parties have also taken part in the proceedings before the Commission and advanced their arguments and that the final order passed by the CCI is also kept in a sealed cover as per the order dated 8.3.2018 passed by this Court, after getting the said final order, the parties, who are likely to be aggrieved, have to work out their remedy in the manner known to law. Therefore, at this final stage, the Court should, as far as possible, avoid any decision which would bring about the result of rendering the system unworkable in practice.

48. Therefore, for all the aforementioned reasons, we do not find any merit in the appeal and accordingly, the writ appeal stands dismissed. In view of the above, respondents 2 & 3 are at liberty to proceed further in the manner known to law. Consequently, C.M.P.Nos.4987 & 4988 of 2018 are also dismissed. However, there is no order as to costs.

Speaking order (T.R.,J.) (T.V.T.S.,J.)

Index : yes 06.01.2022

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To

1. The Secretary to Government of India
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   Kasturba Gandhi Marg
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3. The Additional Director General (DG)
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T.RAJA, J.

and

T.V.THAMILSELVI, J.

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Judgment in

W.A.No.529 of 2018

06.01.2022