6

COMPETITION LAW

*Vinod Dixit**

I INTRODUCTION

IN 1990s India switched over from welfare state to free market economy mode, with the belief that better means of development is through privatisation of means of production. In course of time privatisation became synonymous with corporatisation. The best means of development is through corporations, domestic and international. The government is gradually withdrawing itself from commercial activity and vacating the space to private initiative. What actually is happening is not so much highlighted; commercial space of medium and small scale entrepreneurs is also shrinking at a fast pace. Commerce is increasingly being monopolised by bigger corporations. Bigger is beautiful, smaller is not. Big corporations have taken centre stage not only at the cost of government but also the smaller entrepreneur. A logical conclusion is taking shape in the modern Indian philosophical discourse in an unstated idea that big economic entities are more important than consumers. In theory consumer may be king but in reality he is fast becoming a zombie, dictated big business. The unstated ideology has affected the mindset of adjudicating authorities of our competition redressal forums. It is regrettable, as has been pointed out in earlier surveys of competition law,[1] that the scope of the Act is gradually being narrowed down at the cost of the interest of consumers and in the interest of economic corporations.

II TRENDS

This year we are analysing a High Court of Delhi cases and then the cases decided by the Competition Appellate Tribunal (CompAT) and the Competition Commission of India (CCI). The high court has made a notable point that though the scope of the Competition Act, 2002 and Patents Act, 1970 may be overlapping, the

* Former Professor of Law, University of Delhi, e-mail vkd1238@gmail.com

1 Vinod Dixit, "Competition Law", *ASIL* XLVII (2011), XLVIII (2012), XLIX (2013), L (2014) and LI (2015).

Commission has a duty to examine if competition issues are violated in those cases which primarily are concerned with Intellectual Property Rights (IPR) issues. As happened in preceding years both the tribunal and the Commission are reluctant to construe anti-competitive agreement unless there is proof almost as strong as is required to construe a contract under the Contract Act, 1872. The phrase, 'practice carried on, decision taken', used in section 3 (3) of the Act, though independent of the 'agreement used in the section, has actually become almost redundant.

III POWER OF CCI IN MATTERS REATING TO PATENTS

High Court

Telefonaktiebolaget LM Ericsson (PUBL) v. *Competition Commission of India,*[2] is a case under article 226 of the Constitution decided by the High Court of Delhi. The petition was filed by Telefonaktiebolaget LM Ericsson, a company incorporated in Sweden. The petition was filed against the orders of the CCI passed on; (a) November 12, 2013 on the information given by Micromax Informatics Ltd. and (b) January 16, 2014 on the information given by Intex Technologies (India) Ltd under section 19 of the Act. The orders were passed by the CCI under section 26(1) of the Act ordering DG (Director General) to investigate after finding Ericsson *prima facie* violating the provisions of the Act. Both Micromax and Intex alleged that Ericsson has large portfolio of Standard Essential Patents (SEP), which is used in mobile handsets and mobile stations, and is dominant in the RM (Relevant Market) and abused its dominance. Substantive dispute between Ericsson and Micromax/Intex relates to demand of royalty made by Ericsson for use of SEP, held by Ericsson, which Ericsson claims has been infringed by Micromax/Intex. Essential claim made by Ericsson in this case before the CCI is that the CCI does not have any jurisdiction to decide on claims of royalty in relation to rights of the patentee (the proprietor of a patent). According to Ericsson the case can be decided only under the Patents Act, 1970.

Ericsson is a flagship company of Ericson of Norway, engaged in telecommunications in India. Micromax is an Indian company specialising in production of handsets. Intex is an Indian company and its portfolio includes products such as mobile phones, multimedia speakers, desktops, LED/LCD, TVs, DVD players *etc.* Intex sources its mobile devices from various countries and produces mobile phones and smart phones. Ericsson holds many telecommunications patents in India as SEPs. Standard technology ensures uniformity of technologies for use across various countries. Standardisation is ensured by Standard Setting Organisations (SSOs). European Telecommunication Standard Institute (ETSI) is one of such bodies. When a technology is patented as standard essential technology it is called Standard Essential Patent (SEP). All equipment compliant with standard technology must obtain licence from holder of SEP. There is also provision under ETSI intellectual right policy that

2 (2017) Comp LR 497 (Del); (2016) 4 Comp LJ 122 (Del).

patentee cannot prevent access to SEP. Access to SEP must be on fair reasonable and non discriminatory terms. Ericsson alleges that the products manufactured by Micromax and Intex violate its patents. However in the negotiated meetings between Ericsson and Micromax differences could not be removed. Consequently Ericsson on March 4, 2013 filed a patent infringement suit in the High Court of Delhi against Micromax. The court passed interim order directing custom authorities to dispose of Ericson objection when products are imported by Micromax. Similar orders were also passed by a divisional bench of the high court. Mediation efforts also failed to resolve differences between the parties. After the failure of mediation efforts, Micromax filed information with CCI alleging that Ericsson has abused its dominant position. Meanwhile in civil proceedings the high court passed appropriate interim orders but not final orders. Almost similar are the facts of the dispute between Ericsson and Intex.

The allegation of Micromax before the CCI was that Ericsson is dominant in the relevant market and abused its dominant position by using the threat of interim injunction and custom seizure to coerce Micromax to accept license terms demanded by Ericsson. Micromax also accused Ericsson of limiting the use of technology in India. Almost similar was the allegations levelled by Intex before the CCI. The CCI on different dates ordered the DG, under section 26(1) of the Competition Act, 2002 to begin investigation on these allegations which in the opinion of the CCI were prima facie established.

The high court first determined whether this petition challenging the jurisdiction of the CCI is maintainable or not. The direction given by the CCI under section 26(1) is administrative in nature as the direction does not affect the rights of any party. Though the direction under section 26 (1) is administrative but it places the parties to the inquisitorial process of the DG. Under section 42(2) the powers of the DG is similar to that of the CCI. Section 43 also empowers the DG to impose penalties on any person who fails to comply with the directions of the DG. By virtue of section 41(3) some of the provisions of Company Act,1956 would also apply for seizure of documents. Thus investigation against Ericsson would prejudice the interests of Ericsson. The high court thus concluded that orders under section 26(1) are subject to review under article 226, but does not extend to examining the merits of the case.

The next question is whether the CCI is competent to pass the orders in this case under section 26(1). Ericsson's contention is that the substance of the case relates to rates of royalty for use of SEPs. Since the decision of this matter is outside the scope of the Competition Act, 2002 but within the scope of Patents Act, 1970 the high court can exercise its jurisdiction under article 226. Citing the Supreme Court decision in *CCI* v. *Steel Authority of India,*[3] in which it was held that an order of CCI under section 26(1) is not appealable. Hence the appropriate jurisdiction is under article 226. The high court further observed that even if there is a provision of appeal,

3 (2010) 10 SCC 744.

jurisdiction under article 226 cannot be barred. The fact that Ericsson has a right to appeal at a later stage does not bar the jurisdiction under article 226.

Then the court proceeded to decide the jurisdiction of CCI to decide the case. The Patent Act,1970 not only provides for the rights of the patentee, the frame work within which such rights can be exercised, but also the remedy to enforce the rights of the patentee. Ericsson's submission can be divided into three heads. (1) Ericsson is not an enterprise within the meaning of section 2(h) of the Act and therefore it cannot abuse dominance within section 4 of the Act. (2) As the Patent Act, 1970 is a special Act and the Competition Act, 1970 is general, the former will prevail over the latter. (3) As Micromax and Intex cannot constitute abuse, the impugned order of the CCI is bad in law. On these and some other allied grounds Ericsson prayed for a declaration that the CCI's order, *prima facie* finding that Ericsson is dominant in the RM, is perverse.

On the issue that Ericsson is not an enterprise the argument was that a patentee cannot be an enterprise as neither the patent nor a license of patents are goods or services. The question whether Ericsson is an enterprise depends on whether it produces, supplies, distributes acquires or controls articles or goods or provision of services. But admittedly it has acquired and controls patents, and would, therefore, be an enterprise? Are patents goods or services? According to section 2(7) of the Sale of Goods Act, 1930 goods mean every kind of movable property. General Clauses Act, 1897 defines movable property as every property except immovable property. Thus patents are property. Property also means things having money value. Patents as right to exclude without right to use is property and goods. But whether the license of patents is goods is contentious issue. As the case has not been finally decided the issue remains open, CCI does not lack jurisdiction at the threshold.

Whereas Patent Act, 1970 is concerned with grant of patent rights, right to exclude others, as a reward to inventor, and is akin to monopoly; the Competition Act is concerned with regulation of competition and is opposed to monopolies. As in some cases patent rights may be misused as for example the patentee may refuse to give license on fair and reasonable terms, the remedy can be provided only by Competition Act. The Patent Act, 1970 provides a remedy for excessive license fee, unreasonable and anti-competitive license terms and breach of FRAND terms (fair, reasonable and non-discriminatory terms), is there a scope for applicability of the Competition Act? There are cases where Competition law may be applicable There is difference between both the Acts. Whereas the Patent Act, 1970 endangers competition, the Competition Act engenders it. Though the Patent Act provides for any misuse of IPRs and is a special Act, section 62 of the Competition Act makes the Competition Act an addition and not in derogation of any other law. Even if the Competition Act is inconsistent with any other law still it will have effect. Section 60 is a non obstente clause, giving the Act an over riding effect. But section 62 cannot be used to whittle down the provisions of any other law. However in case of an irreconcilable inconsistency between two Acts, a special provision like the Patent Act, 1970 must be given primacy.

The next issue is whether there is any irreconcilable difference between two Acts. Section 84(7) of the Patents Act provides for compulsory licensing for public requirement, in certain circumstances. Some of these circumstances may be construed as dominant position. In certain cases denial of market access by an enterprise in a position of strength in RM, may amount to abuse of dominant position. If such enterprise falls foul of section 4 of the Act, the consequences given under section 27 will follow. Thus it is clear that remedy provided under sections 27 are materially different from those given under section 84 (7) of the Patent Act. Remedies given in two enactments are different but not mutually exclusive that is grant of one does not destroy the other. It is also relevant to refer to section 21A of the Act, if in course of proceedings an issue is raised by any party that CCI's decision is or is likely to be contrary to provisions of another Act the CCI may make a reference to the authority responsible for implementing that other Act and CCI will give its verdict after considering the opinion of that other authority. Thus the Competition Act also visualise a situation when there may be a conflict between the Competition Act and another Act. Similarly section 21 provides for a reference by any other statutory authority. Intention of the legislature is to make the Competition Act harmonious with other Acts. It must also be noted that the remedy under section 84(7) of the Patent Act is in personam whereas under Competition Act it is in rem. Operative width of two Acts is different. Section 3(5) of the Act specifically protects rights under Patent Act. There is no irreconcilable difference between the scopes of two Acts. The contention of Ericsson that the CCI lacks jurisdiction cannot be accepted. Certain other issues decided by the Court are not being discussed here.

IV MERITS OF CASE FOR ORDER UNDER SECTION 26(2)

Competition appellate tribunal

North East Petroleum Dealers Association v. *Competition Commission India*[4] is a case on if the CCI can look into the merits of the case when ordering investigation into alleged violation of the provisions of sections 3 and 4 of the Act, to inquire if *prima facie* case is established or not? This is the question which arose in this case. The appellants are an association of petroleum product dealers in Guwahati region. Respondents no. 3-7 are public sector undertakings of Government of India. The members of the association sold the products of the undertakings in retail in accordance with dealership agreement.

Appellants alleged that some of the terms of the dealers agreement were one sided and imposed by the dominant undertakings on the dealers without ever consulting them. The terms for example provided that the dealers shall sell only the undertakings products, the undertaking may appoint one or more dealers in the town without referring to the dealer, the quantity of product shall be supplied at the discretion of the undertaking, the dealer from time to time deposit with the undertaking such amount

4 (2016) Comp LR 71 (CompAT); 1(2016) CPJ 93 (TA).

of money as determined by the undertaking, the dealers shall follow all the directions given by the undertakings, all disputes shall be decided by the Director (Marketing) of the Corporation (of the undertaking), after the termination of agreement the dealer shall sell the premises to the corporation,

The Appellant, on the basis of European Commission relevant market notice, submitted that oil supply and distribution market is distinct from the oil exploration and production market. Market constraints and market players in these two distinct markets are distinct. For appointment as a dealer there are three requisite insisted upon by the distribution corporations, namely, residence in the relevant area, that is Assam, availability of land and availability of finances. On the basis of these requirements the RM is 'supply and distribution of oil within the state of Assam.' The share of government of India in Indian Oil Corporation Limited (IOCL) is 78.92%, in Bharat Petroleum Corporation Limited (BPCL) 52.93% and in Hindustan Petroleum Corporation Limited (HPCL) 51.11%. These corporations should be enterprises under section 2(h) of the Act. These corporations are not autonomous but are managed and controlled by the government of India. Market behaviour of these corporations is in coordination and they do not compete with each other. Therefore respondent no 2, the Government of India should be a dominant enterprise. If these corporations because of the theory of corporate personality cannot be considered a single enterprise IOCL being the biggest corporation be treated as dominant.

However the CCI defined RM as 'refining and sale of petroleum product' and the refining share of these three corporations does not make them dominant. Accordingly none of the corporations is dominant. Regarding violation of section 3, the CCI opined that as the dealers and the Corporations are at different stages of production chain, section 3(4) would be applicable. None of the terms of the dealers agreement falls within the purview of section 3(4) (a) to (e). Even term in clause 62(a) providing for dispute to be decided by director (marketing) does not fall within any of the provisions of section 3 (4). The appellant is specially aggrieved by the provisions of clause 42 of dealers agreement, which provides that the directions issued by the corporations have to be complied with by the dealers. As it is not clear as to which aspect of the direction violates section 3(4), the section is not applicable. But more importantly appreciable adverse effect on competition (AAEC) is not established.

As according to section 26 (2) the CCI has to refer investigation only if a *prima facie* case is established, CCI need not enter into the merits of the case. Therefore the order of the CCI is set aside and the matter is remanded to the CCI to issue appropriate order under section 26 (2).

V TRANSFER OF A CASE TO NATIONAL CONSUMER REDRESSAL FORUM

P.C. Rishi v. *Ambit Corporation*[5] is a case on transfer of case to National Consumer Redressal Forum from the tribunal. In1984 complainant paid Rs. 20000/-

5 2016 Comp LR 27 (CompAT).

by a cheque to the Respondent as booking amount for purchase of a flat and agreement was executed in 1985. In 2004 the complainant filed an application under sections 36A, 36B and 36D of MRTP Act praying that an inquiry be ordered against the respondent for unfair trade practices and be directed to give a flat in a building 'Somerset B' in Pali Hills Mumbai. After eight years he filed an application under section 12 B of the Monopolistic and Restrictive Trade Practice Act (MRTP Act) for award of Rs. 8 crore and Rs 10 lakh for harassment against the respondents. Later in an amended complaint demand for compensation was reduced to 7 crore. Respondent no1 did not but respondents no.2 and 3 appeared.

The respondent no. 1 constructed a housing society New Bandra Housing Society comprising 28 flats and sold them. The residents filed a civil suit in High Court of Bombay for a declaration that the residents are owners and for grant of related relief. The high court declared that respondent shall issue ownership letter to the resident owners of the society and not do any construction work in the residential society. In small causes court of Bombay the suit filed by the respondent was also pending. During the pendency of all these cases the plaintiff complainant executed a purchase agreement with respondent no.1. For the next ten years, after executing purchase agreement, the complainant did not make any effort to find out status of progress in construction. When he visited Bombay in 1994, he was told that construction could not commence because stay granted by High Court of Bombay. In February when he visited Bombay again he found construction was in progress in plot no. 7 he took photograph of the construction and filed the complaint before MRTP Commission. The respondent averred that in 1989 Ramchandanis and Motvani sold the property to M/s Om Prakash and company. Om Prakash and company published public notice in news papers inviting claims of rights in the purchased property but no claim from the complainant was received. The claim of the complainant could not be found in the records of Sub Registrar Assurances at Bandra; this makes the case of complainant fatal.

It appears that the respondent no.1 had constructed 28 flats in 'Somerset' and entered into agreement for their sale, and put members in possession of these flats. The complainant has concealed this information from the tribunal, and therefore is not entitled to any relief from the tribunal. Thereafter Om Praksh and Company has duly purchased the property Somerset. Neither the former owner has brought to the notice of Om Praksh and Company the agreement between respondent no.1 and the complainants nor had Om Praksh and Company entered into any agreement with the complainant. The complainant has not claimed a flat in the building constructed by the former owner but has laid claim in the building constructed by Om Prakash and company the latter is being harassed by the complainant.

The CompAT framed three issues (1) whether the complainant is entitled to any relief? (2) Whether the complaint is maintainable? (3) Any order as to cost? The tribunal observed that at this belated stage the case cannot be transferred to National Consumer Commission in accordance with the provisions of section 66(4) of the Competition Act. As the case was transferred to the tribunal in 2010 and during several hearings and even at the stage of framing of issues till 2014, the complainant did not raise such prayer, it is too late to entertain such matter now. In addition to delay the tribunal also rejected the prayer on grounds of the provisions of section 66(3) of the Act, which provides for transfer of cases of monopolistic trade practices, restrictive trade practices, including cases in which restrictive trade practice is alleged.

The tribunal then proceeded to consider the question whether the complainant is entitled to recover a compensation under section 12B of the MRTP Act? Since an affirmative finding that the respondents have indulged in monopolistic or restrictive trade practice is a *sine-qua-non* for award of compensation, it is necessary to see if there can be such a finding. Sum and substance of the pleadings is that the respondent no1 has misrepresented that a flat has to be constructed at 5, Palli hills, in as much as it did not disclose that 28 flats have already been sold and it does intend to raise another flat. On the basis of pleadings and examination of witnesses respondents no.2 and 3 were ignorant of any agreement for construction of a flat for the complainant. The complainant during this long period never bothered to find the status of construction. It appears that by investing Rs.20000/- he wanted to earn crores of profit. However the complainant is entitled to get a refund of Rs.20000/- with an interest of 20% per annum.

VI ANTI-COMPETITIVE AGREEMENTS

L.H. Hiranandani v. *Competition Commission India,*[6] is a case on anti-competitive agreements. Medical science is continuously making advancements. One of the latest innovations is the use of stem cells, extracted from umbilical cord and placenta of a newly born baby for treating a large number of diseases. Umbilical blood and tissues are collected and preserved in stem cell banks for future use.

L. H. Hiranandani Hospital Mumbai is a private charitable hospital and it made agreement, in 2009 with Life Cell International Private Limited Chennai for joint promotion of stem cells among the patients. The agreement was for one year and life cell was given exclusive right to collect stem cells from the patients who were desirous of the benefits of them. The agreement initially was for one year and was extended for another year. But before the end of the second year Hiranandani, the appellant, fund that Cryobank provides a better technology. After the expiry of second year, services for collection of stem cells, under an agreement, was given to Cryobank on the basis of comparison with other similar service providers. Though baby cell were willing to pay more per case, the appellant preferred Cryobank because of better technology and they agreed exclusively to recommend each other.

One Manju Jain had entered into an agreement with Life Cell to obtain its stem cell banking services but on first visit to the appellant hospital she did not but on second visit she informed the hospital that she had an agreement with Life Cell, but was told that Life Cell cannot be permitted of to provide service in the hospital.

6 2016 Comp LR 129 (CompAT).

Consequently she obtained the services of another hospital 500 yards away from her residence. Though Manju Jain did not go to judicial authority but one Ramnath Kini, respondent no.2, not related to Jain, through Dhull Chambers filed information against the appellant alleging abuse of dominant position, and anti-competitive agreement between appellant and Cryocell and prayed for imposition of penalties and direction that they will not enter into such exclusive agreement.

In September 2012 the majority of CCI directed the DG to conduct investigation into the allegation when to their satisfaction a *prima facie* case was established, but one member, Tayal dissented that a *prima facie* case has not been established. Even before investigation could commence, the CCI in its newsletter stated that CCI found that patients were forced to take the services of Cryobank, if they want to preserve the stem cells of new born baby, and that the hospital was dominant. The fact of such publication was protested by the appellant. After receiving the report of the DG the CCI required DG to further investigate. A supplementary investigation report was also submitted. After hearing the parties and considering the record the majority of the Commission found that the agreement between the appellant and Cryobank was in violation of section 3(1), and caused AAEC and imposed a penalty. The CCI further observed that stem cell market in India is at nascent stage, Cryobank and Life Cell together control 67% of the market. The nascent industry is bound to suffer if such exclusive agreement is entered between the parties. Such exclusive agreements are at the cost of the consumer and do not confer any benefit on the consumers. Such agreements pre-close the market for new entrants. As at an advance stage of pregnancy it is not convenient for Manju Jain to change the hospital, and as Jain had already paid money to Life cell for stem cell, she had no alternative but to change hospital. Change of hospital is not without cost to the patients. The CCI found that there was tie in vertical arrangement between the Cyorobank and the respondent.

After considering all these aspects of the case the tribunal proceeded to decide the validity of the decision of the CCI, whether there was a violation of section 3(1) of the Act and whether the imposition of the penalty was appropriate? The tribunal begins with the assertion that respondent no. 2 (the IP) in neither related to Manju Jain nor authorised by her, he actually, in the opinion of the tribunal, is acting on behalf of Life Cell, without saying so, which actually is a rival of Cryobank. The author of this survey finds it difficult to understand the relevance of this observation. It would have been better for Singhvi J to avoid this observation. The Competition Act provides remedy in rem and not in personam. The motive of the IP is irrelevant as long as he is able to establish the violation of the provisions of the Act because the remedy under the Act is for the benefit of all and not merely for the IP. The tribunal further observed that IP's assertion that the Hiranandani gynaecologist unduly. pressurised Jain to seek the services of Cryobank is factually wrong and actually Jain did not on her first visit inform the gynaecologist that she had a contract with Life cell, implying that she was under a duty to give this information to the hospital. But, as opposed to what is said by the tribunal, we may also say that neither the hospital informed the patient that Cryobank is a tied product in case stem cell procedure is needed.

According to the tribunal some of these were the infirmity in the decision of the CCI and DG. Failure to give information by Jain to inform the hospital of the fact of the agreement with Life cell, failure of DG to examine Jain, who alone could have testified about the facts of the case, were considered to be fatal to the success of the case. (Would it not have been appropriate for the tribunal to remand the case for further investigation?) The tribunal further opined that the definition of RM was wrongly defined by CCI in as much as they took into consideration only maternity services ignoring stem cell services. On this count, there is difference of opinion with the tribunal as stem cell was only a tied product whereas the RM consisted only of maternity services.

The tribunal considered that stem cell was an independent product not an integral part of maternity service, as opposed to the opinion of the majority of the CCI. There were many hospitals that provided stem cell service and were rivals of Cryobank. Off course the appellant hospital did not impose stem cell service on every maternity case, but if a maternity case wanted stem cell service it must be through Cryobank. The tribunal argument was that Jain did not inform the hospital that she has entered into an agreement with Life Cell. However our point of view is that if we apply the doctrine of asymmetry of information it is the primary duty of the appellant to inform Jain that she must approach another hospital if she wants stem cell service from Life cell. As Jain already made payments to the appellant and valuable time was lost, she was a trapped consumer, exit being costly and more importantly risky, RM being the appellant only, and hence there was also AAEC in this case of tied product of stem cell the tribunal cites some other decisions of the CCI regarding so called tied products, but they do not seem to be comparable. In this case the tribunal completely ignored the element of risk to the health of the maternity patient, Jain in exiting the appellant hospital at a late stage. The tribunal's observation that the CCI ignored the fact that the appellant hospital gave an undertaking before the CCI that they will not renew the exclusive agreement with Cryobank does not make much sense if the exclusive contract between the appellant hospital and Cryobank was valid. However the tribunal allowed the appeal and set aside the decision of the CCI.

VII ANTI-COMPETITIVE AGREEMENTS; CONFIDENTIALITY OF DOCUMENTS

TPM Consultants (p) Ltd. v. *Competition Commission of India,*[7] is a case decided by the Tribunal on confidentiality of documents. In this case, during the course of investigation conducted by the DG, the DG demanded production of certain documents. At the time of production of the documents TPM consultants requested the DG that the documents be treated as confidential in accordance with the provisions of regulation 35. The Commission refused to extend the duration of confidentiality granted by the DG. The appeal is against this order of CCI. The CompAT first decided the question

7 2016 Comp LR 867 (CompAT).

of maintainability of the appeal under section 53A. Section 53A provides for appeal against orders of the CCI under certain specified sections given in section 53A of the Act. As regulation 35 does not find mention in section 53A appeal is not maintainable and the Tribunal refused to hear the case on merits.

VIII BID RIGGING

A.R.Polymers (p) Ltd. v. *Competition Commission of India,*[8] is a case on bid rigging. The tribunal was concerned with the decision of two important issues involved in this case. First whether certain enterprises can be held guilty of bid rigging merely because they quoted identical or near identical prices? And whether penalty under section 27 can be imposed on basis of turn over of all the products produced by an enterprise though it may be guilty of violating the provisions of the Act with respect only to one product?

In response to a tender for supply of jungle boots for security forces given by the Director General (DG) the appellants quoted rates for rate contract for the period November 1, 2012 to November 30, 2012. The DG negotiated and executed rate contract with successful bidders. After about nine months the DG informed the CCI of suspected bid rigging. Finding *prima facie* evidence of bid rigging the CCI directed the DG to conduct investigation. The DG in his report found that the OPs have repeatedly been quoting identical or near identical tender bids. Direct and indirect evidence has established collusive behaviour of the OPs. The OPs have violated the provisions of section 3(3) (a), (c) and (d) read with section 3(1). For defining RM, relevant product market (RPM) was 'Polyster Blended Duck Ankle Boot Rubber Sole according to government specification G/Tex/ Misc/55 Boot Rubber with detachable sock thickness 5mm.' This is a distinct product used by para military forces *etc.* manufactured by producers registered with DGS and D against rate contract. All such suppliers constitute relevant geographic market (RGM) as there is no demand for such product in the open market.

DGS and D gives supply orders to several producers after fixing rate contracts. As the product is used only by para military forces there cannot be any independent estimate of prices of the finished products except by estimating market price of various input material. This was done by DGS and D by estimating 2010-11 rates. The DG in his report stated that the circumstances were conducive for collusive bidding. During the course of investigation it was found that after quoting identical or near identical prices their margin of profit was different, and hence cost of production was also different; therefore they might have quoted different rates had there not been collusion. Regarding the issue whether information was exchanged between the OPs, the DG stated that on October 20, 2009 there was a meeting between OPs in Delhi and on March 13, 2009 under the aegis of Federation of Industries of India, it was probable that they might have discussed price. Though OPs have larger installed capacity they

8 2016 Comp LR 905 (CompAT).

imposed restrictions on themselves on quantity they can supply. None of the OPs was able to give any plausible reason for identical or near identical rates and restrictions on quantity to be supplied. But the DG denied the violation of section 3 (4) as they were not at different stages of production. After giving opportunity to OPs to rebut the findings of the DG, the CCI approved the findings of the DG found OPs guilty of violating sections 3 (3) (a) and (d) of the Act imposed penalty on OPs. The CCI distinguished the Supreme Court's ruling in *Union of India* v. *Hindustan Development Corporation*[9] and observed that apart from price parallelism there are other circumstances proving collusive bidding.

One of the arguments relied by the appellant was that two meetings of federation of industries attended by the appellants were not regarding price of jungle boots; therefore reliance on them by the CCI is unwarranted, especially because some of the appellants were not members of the federation. However in our opinion evidence of meeting was merely supportive evidence, corroborating tender of identical or near identical price. The real reason was that if their cost of production was different why identical or near identical price was quoted. Another argument was regarding quantity restriction. They said it was because of escalation in the cost of inputs, and that this was done earlier also. This seems to be a superfluous argument and actually this superfluous argument corroborated the fact of collusive bidding, but was not accepted by the tribunal. It seems that the tribunal also requires a degree of proof which is required to construe contract under Contract Act, 1872. Last argument was that for imposing penalty, CCI wrongly took into consideration total turnover and not the turn over of jungle boots, the argument was accepted by the tribunal. There can be two views regarding calculation of turn over. As the purpose of penalty is not compensatory but deterrent it depends on the circumstances of the case whether total turn over or turn over of relevant product should be taken into calculation to make it deterrent. For example if a liquor giant also produces mineral water in small quantity, for the anti-competition activity of the liquor giant in relation to mineral water, penalty on the basis of mineral water turn over shall not be deterrent. The appeal was allowed and decision of CCI was set aside. However for reasons stated above it is difficult for us to agree with the order of the tribunal.

IX ADEQUACY OF EVIDENCE

All India Motor Transport Congress v. *Indian Foundation of Transport Research and Training (IFTRT)*[10] is a case on adequacy of evidence to construe anti-competition agreement. All India Motor Transport Congress was the apex body of the transporters of goods and passengers. On September 13, 2012 Government of India announced a hike of Rs.5/- per litre on diesel. Next day the Congress convened a press conference

9 (1993) 3 SCC 499.

10 2016 Comp LR 646 (CompAT).

expressing resentment over the uncalled for increase which would have a dampening effect on transport industry and economy and transport industry would not be able to bear the cost of the increase in price. In the press conference it was also announced that an emergency meeting of the transporter members is being convened to take stock of the situation and future course of action. The president of the Congress also issued a similar press release from his office in Mumbai. The Congress will meet again after 20 days to assess the response of the government. When the reports of the press conference were published by newspapers respondent no.1 Indian Foundation of Research and Training, filed information of the alleged anti-competition agreement that freight charges have increased by 15%. Reliance was also placed by the respondent no.1 on earlier orders of MRTP Commission and tribunal in support of the allegation of anti-competition practices.

In response to notices issued by the DG some transporters stated that they were not members of the apex body; some said that they did not receive directions from the apex body and some that directives of the apex body are not binding on them. The DG found that all the replies of the appellants (OPs) appeared to be identical. On further examination DG found it to be probable that before sending replies to the query there was a meeting. The reply of Tulsa Transport contains two replies one a draft response and the other a proper response. The response of Tulsa Transport was posted to CCI office bears the stamp of April 16, 2013. It appears that the draft prepared by Tulsa Transport was circulated to other members, as 21 of replies were identical. Though the DG sent notices to 232 transporters only 34 sent replies. When reminders were sent on July 8, 2013, only 21 replies were received. From the sequence of events it is apparent that matter was discussed among members; a substantial majority decided not to respond. An important member prepared the draft, it was circulated among members and 21 sent identical replies.

The tribunal however came to the conclusion that there was no evidence to prove existence of anti-competition agreement between the transporter members of the appellant: sequence of events discussed above was considered to be no evidence by the tribunal. Hence the appeal was allowed and the order of the CCI was set aside. In our opinion at least 21 transporters should have been declared guilty of anti-competitive behaviour. It seems that the tribunal requires the same conclusive proof which is required in case of a contract under the Contract Act, 1872. In our opinion the order of the CCI was better than that of the tribunal. If this order of the tribunal is a precedent the provisions of the Act would be further diluted to the advantage of those who prefer to violate them.

X PRINCIPLES OF NATURAL JUSTICE

Alkem Laboratories v. *Competition Commission of India*[11] is a case on anti-competition practice, suppression of facts by a respondent, and violation of rule of

11 2016 Comp LR 757 (CompAT).

audi alteram partem. These appeals are against the order of the CCI of December 1, 2015 holding Alkem Laboratories (appellant no. 1) guilty of violating section 3 (1) of the Act and Johnson Methew (appellant no. 2) then working as DGM-ACE, Sales of Alkem Labs, and T.K. Haridas (appellant no. 3) then working as Branch Manager of Alkem at Kochi, Ernakulam guilty of violating section 48(1) and imposed a penalty @ 3% of their respective average income.

Appellant no. 1 is in the business of manufacturing branded and generic drugs. P.K. Krishnan, respondent no. 2 proprietor of Vinayak Pharma of Pallakad district of Kerala applied for stockist ship of medicines of the appellant no.1. After preliminary verification, application was approved by Paul Madhavan, district sales manager and an appointment letter was sent by him, though according to the procedural practice of appellant no.1 approval should have been given by vice-president (marketing) and the authorised signatory. Whether this procedural mistake would make respondent no.2 an unauthorised stockist and an impostor or the mistake's responsibility would be burdened by the appellant as the district sales manager (sales) was the employee of the appellant no.1 and the respondent no. 2 was stranger to the internal arrangement of the appellant no.1. The tribunal took, unlike the CCI, the view that Respondent was not an authorised stockist of the Appellant No.1. We prefer to agree with the view of the CCI rather than that of the Tribunal. When a demand draft of Rs. five lakhs was sent by respondent no.2 it was returned by appellant no. 1 on grounds that his appointment was not validly done. The tribunal ignored the fact that because of the mistake of one of the employees of the appellant no.1 respondent no.2 suffered and resulted in frustration of legitimate expectations. The appeal was allowed and the order of the CCI was set aside. One of the additional grounds for setting aside the order was that the DG did not summoned appellants no.2 and 3, the officers of appellant no. 1. This resulted in violation of the rule of *audi partem*. It seems to be a valid ground for invalidating the order of the CCI; however the better course would have been to remand the case for further investigation.

Coal India Limited v. *Competition Commission India*[12] is a case on alleged violation of rules of natural justice in imposition of penalty for abuse of dominant position. A number of appeals were bunched together as the common question involved in all of them was the same. A number of IPs alleged that Coal India Limited along with its subsidiaries such as Mahanadi Coalfields Limited, Western Coalfields Limited were dominant and abused their dominant position. After investigation was made by the DG the allegations were found to be correct. But at the final disposal of the case a decision to impose penalty was taken by the members of the CCI along with two members who were not present at the time of hearing. That is two members of CCI were party to the decision of imposition of penalty without having the advantage of hearing the case and without knowing the merits of the case.

12 2016 Comp LR 716 (CompAT).

Under these circumstances the tribunal rightly allowed the appeals on grounds of well known maxim of rules of natural justice that one who hears must decide. In these cases two of the members of CCI who were party to imposition of penalty did not hear the case and hence the maxim that one who hears the case must decide was applied. It is necessary to apply the maxim as the decision to impose penalty adversely affect the rights of the appellants. The tribunal also made distinction between final orders and interlocutory orders. The maxim may not apply in the latter orders as they are ad hoc in nature and do not adversely effect the rights of the parties. The tribunal supported their orders with the Supreme Court decisions in *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road transport Corporation*[13] and *Rasid Javed* v. *State of U.P.*[14] insisting that he who hears must decide.

The Tribunal also rejected the argument advanced by the CCI that it is an expert economic body and performs administrative functions. Though the CCI may be an expert body but at the same time it is a quasi-judicial body: its decisions affect important rights of the parties. It would also be relevant to cite the Supreme Court case *A.K. Kripak* v. *v. Union of India*[15] in which the court extended the principles of natural justice to administrative proceedings. The tribunal allowed the appeals and set aside the orders of the CCI. The case was remitted to the CCI for fresh consideration.

XI UNFAIR TRADE PRACTICES

Dipti Bhalla Verma v. *DLF Universal*[16] is a case on 'unfair trade practice' under MRTP Act decided on appeal by the tribunal. The tribunal after going through the case held that there was no unfair trade practice and dismissed the appeal. But strongly disagreeing with the order of the tribunal, the author of this survey finds that actually it was a fit case for holding that the respondents action amounts to unfair trade practice. It seems that the view taken by the tribunal was highly technical which actually defeated the ends of justice. Avoidable technicalities must not be allowed to defeat the ends of justice. Unfair conduct of the respondent is writ large if the sequence of events are properly analysed.

The respondent gives an advertisement in newspapers, "Pay just over 40% the first 2 ½ years move into your exclusive apartment. The balance could come from the rentals, you would otherwise have paid for your home in Delhi see detailed terms and conditions at the DLF office." In the DLF office the appellant was asked to pay the first instalment of 10% of the sale price and sign an application form, some of the clauses provided as follows. The company shall have right to effect suitable and necessary alterations in the lay out plans if and when found necessary. If there is increase and decrease in the area charges per square metre and other charges will be

13 AIR 1960 SC 308.
14 AIR 2010 SC 2275.
15 (1969) 2 SCC 262.
16 2016 Comp LR 245 (CompAT).

payable. If company is not able to allot the apartment for any reason the paid amount shall be refunded at 12% simple interest. If the intended allottee is not given possession (in 2 ½ years) the allottee shall continue to make payment of agreed equated quarterly instalments including interest @ 18% on reducing balance payment basis.

After 10 months of the initial payment the appellants were required to execute buyers agreement. In the buyers agreement following additional conditions was added. If for whatever reason, as assessed by the company, there is increase in the cost of construction the allottee shall pay the increased cost on demand; the decision of the company shall be final. The buyer agrees to additions variations alterations and modifications as the company, in its sole discretion, may deem fit. Alterations may involve change in the position of apartment, change in its dimension area or number. There may be reduction or increase in the covered area. If the company cannot deliver the possession within two and half/three years (the original 2 ½ years duration has been increased to three years) the company shall not be liable for the delay. If there is delay in giving possession the buyer at his option may terminate the agreement and the company shall refund the realised amount, (off course without any interest), and beyond this company shall not be liable. The buyers agreement also provided that possession may be possession or deemed possession.

Unfortunately the tribunal is in laissez faire mode in interpreting the sequence of transactions leading to sale of apartments: it interprets the Contract Act, 1872 with assumption that parties are equal, there is symmetry of information and knowledge of law; consumers have a choice to go to other competitors. None of these assumptions are correct. The tribunal has ignored the psychological war launched on the consumers by the builder. Very attractive and firmly stated advertisement gave way to an onerous, one sided and grossly unfair buyers agreement. The buyers agreement is absolutely one sided because it is between two unequal parties on unequal terms. The buyer does not have any real choice to go to another builder in the so called competitive market as all the builders give similar terms and conditions. They cannot be accused of anti-competitive agreement as the degree of proof required by Competition law forums is difficult to provide. The builders never meet in this regard, they never consult each other, and there is never a wink or nod of agreement: they simply copy each others terms and conditions. Had the competition forums apply the test of 'practice carried on' given under section 3 of the Competition Act to construe anti-competition agreement or the spirit of section 3 in interpreting 'unfair trade practices' in the MRTP Act, the result would have been anti-competition agreement for the purposes of the Competition Act and unfair trade practice for MRTP Act.

The transaction leading to sale of apartment, if we discard laissez faire baggage, clearly show unfair psychological war unleashed by the builder. First step was an ad in newspapers which read as "Pay just over 40% the first 2 ½ years move into your exclusive apartment. The balance could come from the rentals, you would otherwise have paid for your home in Delhi….. Detailed terms and conditions at the DLF office." For the purposes of Contract Act this is an invitation to offer. Its ingredients are,(a) pay 40% of the sale price in 2 ½ years (b) move into your home in 2 ½ years (c) balance payment would come from rentals, (d) detail of the contract would be provided in the office of DLF. Details means details within the parameters set out by the advertisement. But the process to renege the parameters of invitation begins in the office. The consumer pays an amount equal to 10% of the cash, given a lengthy application, the layman half understands it or understands what has been explained by the staff of the DLF. The application provides, (a) position, area, design may change and charges may increase; (b) if for any reason apartment cannot be delivered paid amount shall be refunded with a simple interest of 12%(why not compound); (c) There may be delay in giving possession. (If there is delay how to pay the balance from the rentals). Now the contract is complete, but terms unknown to the consumer will come later in the form of buyers agreement. At the time of making initial payment and applying, the consumer knew that there would be a buyers agreement without knowing its terms. But the real reneging terms will come after ten months when the buyers agreement would be signed. The consumer is trapped when he pays 10% of the sale price and this trapped consumer after 10 months is required to sign buyers agreement. If all this is not unfair what else would be. However the tribunal came to the conclusion that respondent has not made any false or misleading promises, hence appeal dismissed.

XII ABUSE OF DOMINANT POSITION

DLF Home Developers Limited v. *Competition Commission of India*[17] is a bunch of appeals on abuse of dominant position. In these cases the DG gave three different definitions of RPM but RGM in all these cases was 'geographic region of Gurgaon'. Three RPMs were 'services provided by developers/builders for construction of high end buildings', 'services provided by developers/builders in respect of residential apartments ranging between 40-60 lakh to the customers' and 'provision of services for residential apartments'. And in all these cases the DG found the OP (appellant) dominant in the RM. The tribunal observed that whichever definition of RPM is accepted the OP-appellant would remain dominant. The same was also held in *Balaire* case[18] in which the RM was defined as 'services of developers for high end residential accommodation in Gurgaon'. As the OP/appellant is a group company of DLF limited there is no reason not to consider the appellant dominant. Unfair conditions were similar to those which were involved in *Belaire* case and were discussed in an earlier *survey.*[19] For the same period a penalty had already been imposed in *Belaire* case, nothing more need to be done.

17 2016 Comp LR 60 (CompAT).

18 *Belaire Owners' Association* v. *DLF Limited, Huda*, Comp LR 0239 (CCI).

19 Dixit, Vinod, Competition Law, XLVII *ASIL* 150-152 (2011).

XIII ANTI-COMPETITIVE AGREEMENTS

Competition Commission of India

Maruti and Company v. *Karnataka Chemists and Druggists Association*[20] is a case on alleged violation of section 3 of the Act. The information was filed by Maruti and Co (IP) against Karnataka Chemists and Druggists Association (OP1), K.E.Prakash, (OP2) is the president of OP1. The regional sales manager, Lupin diabetes care unit of Lupin Ltd., is OP3 and Lupin Ltd. is OP4. The IP alleges that though they were appointed a stockist for the diabetes care division of OP4 yet they were not supplied with medicines as OP4 refuses to supply medicines till they obtain a no objection certificate (NOC) from OP1. Collusion is alleged between OP1, OP2, OP3 and OP4 in denying supply of medicines to IP.

After the submission of the main investigation report by the DG on the request of OP2 and OP4 the CCI directed the DG to cross examine the witnesses. After cross examination another Report on Cross Examination was submitted by the DG. The DG found that the OP1 is carrying on the practice of insisting on obtaining NOC as pre condition of supply of medicines, thus limiting and controlling the supply of medicines in violation of section 3 (3) (b). This arrangement between OP1-OP4 has caused AAEC on market in contravention of section 3 (1) of the Act. On the basis of evidence the DG concluded that OP1-OP4 together insisted on NOC before supply of medicines. The DG further examined whether OP1 and OP2 restrained pharmaceutical companies from supplying medicines unless the stockist obtains NOC from the OP1. The DG concluded on the basis of evidence, including the minutes of the meetings of working committee and managing committee, that requirement of obtaining NOC was not voluntary but mandatory.

After considering the reports of the DG and replies of parties the following issues were framed by the CCI. (1) Whether it was mandatorily required by OP1 that pharmaceuticals must not supply medicines before the stockist obtains NOC from OP1. (2) Whether there was any understanding or arrangement between OP1-OP4 in contravention of section 3? (3) If answer to issues 1 and 2 is yes whether the officers of OP1 and/or OP4 are liable under section 48?

The CCI's findings on these issues are as follows. The first issue, is whether OP4 received the letter of IP of August 24, 2013 placing order for supply of medicines which resulted in non supply of medicines for want of obtaining NOC from OP1, but the larger issue is whether there is practice of mandatorily requiring NOC? A letter of June 5, 2013 sent by OP3 a regional manager of OP1 informing the appointment of IP as a stockist of OP4 establishes the fact of appointment. That IP placed an order for delivery of medicines on August 24, 2013, though denied by officers of OP4, was established by postal department. It is proved that medicines were not supplied though the order was placed by the IP. The contention of the IP that medicines were not

20 2016 Comp LR 953 (CCI).

supplied because of not procurement of NOC from OP1, were proved in the covering letter sent along with placement order of August 24, 2013, which stated that when contacted by the IP, OP4 asked them to furnish NOC from OP1. The IP in the covering letter insisted that NOC is not required as per Competition law. The web page of OP1 substantiates the contention that requirement of NOC was mandatory in as much as the letter of OP4 to OP1on June 5, 2013 stated that NOC was required by the OP4 from OP1. Minutes of the working committee and managing committee of OP1 also confirm the fact that NOC is mandatory requirement. Letters exchanged between OP1 and other pharmaceutical companies also substantiate the fact of mandatory requirement of NOC. On the basis of material on record the CCI concludes that OP1 has mandatorily required the IP to obtain NOC to get supplies from OP4 and has violated the provisions of section 3(1) read with section 3(3) (b).

The second issue is whether there was any anti-competition agreement/ arrangement between OP1 and OP4? As the OP1 neither supplies nor distributes medicines it is not part of production chain and is not connected with OP4 either vertically or horizontally. The case does not fall in either of the sections 3(3) or 3(4). But can it fall under section 3(1)? After examining the facts of the case the CCI concluded that OP1 followed the practice of requiring NOC before pharmaceuticals can supply medicines to stockists. "NOC Request Letter" by OP4 to OP1 indicates that NOC was necessary so as to inform the retailers that a new stockist has been appointed, so that they can place order to them. The understanding/arrangement relating to the requirement of NOC, between the KCDA, OP1, is liable to be scrutinised under section 3(1). The CCI opined that both Associations and pharmaceuticals unabashedly violate the provisions of section 3 (1) of the Act and continue with this anti-competition practice. The CCI concluded that there was an anti-competition agreement/arrangement between OP1 and OP4.

In this case though it is possible that the agreement was rightly found under section 3(1), it is appropriate to discuss if the prohibited agreement between OP1 and OP4 can be found under section 3(4) or not? The impugned agreement violated section 3(1) because it uses the word 'control' but section 3(4) uses only 'supply, distribution etc.' Section 3(1) is applicable because OP1 controls but does not supply *etc*. Would the case also fall under section 3 (4)? Answer may be yes for several reasons. *Firstly* section 3(4) would be applicable if the association is unincorporated as it would not have a personality distinct from that of the members who are engaged in supply and distribution. *Secondly* if the association is incorporated the case will be fit for 'lifting the corporate veil' as otherwise a fraud and gross illegality would perpetuate and after lifting the veil it will be apparent the members are engaged in supply *etc*. *Thirdly* as section 3(4) uses the words, 'Any agreement….in respect of supply, distribution' etc., a purposive interpretation of 'in respect of' would make the Association guilty of making arrangement with OP4 in respect of supply, distribution *etc.* as the members of OP1 cannot enter into any agreement without the consent of OP1. What cannot be done directly must not be allowed to be done indirectly.

Regarding issue 3, the CCI on the basis of the record held A.K. Jeevan Secretary of OP1 and K.E.Prakash President of OP1 guilty under section 48 (1) and (2). Nishant

Ajmera and Amit Kumar Dhiman officers of OP4 were also found guilty under section 48 (1) and (2).

XIV EFFICIENCY ENHANCING AGREEMENTS

Association of third party administrators v. *General Insurers (public sector) Association of India*[21] is a case on efficiency enhancing agreements which are exempt from the adverse operation of section 3(3) of the Act. Information is given by Association of Third Party Administrators against General Insurance Association (GIPSA), OP1, that is, association of four companies of General insurance, OP2-OP5, which are government companies and Department of Financial Services Ministry of Finance Government of India, OP6, alleging violation of the provisions of sections 3 and 4 of the Act. As these four companies, control 60% of the RM, the management of which, being directly or indirectly, controlled by the Department of Financial Services, they are dominant enterprises. Though it is said that OP1 is an informal body without being a legal entity, it actually issued an Expression of Interest (EOI) for setting up a captive TPA, Health India TPA Limited (HITPA): thus proving that OP1 is a platform for furthering anti-competitive agreements. With the permission of the IRDA, as required under section 27B (9) of Insurance Act, 1939 all the four public sector companies invested in HITPA. It is alleged by the IP that acting collectively public sector general insurance companies (PSGICs) have entered into anti competitive agreement.

The CCI did not agree with the contention of the IP. It rejected the contention of the IP on ground that all the four PSGIC assured the CCI that there would be no discrimination against individual TPAs. It is difficult for us to understand the logic of this argument. Examination of whether there exists an anti-competition agreement is prior to and independent of the assurance that the agreement would not operate against the TPAs. Can we justify an alleged anti-competition agreement merely because the agreeing parties assure that the agreement would not be used against consumers? Provisions of section 3 (1) and (3) of the Act do not warrant this interpretation. The section requires that alleged agreement should not lead to anti-competition behaviour of the agreeing parties independent of any assurance.

The argument of the CCI that OP6 was acting in exercise of the prerogative of the public authority to protect public interest and not as shareholder falls flat as OP6 actually by giving instruction to all the four companies to invest in HITPA interfered in administration of the companies within the meaning of Explanation (b) of section 5 of the Act. However the CCI concluded that mere issuance of instruction by OP6 cannot amount to interference by OP6. According to CCI, HITPA was created for efficiency but other TPAs were not prevented from operating therefore no case against contravention of the provisions of the Act is made out.

21 Case No. 49/2010 decided on July 8, 2011 .

XV ABUSE OF DOMINANT POSITION

Mega Cabs Pvt. Ltd. v. *ANI Technologies Pvt. Ltd,*[22] is a case on violation of sections 3 and 4 of the Act. The IP provides radio taxi service whereas the OP is another taxi service provider operating taxi service under the brand name 'OLA'. The IP alleges that OP is a dominant operator in the RM and has abused its dominance. OP is also guilty of entering into anti-competition agreement with the taxi drivers registered on its network. Relying on the report named '6wresearch' IP claimed that OP has a market share of 52.9% to 57.5% share in the RM. OP also abused its dominant position in as much as it charges predatory prices, gives periodic incentives to consumers and gives many incentives to its drivers.

On the other hand the OP denied all the allegations. The OP discredited the '6wresearch' report relied upon by the IP. The report if at all reliable reflects on the poor performance of the IP, they have 650 taxis out of which 250 are inactive. The IP operates on own assets model whereas the OP on aggregators model. Regarding CCI query on whether OP gives heavy discount to the consumers, the OP submitted that every new entrant suffers losses during initial years in order to establish a foothold on the market, hence discounts. Incentives to drivers are given in order to retain them in the fleet.

After taking into considerations relevant circumstances, the CCI opined that there are two relevant issues to be determined, namely, whether OP has violated sections 3 and 4. The alleged violation of section 4 requires determination of RM (RPM and RGM) with reference to section 19 clauses (6) and (7). Regarding RPM the CCI was of the view that there is a dedicated class of consumers who opt for radio taxis in preference to other modes of public transport, such as auto rickshaw, buses and non-radio taxi, because of use of technology by them which results in ease of availability, pre-booking facility *etc*. Therefore the RPM consists only of radio taxis. The RGM to a great extent depends on consideration of city, and state and legal regime regulating them. Radio taxis operating in Delhi as opposed to operating in NCT are a distinct category because of two reasons Delhi taxis must use CNG and their regulatory regime is different. Therefore RM consists of radio taxis operating in Delhi as opposed to operating in NCT.

The IP alleged that OP is dominant because it fleet size is 52.9% active fleet size is 54.3% its monthly revenue is 52.3% and daily trips is 57.5% and it is supported by foreign funding. The authenticity of the 6W research report is questionable as the source from which the data has been taken is questionable. Regarding violation of section 3 the IP alleged that many drivers from its fleet have migrated to OP because they give them incentives which are not sustainable and agreement also results in denial of entry to new entrants because OP uses technology not viable for any new entrant. CCI was of the view that allegations were against the spirit of Competition

22 Case no. 82/2015 decided on Feb. 9, 2016.

law. If IP is unable to compete with OP because of lack of funds, technology or efficiency, competition issue do not arise. Contentions of IP are liable to be rejected.

Airline Operators Committee (AOC) v. *Delhi International Airport Authority (P) Ltd.,*[23] is a case on abuse of dominant position. However the CCI did not order investigation on grounds that no prima facie case of abuse of dominant position was made out. The information was filed by Airline Operation Committee alleging that Delhi International Airport Authority, the OP, has abused its dominant position in as much as they have arbitrarily and discriminatorily enhanced rent of office space provided to airlines, between 25% to !00% in violation of section 4 of the Act. Increase was effected in graded manner from 25% to 100%, from lesser to grater space. It is alleged that initially it was agreed that the increase in rental would only be nominal, but it is exorbitant and even perverse. Though initially it was agreed that per annum increase would be nominal and up to 7.5% but the CCI noted that increase of 25%-100% was affected after the expiry of the agreement. CCI also noted that the increase was non discriminatory. Hence no case is made out of abuse. In our opinion the CCI failed to answer satisfactorily whether increase of 25-100% after the expiry of agreement and even after shifting the offices from T1 to T3 is not unfair.

Gujarat State Fertilisers and Chemicals Limited v. *Gas Authority of India Limited,*[24] is a case on alleged abuse of dominant position. The IP is one of the largest fertilisers and chemicals producing company of the state of Gujarat and alleges violation of the provisions of section 4 of the Act. IP uses re-gasified liquefied natural gas as its productive input. OP is a central government company engaged in exploration sale marketing and distribution of gas in India. It has 67% of share in gas marketing in India. It also has 11000 kms of natural gas high pressure trunk pipeline On December 26, 2008 the IP entered into a gas sale agreement (GSA) with the OP.

According to the IP there are many unfair and discriminatory conditions in the GSA, Some them are as follows: the quantum of gas that has not been taken pursuant to GSA, the buyer could request make good gas at a later period but during the duration of the GSA. If the buyer does not take 'make good gas' till the end of the duration of GSA, the buyer will have to pay for the unused quantity even if the seller has sold this quantity to some one else. The IP alleges discrimination in recovery period gas in GSA. Recovery period gas denotes total gas outstanding at the end of basic term of GSA. If the buyer does not take recovery period gas it is liable but the seller does not have any liability if it does not deliver gas on demand of the buyer. In accordance with GSA buyer needs a specific quality gas: no remedy is provided if the seller fails to supply gas of the required quality. The buyer is required to pay even for the gas not supplied due to force majeure. The OP is liable to liquidated damages if the OP is unable to supply agreed quantity of gas and the IP has to procure alternate gas from other sources. The term alternate gas includes only gas of specific quality. *Force majeure* is widely defined for the OP but narrowly for the IP. The termination of GSA is also discriminatory in favour of the OP.

23 2016 Comp LR 229 (CCI).
24 2016 Comp LR 570 (CCI).

The Commission observed that the GSA was executed when the Act was not in force and section 4 will come to play only if it is proved that any of the impugned condition or conduct has taken place after the section came into force. But first RM must be defined. For the purpose of defining RPM the CCI relied on *Faridabad Industrial Association* v. *M/s Adani Gas Limited.*[25] Industrial gas and domestic gas constitute two different categories. Therefore RM is industrial gas. RGM is not India but the city of Vadodara. As supply of gas is constrained by the infrastructure of supply available in Vadodara therefore RGM is Vadodara. RM is supply of industrial gas in the city of Vadodara. In this RM GAIL is dominant as it does not face any competition from others because of infrastructure constraints. As the IP could not bring to the notice of the Commission any abusive conduct/action of OP, no action can be taken against the OP.

Kyal Agencies (P) Limited v. *Utkal Chemists and Druggist Association*[26] is a case on alleged violation of sections 3 and 4 of the Act. Regarding OP, which is an association of chemists and druggists, the CCI concluded that it is not an enterprise as it is not engaged in any commercial or economic activity. Of course it is not engaged in any activity relating to production, storage, supply, distribution, or acquisition of article or goods or provision of services but certainly they control distribution *etc*. of articles, goods or provision of services within the meaning of section 2 (h): We have seen cases after cases where these chemists and druggists associations have effectively indulged in anti-competition activities, they are so effective that members and manufacturers cannot afford to violate their dictates. We fail to understand why the Commission has avoided discussing the importance of the word 'control' in section 2 (h) of the Act. As far as the explanation of section 2 (h) is concerned it defines 'activity' as including profession and occupation. We fail to understand why an association cannot come under the definition of enterprise when the definition of activity is not exhaustive but only inclusive. Not holding the association an enterprise will defeat the objective of the Act. It seems the CCI rightly decided that there is no case of violation of section 3, unless alternatively it is decided that the members of the association entered into agreement at the platform of the association.

Tamil Nadu Power producers Association (TNPPA) v. *Chettinad International Coal Terminal Private Limited (CICTPL)*[27] is a case on alleged abuse of dominant position. The IP's (an association of power producers) allegations were against CICPTL, OP1 and Kamrajar Port Limited, OP2. TNPPA is an association of power producers around Chennai who use domestic and international coal through cheaper sea route and from port coal is transported through road and rail to power plants to

25 2014 Comp LR 185 (CCI).

26 2016 Comp LR 235 (CCI).

27 2016 Comp LR 338 (CCI).

minimise transport cost. OP1 is special purpose vehicle as a common purposes coal user facility at OP2. Earlier the Power companies used to source coal requirement from Chennai port but after the High Court of Madras by an order prohibited storing and dumping of coal at Chennai port, they began sourcing through OP1 at OP2. Between March 2011 and September 2011 both OP1 at OP2 and Chennai port were operational; the consumers have option to use either of them. Then charges levied by OP1 were Rs. 145/- per M.T., however once due to order of the High Court of Chennai port ceased to be an option to source coal OP1, taking advantage of its dominance, increased the charge to Rs. 180/- per M.T. and after a short while to Rs. 300/- per M.T. OP1 requires a part of the afore mentioned charges to be paid to Breeze Enterprises Private Limited as coordination and liasioning charges.

The OP1 contended that there is no substance in the allegations of the IP. The Supreme Court in its order has disposed a special leave petition and ordered that an empowered committee would consider the proposals of Chennai port regarding control of pollution. Therefore the matter should not be considered by the CCI. Secondly there are other ports in the vicinity therefore the allegation of dominance of OP1 is baseless. But both these contentions were rejected by the majority of the CCI. Notwithstanding the order of the Supreme Court, if the IP alleges existence of anti-competitive practices the CCI will have to look into the matter. The second contention was also rejected. The ports, those exist at a distance of 130 Kms. and 300 kms from the power stations, are not viable options because of the transport cost. The majority defined RM as 'provision of coal terminal services in area around Kamrajar port'. The majority on the basis of the definition found the OP1 dominant and DG was directed to investigate the matter.

XVI INTERIM ORDER UNDER SECTION 33 OF THE ACT

Nuziveedu Seeds Ltd (NSL) v. *Mahyco Monsanto Biotech (India) Ltd. (MMBL)*[28] is a case on under what circumstances an interim relief order under section 33 may be issued. On February10, the CCI by a majority held that there is a prima facie case of contravention of the provisions of sections 3(4) and 4 of the Act. The IP prayed that an order under section 33 be issued restraining MMBL from terminating sub licence entered into with IP till the disposal of the case. Subsequently the IP moved another application requesting urgent hearing so that status quo may not be disturbed. The OPs, moved the high court, under article 226, contesting the CCI finding that there is a prima facie case of dominant position. The high court directed that the CCI may proceed with the proceedings but no final order would be passed and no interim order would under section 33 would be given effect without the leave of the high court.

The IP stated that their sub license which originally was for ten years was terminated by OP1 on grounds of breach of payment obligation.Trade mark sub license

28 2016 Comp LR 578 (CCI).

was also terminated. But OP1 was willing to consider pro-term arrangement for Kharif 2016 provided all out standing payments are made. The IP countered the termination on grounds that a case against non payment is pending before the High Court of Bombay. The IP asked OP to withdraw the termination notice but the OP1 refused to do so. In accordance with the terms of agreement the IP was required not to sell any seeds after the termination of license and destroy all outstanding stock. As the IP has many varieties of hybrid cotton supplied to 40000 producer farmers and used in turn by one million farmers, the cancellation of sub license would lead to irreparable damage. IP's exit from the market would harm these farmers and benefit OP1, OP3 and OP4 who are the competitors of IP. The dispute relating to trait value of seeds for Kharif 2015 is already under arbitration.

The High Court of Delhi has allowed the IP to sell seeds in their stock till November 15, 2015. For any modification in the order the IP should have approached the high court. The IP submitted if interim relief is not given and if at the end of the proceedings before the CCI decision is in their favour they would get only monetary compensation and farmers would get nothing.

CCI began deciding the case after citing the Supreme Court judgement *Competition Commission of India* v. *Steel Authority of India Limited.*[29] In the opinion of the Supreme Court interim relief under section 33 is to be granted sparingly. It may be issued only when in the opinion of the CCI, it is absolutely necessary to do so and if it is likely to cause irreparable damage to a party to the *lis* and would have adverse effect on competition. The OP has filed a writ petition before the High Court of Delhi in which it was ordered that the CCI would neither deliver the final order nor would its interim order be effective without the consent of the high court. The CCI also did not agree with the contention of the OP that the case relates only to determinability of the contract. CCI said it also have to decide competition issues. As the legality of termination of the sub license is to be determined by the CCI in view of the fact that *prima facie* OPs are dominant, and in view of the facts and circumstances of the case, it is a fit case for existence of higher standards required for application of section 33.

The IP needs temporary injunction against post termination obligations not against termination of sub license. Therefore, CCI noted that sale and distribution of seeds after termination of sub license has been taken care of by the order of the high court. The CCI observed that the issue before them is not termination of sub license and after termination sale and distribution, but the destruction of seeds, parent line and germplasm as stipulated in article 9 of the contract. IP is a key player in the down stream Bt Cotton market. It takes about 5-7 years for developing hybrid seeds, if the seeds, parent lines and germplasm are destroyed and the CCI decides the case in favour of IP, it would be impossible to restore the status quo ante and would take another 5-7 years to develop seeds. As the CCI is likely to take some time to decide the case, it would be appropriate to exercise power under section 33.

29 (2010) 10 SCC 744.

The CCI also considered the question if at the end of the proceedings CCI decides that the OP has not violated the provisions of the Act, there would be only financial loss to the OPs; the OP has only to recover trait value from the IP. Interest of the OPs can be secured by giving appropriate directions. The CCI restrained the OP from enforcing post termination contractual obligations. (i) Enough protection is available to the OP as per the directions of the high court no seeds manufactured by the IP after November 30, 2015 would be sold by the IP without the permission of the high court. (ii) The IP would maintain the record of seeds manufactured by them after November 30, 2015 and will allow audit, inspection etc. as per the terms of sub-license agreement. (iii) Any seeds manufactured by the IP after November 30, not covered under the order of the high court, would not be sold by the IP without the permission of the CCI. (iv) Within 15 days of this order the IP would give an undertaking to adhere to these conditions.

One of the members of the CCI, M.M. Sahoo gave a dissenting opinion. The member observed that sub license agreement terminated because subsequent to agreement, the IP wanted to lower the rate of chargeable trait value payment, to which the OP did agree and consequently the OP terminated the agreement. According to article 9 of the agreement the IP (1) has to cease selling the seeds and (2) had to destroy all seeds *etc.* Thereafter the Member stated all the facts relating to proceedings before the high court and the Commission. The IP has got relief (1) from the high court. The member opines that as both the parties do not want to continue with the agreement no useful purpose would be served to grant interim injunction.

The member said that an interim injunction can be granted only if an act contravening the provisions of sections 3 and 4 (a) has been committed, (2) continues to be committed (3) is subject matter of inquiry before the CCI and (d) is in contravention of the provisions of sections 3,4 and 6 of the Act. The member observed that reference of the matter to the DG for investigation *ipso facto* does not constitute 'satisfaction of the Commission as required under section 33.[30] On this ground also the member refused to issue interim injunction. It is difficult to agree with the opinion of the member as the 'satisfaction of highest degree would be possible only after the completion of the inquiry by the CCI when they issue final order, but then there is no meaning of an interim order. When the majority speaks of high standard of satisfaction, in accordance with the cited Supreme Court decision, the term 'highest standard' is used in the context of pre-final order.

The member examines the issue from another angle also. He says that under section 33 no order can be given which cannot be given under section 27 that is after the completion of the inquiry. Section 27 does not envisage resonation of a terminated

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

agreement. As the dispute relates only to determination of trait value payment and not restoration of agreement the interim injunction cannot be issued. On this issue our opinion is that as the matter relates to abuse of dominant position, the legality of termination of sub license agreement is a mater to be decided by the CCI, even if the parties do not pray for the restoration of sub license.

XVII CONCLUSION

It is a well fact that enterprises especially bigger ones have considerable legal, monetary and other resources at their disposal. When an ordinary consumer is pitted against them, there may be asymmetry of resources, power money and information, which makes the contest between them unequal. Unfortunately the tribunal acts as a positivist constructionist appellate forum, which makes the consumer even more unequal and helpless. *L.H. Hiranandani Hospital* case[31] decided by the tribunal for reasons stated there is especially disappointing. Although there are some reservations about *A.R. Polymers* case[32] as well. In *All India Motor Transport Congress* case[33] the tribunal refused to construe anti-competitive agreement on the basis of sequence of events, which in our opinion were sufficient to draw such conclusion. The tribunal seems to require the same degree of proof, for construing anti-competitive agreement, which is required in case of contract under Contract Act, 1872.

31 2016 Comp LR 129 (CompAT).

32 *Supra* note 8.

33 *Supra* note 10.