

Daily Order

Judge Name	Case No/Year	Date of Order	Daily Order
P.S.DINESH KUMAR	WP 3363/2020	14/02/2020	<p>Heard Shri Gopal Subramaniam & Shri Sajan Poovayya, learned Senior Advocates for the petitioner, Shri Harish B.N., learned advocate for respondent No.1, Shri K.G.Raghavan, learned Senior Advocate for respondent No.2, Shri Dhyan Chinnappa, learned Senior Advocate for respondent No.3 and Shri Aditya Sondhi, learned Senior Advocate for respondent No.4.</p> <p>2. Petitioner has challenged order dated 13th January 2020, in Case No.40/2019 passed by the Competition Commission of India ('the CCI' for short), directing the Director General to cause an investigation into the matter under Section 26(1) of the Competition Act, 2002 ('the Act' for short) .</p> <p>3. Shri Gopal Subramaniam, learned Senior Advocate assailing the impugned order made the following submissions:</p> <ul style="list-style-type: none"> • that the petitioner is carrying on the business under the 'Market Place Model'. The allegation made in the compliant filed before CCI is, petitioner provides 'deep discounts' to 'preferential sellers' like Cloudbtail India and Appario Retail. It provides incentives to 'preferred sellers' to sell their products on its platform to the detriment of non-preferred sellers. • During 2018, a complaint was lodged by the All India Online Vendors Association ('AIOVA' for short) to the CCI against respondent No.3-Flipcart Internet Private Limited and another. Though petitioner was not named in the complaint, it was invited to participate in the proceedings by the CCI to understand the nuances of online retail sector. In the said proceedings, respondent No.3 as well as petitioner have been absolved of violation of Section 4 of the Act; • Confederation of All India Traders ('CAIT' for short) have filed a writ petition in Delhi High Court and another writ petition in Jodhpur High Court; • In W.P.(C) No.9332/2018 filed by CAIT in Delhi High Court against Directorate of Enforcement, respondent No.3 and another, the Court disposed of the writ petition by order

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			<p>dated 05th September 2018 by recording the submissions of learned advocate for Directorate of Enforcement that respondents No.2 and 3 therein were located in Bengaluru and there is a possibility that the issue has been examined by the concerned authorities having jurisdiction in respect of Bengaluru and if any inquiry was warranted, steps would be taken by the concerned authorities;</p> <ul style="list-style-type: none"> • In the writ petition filed by the Telecom Wachdog before the Delhi High Court in W.P.(C) No.7907/2018 against Directorate of Enforcement, Flipkart India Ltd. and the petitioner, a direction was sought against the Directorate of Enforcement to investigate into the FDI violations of Press Note No.3/2016 by petitioner through companies such as Prione Business Services Pvt. Ltd and Cloudtail India. The said writ petition has been disposed of by the Delhi High Court by recording paragraph No.5 of Counter Affidavit filed by the Union of India stating that investigation under FEMA, 1999 was in progress; • CAIT filed W.P No. (C).14400/2019 in Jodhpur High Court seeking a direction against Union of India, Ministry of Commerce and Industry, to take immediate measure to ensure that e-commerce entities do not circumvent FDI policies. A prayer for interim direction by way of injunction against petitioner from indulging in deep discounting was also made in the said writ petition; • Not being satisfied, the CAIT have now got Delhi Vyapar Mahasangh to file instant complaint before the CCI. To substantiate this contention, Shri. Gopal Subramanium placed reliance on the Demand Draft for Rs.50,000/- deposited in the CCI by the complainant and pointed out that the demand draft has been purchased by CAIT. He submitted that instant complainant and petitioner in the writ petitions before Delhi High Court and Jodhpur High Court are one and the same. <p>4. He placed reliance on the decisions of the Hon'ble Supreme Court in Competition Commission of India Vs. Bharti Airtel Limited and others and Competition Commission of India Vs. Steel Authority of India Limited and another and submitted that in view of the order passed by the Delhi High Court in</p> <p>W.P.No.7907/2018 (Telecom Watchdog Vs. UOI & Others)</p>

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			<p>recording submission of UOI that UOI has initiated investigation under FEMA 1999 against petitioner, the impugned order passed by CCI is unsustainable.</p> <p>5. Adverting to notification dated 17th October 2019 notifying the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, Shri. Subramaniam submitted that table in Schedule I contains details of e-commerce business model in clear terms. Should there be any violation of FEMA Act, Rule or Regulation, petitioner shall be liable for penalty under Section 13 of the FEMA Act. Since the matter is already seized before the Central Government to investigate into violation of FEMA, keeping in view the law laid down in Bharti Airtel Limited and Steel Authority of India cases, the CCI ought to have issued notice to the petitioner to explain it's stance and awaited outcome of such investigation by the Central Government. He stressed this point by strongly relying on the order dated 06.11.2018 passed by the CCI in the case of AIOVA Vs. Flipkart India Private Limited and another, wherein the petitioner was invited and called upon to explain the nuances of e-commerce business. He pointed out that in the instant case, the complainant has annexed a portion of the copy of said order to the complaint. However, the CCI has not chosen to issue notice to petitioner to put-forth it's case.</p> <p>6. Shri. Raghavan, learned Senior Advocate for the complainant opposing the petition, in substance submitted that in the case of Bharti Airtel Limited, the TRAI and TDSAT were regulating authorities and therefore, there is a classic distinction between the case on hand and said two authorities. An order under Section 26(1) of the Act does not meet the petitioner with any civil consequences. By the said order, the CCI has merely directed the Director General to hold an investigation. The CCI has the option to close the complaint after receiving report by the Director General. Otherwise, the CCI will have to pass orders only after hearing the petitioner. Therefore, no prejudice would be caused to the petitioner by the impugned order.</p> <p>7. Shri Aditya Sondhi, learned Senior Advocate for respondent No.4 submitted that order under Section 26(1) of</p>

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			<p>the Act is an administrative order. Therefore, no writ petition is maintainable. With regard to judgment in Star India Private Limited. Vs. Competition Commission of India & others cited by petitioner, he submitted that there is no parallel regulation. Therefore, no interference is required in this case.</p> <p>8. Shri Dhyan Chinnappa for respondent No.3, Flipkart Internet Private Limited submitted that jurisdiction of High Court under Article 226 of the Constitution of India has been upheld by the Hon'ble Supreme Court in paragraph 120 of Bharti Airtel Limited . Unless a prima facie case is made out, investigation under Section 26(1) of the Act cannot be ordered. The impugned order does not disclose jurisdictional facts and satisfaction of CCI with regard to prima facie case.</p> <p>9. Shri Harish B.N., for the CCI defending the impugned order submitted that all that the Commission has directed is to conduct an investigation by the Director General. CCI, after a careful examination of records has opined that there exists a prima facie case against petitioner and recorded that there appears to be exclusive partnership between smart phone manufacturers and e-commerce platforms. This adversely affects e-commerce business in entire country. Therefore, investigation order is just and appropriate.</p> <p>10. I have carefully considered rival submissions and perused the records.</p> <p>11. Though elaborate arguments were addressed, it was requested by learned Senior advocates on both sides that since counter affidavits have not been filed on behalf of respondents, matter may be heard for preliminary hearing and interim order.</p> <p>12. Indubitable facts of the case are, complainant has</p>

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			<p>annexed the order dated 06.11.2018, passed by the CCI in the case of AIOVA Vs. Flipkart India Private Limited and another. The prayer made in the instant complaint is inter alia for a investigation by the Director General and for a direction to petitioner to desist from indulging in anti competitive activities under Sections 3 & 4 of the Act. CCI has recorded in paragraph No.15 of impugned order that there is no need to deliberate with regard to Section 4 of the Act. It has opined in paragraph No.27 that there exists a prima facie case which requires investigation to determine if petitioner has violated Section 3(1) r/w Section 3 (4) of the Act and directed investigation by the Director General.</p> <p>13. Shri. Gopal Subramaniam is right in his submission that notification dated 17th October 2019 notifying the FEMA Rules contain description of e-commerce in detail. Item No.15.2.3 in the table contains details of e-commerce. Section 13 of the FEMA Act provides for penalty for violation of FEMA Act, Rules and Regulations. Admittedly, Union of India have stated before the Delhi High Court in their affidavit filed in</p> <p>W.P.No.(C)7907/2018 (Telecom Watchdog Vs UOI and others) that the Department has already registered and initiated investigation under the provisions of FEMA Act, 1999 and the investigation is in progress. In view of penal provision under the FEMA Act and undertaking given by the Union of India, in the opinion of this Court, ratio of Bharti Airtel Limited is applicable to the case on hand with regard to jurisdictional facts.</p> <p>14. Though no definite opinion can be expressed at this stage with regard to legal malice urged by Shri. Gopal Subramaniam that complainant has been set up by CAIT, it is not disputed by Shri Adithya Sondhi, that demand draft has been purchased by CAIT. This admission, prima facie, leads to an inference that CAIT and the complainant may have joined hands. The CCI having invited the petitioner in AIOVA's case and having recorded a finding in its favour in November 2018, has chosen not to call upon the petitioner to put-forth it's case. This assumes significance because, CCI'S order in AIOVA case has been referred to in the instant complaint and a portion of the order has also been annexed.</p>

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			<p data-bbox="651 315 1501 472">15. The contention urged on behalf of the petitioner that CCI has imagined existence of 'some agreement' merits consideration. I say so because, the agreement referred to by</p> <p data-bbox="651 521 1501 633">Shri K.G.Raghavan is an agreement between the petitioner and the seller of the product and the same was on record before the CCI.</p> <p data-bbox="651 768 1501 1126">16. Though agreement relied upon by Shri Raghavan has been referred by the CCI in paragraph No.9 of impugned order, it is recorded in paragraphs No.22 and 23 that there 'appears' to be exclusive partnership between smart phone manufacturers and e-commerce platforms. This finding is based on allegations made in the complaint. These findings have been strongly assailed by Shri Gopal Subramaniam contending that CCI has imaged 'some agreement' and directed an enquiry.</p> <p data-bbox="651 1261 1501 1541">17. The Division Bench of Bombay High Court in Star India Pvt.Ltd. at paragraph No.83 of the order has held that CCI ought to have formed a prima facie opinion that there exists an agreement between the parties. In the case on hand, what is recorded is CCI's inference that there 'appears' to exist an agreement without there being any material on record.</p> <p data-bbox="651 1675 1501 1742">18. In view of the above, matter requires consideration. Hence, the following:</p> <p data-bbox="651 1794 759 1827">ORDER</p> <p data-bbox="651 1877 842 1910">(i) Issue Rule.</p> <p data-bbox="651 1960 1501 2072">(ii) Order dated 13.01.2020 passed by the Competition Commission of India in case No.40/2019 shall remain stayed.</p>

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			(iii) Respondents shall file statement of objections/counter in eight weeks.

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