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

Pronounced on: April 11, 2017

\+ **W.P.(C) 1416/2016 & CM No.6194/2016 (*stay)***

SOMI CONVEYOR BELTINGS LTD. & ANR. ..... Petitioners
Through: Mr.T.S. Ramanathan, Adv.

Versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr.Ravi Prakash, CGSC with Ms.Rimali Batra, Adv. for R-1.
Mr.Sanjay Jain, ASG with Mr.Prashanto Chandra Sen, Mr.Prasenjit Sen, Mr.Shivanshu Singh and Mr.Udyan Verma, Mr.Vidur Mohan, Advs. for CCI/R-2 & 3.

\+ **W.P.(C) 1969/2016**

PREMIER RUBBER MILLS ..... Petitioner
Through: Mr.T.S. Ramanathan, Adv.

Versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr.Ravi Prakash, CGSC with Ms.Rimali Batra, Adv. for R-1.
Mr.Anupam Singh, Adv. for CCI/R-2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE JAYANT NATH

J U D G M E N T

: Ms.G.ROHINI, CHIEF JUSTICE

1. These two writ petitions have been filed with a common prayer to declare Regulation 35 and the proviso to Regulation 37(1) of the Competition Commission of India (General) Regulations, 2009 as well as Regulation 6 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 as illegal and unconstitutional.

2. As could be seen from the material available on record, the Competition Commission of India (CCI) passed an order dated 06.11.2013 under Section 26(1) of the Competition Act, 2002 recording a prima facie opinion that the acts and conduct of the Opposite Parties (OP) mentioned therein is in contravention of Section 3 of the Act and thus directing the Director General (DG) to make an exhaustive investigation into the allegations. The petitioner No.1 in W.P.(C) No.1416/2016 i.e. Somi Conveyor Beltings Ltd. as well as the petitioner in W.P.(C) No.1969/2016 i.e. Premier Rubber Mills have been shown as OP-13 and OP-11 respectively. The allegation is that the Opposite Parties have been indulging in bid- rigging cartel in the market for Conveyor Belt Sector in India and indulged in exchange of the commercial and confidential price sensitive information among themselves prior to submission of bids.

3. The petitioners in both the writ petitions claim to be the manufacturers of conveyor belts. They were served with the notice dated 27.05.2015 issued by the Director General, Competition Commission of India/respondent No.3 herein calling upon to furnish the information/documents specified therein stating that in the investigation being conducted in Case No.DG/CC/IW/1/33/2013 in pursuance of the order of the Competition Commission of India under Section 26(1) of the Competition Act, 2002 (hereinafter referred to as the Act), they are arrayed as the opposite parties and that the information/documents were called for in exercise of the duties and powers conferred under Section 42(2) read with Section 36(2) of the Act.

4. In response to the same, the petitioners vide letters dated 10.06.2015 and 12.06.2015 respectively furnished the information on certain points and sought extension of time at least by 60 days for collection of information on other points. By letter dated 18.06.2015, the respondent No.3 while furnishing a copy of the order dated 06.11.2013 passed under Section 26(1) of the Act called upon the petitioners to submit their explanation as to why their act and conduct should not be treated in contravention of Section 3 of the Act latest by 30.06.2015. It was also stated that no further extension could be granted. The petitioners, in their replies though furnished some more information, requested to grant further time to furnish the balance information and to enable them to effectively participate in the enquiry.

5. Subsequently, the petitioner made an application dated 08.12.2015 through its counsel seeking permission to inspect the record/documents forming part of the record in Suo Moto Case No.6/2013 regarding cartelisation in the conveyor belt sector. It is pleaded in the said application that the Managing Director of the petitioner No.1, Sh.O.P. Bhansali who is having technical knowledge in his field of operations and business has difficulty in communicating and conversing in English and since his knowledge of English and his ability to communicate in English is very limited, he has requested his Advocate to inspect the files on his behalf and brief him on the contours of the present inquiry and investigation. In terms of Regulations 37 and 50 of the Competition Commission of India (General) Regulations, 2009, requisite fee was also enclosed and a request was made to permit the petitioner's Advocate to inspect the files so that Sh.Bhansali can effectively participate in the summons issued to him. The earlier request

to provide all the relevant materials, documents, information, etc. on the basis of which the *prima facie* order dated 06.11.2013 has been passed against the petitioner No.1 along with a copy of all the meetings of the Commission/orders of the Commission in the said case are also required to be furnished. The said request was followed by reminders dated 08.12.2015, 11.12.2015 in which while explaining the reasons for seeking permission to inspect the records, the details of the information required have also been mentioned.

6. On 18.12.2015, the respondent No.3 issued a notice under Section 36(2) read with Section 41(2) of the Act calling upon the petitioner No.1 to submit its reply and clarification in respect of the copies of Ex.15 containing print out of e-mails relating to its company, which contained the details of discussion between the company and its competitor bidders regarding price and quantity in respect of tenders issued by PSUs/customers for supply of conveyor belts. In response to the same, the Managing Director of the petitioner No.1 filed his affidavit before CCI dated 27.12.2015. Ultimately by the impugned notice dated 11.01.2016, petitioner No.1 was informed that its request for inspection of records and supply of certified copies of documents cannot be acceded to since the said information based on which *prima facie* order for investigation has been passed by CCI is confidential in terms of the provisions of the Competition Act read with the relevant Regulations. Thereafter, by letter dated 27.01.2016, the respondent No.3 while providing some of the documents called upon the petitioner No.1 to submit its reply by 08.02.2016 by way of an affidavit signed by the Managing Director of the petitioner No.1 company.

7. Hence, the present writ petitions contending that the action of the respondents in denying access to documents, evidence, information, etc. in possession of CCI and the Director General on the ground of confidentiality is arbitrary and illegal. It is contended by the petitioners that the entire investigation and inquiry by CCI pursuant to the order dated 06.11.2013 is without any jurisdiction and legal basis and therefore, the order dated 06.11.2013 and the consequential investigation is liable to be set aside. It is also contended that there is no information at all against the petitioners to form a *prima facie* opinion required under the Act and that the order dated 06.11.2013 has not specified any reasons to hold a *prima facie* case qua the petitioners.

8. So far as the validity of the impugned Regulations is concerned, the contention is that the same are arbitrary and in violation of Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution of India to the extent that they do not provide the information/documents in the possession of CCI and Director General to the parties to an inquiry and investigation to present their views and defend their position. Placing reliance upon the judgment of this Court in LPA No.733/2014, it is contended that the investigation by the Director General would amount to commencement of trial/inquiry and therefore, the parties are entitled to defend themselves and that the information available with the Director General cannot be denied to a person who is alleged to have contravened the provisions of an Act on the ground of confidentiality. The action of the respondents in denying access to the petitioner to the information/documents available with the Director General is contrary to the very scheme of the Act which contemplates that the parties

have a right to present their views before the Director General and which will be taken into consideration for submitting the report of the Director General. The impugned Regulations to the extent of depriving the fundamental rights of the parties to have access of information are, therefore, liable to be declared as unconstitutional.

9. It is also contended that the impugned Regulations are not in conformity with the provisions of the Act since Section 36 mandates that CCI shall be guided by the principles of natural justice. The further contention is that Section 57 of the Act mandates that information relating to any enterprise shall not disclosed without the previous permission in writing of the enterprise which means that there is no absolute embargo to furnish the information. Confidentiality under Regulation 35 and the proviso to Regulation 37 and Regulation 6 cannot override the mandate under Section 57. Hence, impugned Regulations are *ultra vires* Section 57 apart from being in violation of Section 36.

10. On facts, it is contended that the allegations being formation of cartel, it is necessary to provide the petitioner with all the documents, witness statement, etc. on record. Hence, an opportunity of inspection should have been granted at the very first instance.

11. At the outset, we may refer to Section 36 and Section 57 of the Competition Act, 2002 which read as under:

> "**36. Power of Commission to regulate its own procedure**. - (1) In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other pro visions of this Act and of any rules made by the

Central Government, the Commission shall have the powers to regulate its own procedure.

(2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

> (a) summoning and enforcing the attendance of any person and examining him on oath;
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> (b) requiring the discovery and production of documents;
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> (c) receiving evidence on affidavit;
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> (d) issuing commissions for the examination of witnesses or documents;
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> (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such record or document from any office.

(3) The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.

(4) The Commission may direct any person:

> (a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
>
> (b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in

relation to the trade carried on by such person, as may be required for the purposes of this Act.]

57. Restriction on disclosure of information. - No information relating to any enterprise, being an information which has been obtained by or on behalf of 85[the Commission or the Appellate Tribunal] for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force."

12. In exercise of the power conferred by Section 64 of the Competition Act, 2002, the CCI made the Competition Commission of India (General) Regulations, 2009 (for short 'CCI General Regulations, 2009'). The impugned Regulation 35 and Regulation 37(1) may be reproduced hereunder:

"35. **Confidentiality.** – (1) The Commission shall maintain confidentiality of the identity of an informant on a request made to it in writing.

(2) Any party may submit a request in writing to the Commission or the Director-General, as the case may be, that a document or documents, or a part or parts thereof, be treated confidential.

(3) A request under sub-regulation (2) may be made only if making the document or documents or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury.

(4) A request under sub-regulation (2) shall be accompanied with a statement setting out cogent reasons for such

treatment and to the extent possible the date on which such confidential treatment shall expire.

(5) Where such document or documents, or a part or parts thereof, form part of the party's written submissions, the party shall file a complete version with the words "restriction of publication claimed" in red ink on top of the first page and the word 'confidential' clearly and legibly marked in red ink near the top on each page together with a public version, which shall not contain such document or documents or part or parts thereof.

(6) The public version of such written submissions shall be an exact copy of the confidential version with the omissions of the confidential information being indicated in a conspicuous manner, as stipulated in sub-regulation (5).

(7) [*omitted by notification dated 31.03.2011*]

(8) On receipt of a request under sub-regulation (2), the Commission or the Director General, as the case may be, if satisfied, shall direct that the document or documents or a part or parts thereof shall be kept confidential for the time period to be specified:

Provided that the Commission or the Director General, as the case may be, if satisfied, may give such confidential treatment to any other information or document or part thereof also in respect of which no request has been made by the party which has furnished such information or the document.

(9) The Commission or the Director-General, as the case may be, may also consider the following while arriving at a decision regarding confidentiality: –

(a) the extent to which the information is known to outside public;

(b) the extent to which the information is known to the employees, suppliers, distributors and others involved in the party's business;

(c) the measures taken by the party to guard the secrecy of the information;

(d) the ease or difficulty with which the information could be acquired or duplicated by others.

(10) In case the Director-General has rejected the request of the party made under sub-regulation (2), the party may approach the Commission for a decision regarding confidential treatment.

(11) Where the Director-General or the Commission has rejected the request for confidential treatment of a document or documents or a part or parts thereof and has informed the party of its intention, such document or documents or part or parts thereof shall, subject to sub-regulation (13), not be treated as confidential.

(12) [*omitted by notification dated 31.03.2011*]

(13) The document or documents or a part or parts thereof that have been granted confidential treatment under this regulation shall be segregated from the public record and secured in a sealed envelope or any other appropriate container, bearing the title, the docket number of the proceeding, the notation "confidential record under regulation 35" and the date on which confidential treatment expires.

(14) If the Commission includes in any order or decision or opinion, information that has been granted confidential treatment under this regulation, the Commission shall file two versions of the order or decision or opinion. The public version shall omit the confidential information that appears in the complete version, be marked "subject to confidentiality requirements under regulation 35" on the first page, shall be served upon the parties, and shall be included

in the public record of the proceeding. The complete version shall be placed in the confidential record of the proceeding as provided in sub-regulation (13).

(15) Any person or party, including any officer or employee appointed by the Commission under sub-section (1) of section 17 of the Act and any expert or professional engaged by the Commission under sub-section (3) of section 17 of the Act or any expert called upon to assist the Commission under sub-section (3) of section 36 of the Act privy to the contents of the document or documents or a part or parts thereof that have been granted confidential treatment under this regulation shall maintain confidentiality of the same and shall not use or disclose or deal with such confidential information for any other purpose other than the purposes of the Act or any other law for the time being in force:

Provided that breach of confidentiality by any officer or employee of the Commission appointed under sub-section (1) of section 17 of the Act shall constitute a ground for initiation of disciplinary proceedings under the relevant rules or regulations, as the case may be:

Provided further that breach of confidentiality by any expert or professional engaged by the Commission under sub-section (3) of section 17 of the Act or any expert called upon to assist the Commission under sub-section (3) of section 36 of the Act shall be sufficient ground for termination of the engagement or contract, as the case may be."

37. **Inspection and certified copies of documents. - (1)** Subject to the provisions of section 57 and regulation 35, a party to any proceeding of an ordinary meeting of the Commission may on an application in writing in that behalf, addressed to the Secretary, be allowed to inspect or obtain copies of the documents or records submitted during proceedings on payment of fee as specified in regulation:

> Provided further that no request for inspection or certified copies of internal documents shall be allowed.
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> xxx xxx xxx"

13. We may also refer to Regulation 6 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (for short 'CCI Lesser Penalty Regulations, 2009').

> "**6. Confidentiality. -** Notwithstanding anything contained in the Competition Commission of India (General) Regulations, 2009, the Commission shall treat as confidential the identity of the applicant or the information obtained from it and shall not disclose the identity or the information obtained unless -
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> (a) the disclosure is required by law; or
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> (b) the applicant has agreed to such disclosure in writing; or
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> (c) there has been a public disclosure by the applicant."

14. As is evident from the material available on record, suo moto proceedings have been initiated under Section 26(1) of the Act and an order has been passed by CCI directing the Director General to investigate whether there is any contravention of Section 3 of the Act. The report by the Director General is yet to be submitted. Though the petitioners in the present petitions have challenged the validity of certain statutory Regulations, it is apparent that their main grievance is regarding the letter dated 11.01.2016 whereby the CCI rejected the request of the petitioners for inspection of the records and supply of certified copies of the documents. A perusal of the letter dated 11.01.2016 shows that the request of the

petitioners was rejected on the ground that (i) the information sought is confidential in terms of the provisions of the Act and the Regulations made thereunder and (ii) the matter has been referred to the Director General for investigation and the same is currently pending, thus, the request may be referred to the Director General directly in terms of the provisions of CCI (General) Regulations, 2009.

15. As held in ***Competition Commission of India v. SAIL;*** **(2010) 10 SCC 744,** formation of a *prima facie* opinion departmentally, i.e., by the Director General appointed by the Central Government to assist CCI does not amount to an adjudicatory function but is merely of administrative nature. At that stage, it does not condemn any person and therefore, application of *audi altrem partem* is not called for. The relevant excerpts from CCI Vs. SAIL may be reproduced hereunder for ready reference:-

> "31. xxx xxx xxx
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> (1) xxx xxx xxx
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> (*2*) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor can any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter.
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> However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the party(s) concerned to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion

without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17(2) of the Regulations to invite not only the information provider but even "such other person" which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be "preliminary conference", for whose conduct of business the Commission is entitled to evolve its own procedure.

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37. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53-A of the Act.

38. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On

the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

39. Wherever, in the course of the proceedings before the Commission, the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable.

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"69. In light of the above principles, let us examine whether in terms of Section 26(1) of the Act read with the Regulations in force, it is obligatory upon the Commission to issue notice to the parties concerned (more particularly the affected parties) and then form an opinion as to the existence of a prima facie case, or otherwise, and to issue direction to the Director General to conduct investigation in the matter.

70. At the very outset, we must make it clear that we are considering the application of these principles only in light of the provisions of Section 26(1) and the finding recorded by the Tribunal in this regard.

71. The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a prima facie case for issuance of direction to the Director General to conduct an investigation. This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received

by it. Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or any other person is required to be issued at this stage. In contradistinction to this, when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, the Central Government, the State Government, statutory authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Sections 26(7) or 26(8) of the Act, as the case may be. This obviously means that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and we see no compelling reason to read into the provisions of Section 26(1) the requirement of notice, when it is conspicuous by its very absence. Once the proceedings before the Commission are completed, the parties have a right to appeal under Section 53-A(1)(*a*) in regard to the orders termed as appealable under that provision. Section 53-B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or setting aside the direction, decision or order appealed against.

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78. Cumulative reading of these provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion.

79. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural

justice. Furthermore, that non-compliance therewith, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of compliance with the principles of natural justice in light of the above-noticed principles.

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83. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass ex parte ad interim injunction orders immediately in terms of Section 33 of the Act, while granting post-decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance with the principles of natural justice.

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91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (the Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself)

does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice or hearing is not contemplated under the provisions of Section 26(1) of the Act.

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93. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision-making process. That is the precise reason that the legislature has used the word "direction" to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission.

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97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view

> should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned."

16. It is also a settled principle of law that the requirement of principles of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and the consequences that may visit a person after such enquiry from out of the decision pursuant to such enquiry. [Vide : ***Natwar Singh Vs. Director of Enforcement;*** **(2010) 13 SCC 255**]. While observing that the duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations, it has further been held in ***Natwar Singh Vs. Director of Enforcement*** *(supra)*:

> "26. Even in the application of the doctrine of fair play there must be real flexibility. There must also have been caused some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth. Can the courts supplement the statutory

procedures with requirements over and above those specified? In order to ensure a fair hearing, courts can insist and require additional steps as long as such steps would not frustrate the apparent purpose of the legislation.

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29. It is thus clear that the extent of applicability of the principles of natural justice depends upon the nature of inquiry, the consequences that may visit a person after such inquiry from out of the decision pursuant to such inquiry.

30. The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognised by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 65 : (1955) 1 SCR 941] . However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future (see R. v. Secy. of State for Home Deptt., ex p H [1995 QB 43 : (1994) 3 WLR 1110 : (1995) 1 All ER 479 (CA)]).

31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice

requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute.

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34. As noticed, a reasonable opportunity of being heard is to be provided by the adjudicating authority in the manner prescribed for the purpose of imposing any penalty as provided for in the Act and not at the stage where the adjudicating authority is required merely to decide as to whether an inquiry at all be held into the matter. Imposing of penalty after the adjudication is fraught with grave and serious consequences and therefore, the requirement of providing a reasonable opportunity of being heard before imposition of any such penalty is to be met. In contradistinction, the opinion formed by the adjudicating authority whether an inquiry should be held into the allegations made in the complaint are not fraught with such grave consequences and therefore the minimum requirement of a show-cause notice and consideration of cause shown would meet the ends of justice. A proper hearing always include, no doubt, a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.

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> 48. On a fair reading of the statute and the Rules suggests that there is no duty of disclosure of all the documents in possession of the adjudicating authority before forming an opinion that an inquiry is required to be held into the alleged contraventions by a noticee. Even the principles of natural justice and concept of fairness do not require the statute and the Rules to be so read. Any other interpretation may result in defeat of the very object of the Act. Concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework.
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> 49. Hegde, J. speaking for the Supreme Court propounded: "In other words, they (principles of natural justice) do not supplant the law of the land but supplement it" (see A.K. Kraipak v. Union of India [(1969) 2 SCC 262]). Its essence is good conscience in a given situation; nothing more but nothing less (seeMohinder Singh Gill v. Chief Election Commr. [(1978) 1 SCC 405])."

17. In the light of the settled principles of law noticed above, we are of the view that the respondents cannot be held to have committed any error in rejecting the request of the petitioners for inspection of the documents.

18. It may also be added that Section 26 of the Act provides for the procedure for inquiry by CCI under Section 19 i.e., inquiry into anti competitive agreements and abuse of an enterprise of its dominant position. Section 36 further empowers CCI to regulate its own procedure for the purpose of discharging its functions under the Act however, CCI shall be guided by the principles of natural justice and in respect of the matters specified in sub section 2 of Section 36 relating to recording evidence, CCI is conferred with the same powers as are vested in a Civil Court under CPC,

1908 while trying a Suit. However, Section 57 of the Act makes it clear that no information relating to any enterprise being information which has been obtained by CCI for the purpose of the Act shall be disclosed otherwise than in compliance with or for the purposes of the Act or any other law for the time being in force. Further, Regulation 35 of General Regulations 2009 expressly provides that the commission shall maintain confidentiality of the identity of an informant, a document or documents or a part thereof on a request made by the informant. Such confidential treatment may be given by the CCI or DG, on being satisfied, to any other information or document or part thereof also in respect of which no request has been made by the informant or the party which has furnished such information or document. Though Regulation 37 enables a party to the proceedings to inspect the documents or records submitted during proceedings or to obtain copies of the same by making an application accompanied with the specified fees, the same is subject to the restriction on disclosure of information as provided under Section 57 of the Act. Thus, it is clear that the entitlement of a party to the proceedings to inspect the documents or to obtain copies of the same is not absolute and it is always open to CCI to reject permission for inspection or furnishing copies if it is of the view that the documents/information require confidential treatment.

19. Regarding the validity of the subordinate legislation is concerned, the law is well settled that there is presumption in favour of constitutionality or validity and the burden is upon him who attacks it to show that it is invalid. However, a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent

Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made or that it is contrary to some other statute.

20. Since the power to make subordinate legislation is derived from the enabling Act, it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. As held in ***Supreme Court Employees' Welfare Association Vs. Union of India***; **(1989) 4 SCC 187**, the validity of a subordinate legislation is open to question if it is ultra vires the constitution or the governing Act or repugnant to the general principles of the laws of the land or is so arbitrary or unreasonable that no fair minded authority could ever have made it. It was also held that the rules are liable to be declared invalid if they are manifestly unjust or oppressive or outrageous or directed to be unauthorized and/or violative of the general principles of law of the land or so vague that it cannot be predicted with certainty as to what it prohibited or so unreasonable that they cannot be attributed to the power delegated or otherwise disclose bad faith. It was further explained by a Constitution Bench of the Supreme Court in ***Shree Sitaram Sugar Company Ltd. v. Union of India***; **(1990) 3 SCC 223** that the power delegated by statute is limited by its terms and subordinate to its objects and that the delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. It was also added that all the decisions of the delegate, whether characterized as legislative or administrative or quasi

judicial, must be in harmony with the constitution and other laws of the land and that they must be reasonably related to the purposes of the enabling legislation.

21. Regarding the question as to whether arbitrariness can also be a ground to question the subordinate legislation, it was observed by the Supreme Court in ***Indian Express Newspapers v. Union of India;*** **(1985) 1 SCC 641**:

> "77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.
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> 78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur [AIR 1980 SC 882 : (1980) 2 SCR 1111 : (1980) 2 SCC 295], Rameshchandra Kachardas Porwal v. State of Maharashtra [(1981) 2 SCC 722 : AIR 1981 SC 1127 : (1981) 2 SCR 866] and in Bates v. Lord Hailsham of St. Marylebone [(1972) 1 WLR 1373 : (1972) 1 A11 ER 1019 (Ch D)]. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into

consideration, etc, etc. On the facts and circumstances of a case, a subordinate legislation may be struck down a arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant."

22. Reiterating the above noticed principles of law, the grounds upon which a subordinate legislation can be challenged are summed up in ***State of T.N. v. P.Krishnamurthy & Ors.;*** **(2006) 4 SCC 517** as under:

(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest Arbitrariness/unreasonableness (to an extent where the Court might well say that the legislature never intended to give authority to make such rules).

23. As held in the above decisions, though delegated legislation can also be challenged as being unreasonable, the unreasonableness is not to be judged in the same standard as unreasonableness of administrative action.

The delegated legislation can be struck down unreasonable only if it is manifestly arbitrary or if so unreasonable that Parliament never intended to confer such power on the Regulator.

24. For the aforesaid reasons, we are unable to hold that the impugned regulations are either arbitrary or unreasonable, much less, the same are contrary to the parent Act.

25. Accordingly, we uphold the validity of the impugned Regulations and the writ petitions shall stand dismissed.

CHIEF JUSTICE

JAYANT NATH, J.

APRIL 11, 2017
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