IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 11.12.2018
Pronounced on: 10.04.2019

\+ **W.P.(C) 11467/2018, CM APPL. 44376-44378/2018**
MAHINDRA ELECTRIC MOBILITY LIMITED AND ANR.
..... Petitioners
versus
COMPETITION COMMISSION OF INDIA AND ANR.
..... Respondents

\+ **W.P.(C) 6610/2014**
MAHINDRA & MAHINDRA LTD. ..... Petitioner
versus
COMPETITION COMMISSION OF INDIA & ANR. .... Respondents

\+ **W.P.(C) 6634/2014, CM APPL. 20409/2014**
TATA MOTORS LIMITED & ANR ..... Petitioners
versus
COMPETITION COMMISSION OF INDIA ..... Respondent

\+ **W.P.(C) 7087/2014, CM APPL. 16614/2014, CM APPL. 39827/2018**
GENERAL MOTORS INDIA PRIVATE LIMITED ..... Petitioner
versus
COMPETITION COMMISSION OF INDIA & ORS .... Respondents

\+ **W.P.(C) 7121/2014, CM APPL. 16680/2014, CM APPL. 31959/2018**
MERCEDES BENZ INDIA PVT LTD. ..... Petitioner
versus
THE COMPETITION COMMISSION OF INDIA ..... Respondent

\+ **W.P.(C) 7186/2014, CM APPL. 16889/2014**
SUPER CASSETTES INDUSTRIES PVT. LTD ..... Petitioner
versus
UNION OF INDIA & ORS. ..... Respondents

\+ **W.P.(C) 7306/2014, CM APPL. 17096/2014**
SKODA AUTO INDIA PVT. LTD. ..... Petitioner
versus
UNION OF INDIA & ANR. ..... Respondents

\+ **W.P.(C) 7321/2014, CM APPL. 17118/2014**
HONDA CARS INDIA LTD ..... Petitioner
versus
UNION OF INDIA & ANR. ..... Respondents

+ **W.P.(C) 7327/2014, CM APPL. 17125/2014**

VOLKSWAGEN INDIA PVT. LTD. ..... Petitioner

versus

UNION OF INDIA & ANR. ..... Respondents

+ **W.P.(C) 7334/2014, CM APPL. 17158/2014**

HINDUSTAN MOTORS LIMITED ..... Petitioner

versus

COMPETITION COMMISSION OF INDIA & ANR. ..... Respondents

+ **W.P.(C) 7417/2014, CM APPL. 17608/2014**

FIAT INDIA AUTOMOBILES LTD. ..... Petitioner

versus

UNION OF INDIA & ANR ..... Respondents

+ **W.P.(C) 7638/2014**

BMW INDIA PVT LTD. ..... Petitioner

versus

THE COMPETITION COMMISSION OF INDIA & ANR..... Respondents

Present: Mr. Arvind K. Nigam, Sr. Advocate with Mr. Sameer Gandhi, Mr. Mikhil Sharda, Mr. Mehtaab Singh Sandhu & Mr. Pratishth Kaushal, Advs. for TATA Motors.

Mr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Arvind. K. Nigam, Sr. Advocate, Ms. Ruby Singh Ahuja, Mr. Shravan Sahny, Ms. Ashwati, Mr. Nakul Gandhi, Ms. Hemangini, Ms. Krithika Ramesh & Mr. Nitin Nair, Advs. for TATA Motors.

Mr. Amit Sibal, Sr. Advocate with Mr. Aakash Bajaj, Mr. Sanjeev Kapoor, Mr. Vinay Tripathi & Mr. Ambar Bhushan, Advocates, for Mahindra Electric Mobility Ltd. & M&M Ltd.

Mr. Sanjay Jain, Sr. Advocate with Mr. Vaibhav Gaggar, Ms. Neha Mishra, Ms. Aayushi Sharma, Mr. Vidur Mohan, Mr. Adarsh Chamoli, Ms. Niti Richhariya, Mr. Soham Goswami, Mr. Uvraj Sharma, Advs. for Respondent/CCI.

Mr. V. Lakshmikumaran, Mr. Aditya Bhattcharya & Ms. Aishwarya Dubey, Advs. for Honda Motors.

Mr. Neeraj Kishan Kaul, Sr. Advocate, Mr. Arun Kathpalia, Sr. Advocate. with Mr. Akshat Kulshrestha, Ms. Rajshree Sharma, Ms. Bani Brar & Mr. Siddharth Nath, Advs. for Mercedes Benz.

Mr. Abhishek Malhotra & Mr. Karan Kapoor, Advs. for Hindustan Motors.

Mr. Neel Mason, Ms. Sanyukta Banerjie & Mr. Vishesh Kumar, Advs. for Super Cassettes Industries Pvt. Ltd.

Mr. Anand S. Pathak, Mr. Amit K, Mishra, Mr. Akshat Hansaria, Mr. Avinash Amarnath, Mr. Pavan Bhushan, Sh. Abhinav Meena & Mr. Ujwala Uppalusi, Advs. for General Motors.

Ms. Pranaya Goyal, Mr. Nikhil Ranjan, Ms. Pratyushi Mehta, Advs. for

Fiat India Automobiles.
Mr. Ravi Prakash, Mr. Varun Pathak & Mr. Farmanali, Advs. in W.P.(C) 6634/2014.
Mr. Diwakar Maheshwari, Mr. Shreyas Edupuganti, Advs for BMW India.
Mr. Gaurang Kanth, Advocate. with Mr. Aman Singh Bakshi, Advs. for UOI.
Mr. Bhagvan Swarup Shukla, CGSC with Mr. Kamaldeep & Mr. Shravan Kumar Shukla, Advs. for UOI.
Mr. Ashim Sood, CGSC with Ms. Rhythm. B., Advocate, for Respondent No.1 in W.P.(C) 7321/2014.
Ms. Monika Arora with Sh. Harsh Ahuja, Advocates, for UOI, in W.P.(C) 7306/2014.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

MR. JUSTICE S. RAVINDRA BHAT
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1. In all these proceedings, under Article 226 of the Constitution of India, the petitioners challenge various provisions of the Competition Act, 2002 (hereafter "the Act"). The specific challenge is to provisions of Sections 22(3), 27(b), 53A, 53B, 53C, 53D, 53E, 53F and 61 ("the impugned provisions" hereafter) of the Act and the notification dated 31.03.2011 amending Regulation 48 (1) of the Competition Commission of India (General) Regulations, 2009 (hereafter "the Regulations" and the "impugned amending regulation"); and in relation to the appellate remedies to the Competition Appellate Tribunal ("COMPAT"). Now those functions have been taken over by the National Company Law Appellate Tribunal (hereafter "NCLAT") due to provisions of the Finance Act, 2017. Though by amendments, the petitioners have impugned provisions of the Finance Act nevertheless, they do not press it, in view of the order of the Supreme Court in a pending proceeding before it, in respect of the general challenge to the Finance Act, 2017.

2. The genesis to these disputes arose on account of a complaint by one Mr. Shamsher Kataria who filed information under Section 19 (1)(a) of the Act against M/s. Honda Siel Cars India Ltd; Volkswagen India Pvt. Ltd and Fiat India

Automobiles Limited on 18.01.2011 alleging that these auto producers were indulging in abusive behavior in regard to the spare parts market. He later filed a supplementary information against Toyota, Skoda, General Motors, Ford, Nissan Motors, Mercedes Benz, BMW, Audi etc., on 27.01.2011. On the basis of these materials, the Competition Commission of India (hereafter "CCI") recorded its *prima facie* opinion that the complaints needed investigation by its order of 24.02.2011. Subsequently, on 19.04.2011, the Director General ("DG" hereafter) in pursuance of the directions of the CCI conducted investigation into the allegations made by the Informant and submitted his investigation report. The DG by that report requested for permission to expand the scope of the investigation to include other car manufacturers. By its order of 26.04.2011, CCI expanded the scope of investigation being conducted by the DG to include the petitioner herein and certain other car manufacturers operating in India. The DG thereafter issued notice to the other car manufacturers, on 04.05.2011 under Section 36 (2) read with Section 41(2) of the Act, seeking detailed information and documents from them with reference to an investigation being conducted into certain anti-competitive practice alleged to be prevalent in the sale, maintenance, service and repair market of the cars manufactured in India in Case No. 03/2011. Proceedings in this case were stayed by the Madras High Court in WP 31808/2012 filed by M/s. Hyundai Motors India Ltd., *inter alia,* challenging the order dated 26.04.2011 passed by the CCI. This led to some of the petitioners seeking stay of proceedings through orders of the CCI; in the meanwhile, this court in W.P.(C) 2734/2013 filed by M/s. Maruti Suzuki India Ltd, directed that CCI could continue with the proceedings before it, but not give effect to its final order for 10 days. One of the petitioners, i.e. Mahindra & Mahindra (W.P.(C) 6610/2014) filed an application dated 10.07.2013 which requested CCI to ensure that the varying quorum of its Members who have heard the matter would not result in any injustice to or adversely impact the outcome of the judgment in Case No.03/2011. Consequently, CCI by its order dated 24.07.2013 while dismissing that application held that only those (of its) members who had heard the matter and were present at the time of arguments, shall decide the case in question.

3. In the meanwhile, the writ petition before this court and the Madras High Court led to orders of stay in some cases, and notice (in the other case). Eventually, on 25.08.2014, the CCI made its final order in Case No. 03/2011. By this Final Order, the CCI held that all the car manufacturers including the petitioner have contravened the provisions of Sections 3(4)(b), 3(4)(c), 3(4)(d), 4(2)(a)(i) and(ii), 4(2)(c) and 4(2)(e) of the Act.

4. Tracing the origin of competition laws in India, the petitioners refer to the Mahalnobis Committee which flagged income disparity as one of the major challenges to social development. Such inequality in income was viewed as contrary to the constitutional ideals of Justice-Social, Economic and Political as well as the provisions contained in the Directive Principles of State Policy read with reasonable restrictions on fundamental rights and constitutional freedom relating to trade and commerce. This led to the constitution of a high-powered Monopolies Inquiry Commission (hereafter "MIC") in 1964. The Central Government appointed a five-member Commission under the Chairmanship of Mr. K.C. Dasgupta in April, 1964 to enquire into the concentration of economic power and suggest measures to regulate and control monopolistic and restrictive trade practices in the country. The Commission submitted its report in October, 1965. It suggested the introduction of Monopolies and Restrictive Trade Practices Act to check concentration of economic power and to control monopolistic and restrictive trade practices. The report of the MIC highlighted the opinion that restrictive practices need a *judicial determination* and finding. The report of the MIC clearly stated that the success of the proposed MRTP Commission to curb the restrictive practices would largely depend on fair and quick investigations of all complaints. The MIC considered it essential in their view that the question whether a restrictive practice is the common detriment or not should be decided judicially by those at the head of the permanent body. The MIC considered it essential that the Commission should judicially decide the questions to be determined by it. The MIC stated in its report that where the judicial examination results in a finding that no restrictive practice is being pursued or that though such a practice is being pursued, it is in the interest of the general public, then no further action be taken. Where, however, the decision is otherwise, the most fruitful line of

action would be for the Commission to issue an order. It is submitted that based on the recommendations of the MIC, the Monopolies and Restrictive Trade Practices Act, 1969 (hereafter "the MRTP Act") was enacted by the Parliament. It is stated that the MIC was aware that there had to be positive statute by the Parliament and it should be enforced only by substantive due process. This, necessarily needed a judicial body.

5. Next, the Raghavan Committee Report, 2000 (hereafter "the Raghavan Report") was referred to. It was urged that the MRTP Act, which came into effect on 01.06.1970, was the first enactment to deal with competition issues. In the wake of economic reforms since 1991, it was felt that this Act had become obsolete in the light of international economic developments which relate more particularly to competition laws and thus, there was a need to shift the focus from curbing monopolies to promoting competition. Therefore, a High-Level Committee on Competition Policy and Law (Raghavan Committee) was formed. The following extracts of the Raghavan report are relied upon:

> *"4.8.4 Competition Law and Competition Law Authority*
> *For implementing the Competition Policy/Law, it is necessary to establish a Competition Law Authority (Competition Commission of India) with adequate powers for advocacy of competition policy, adjudication, and effective enforcement of the Law and for implementation of its decisions. The following principles are desirable in designing and implementation of Competition Law.*
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> *1. The Competition Law should provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.*
> *2. The Competition Law Authority should be a multi-member body comprised of eminent and erudite persons of integrity from the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. Having an appropriate provision for their removal only with the concurrence of the Apex Court may ensure their independent functioning.*
>
> *3. The Competition Law Authority should be independent and insulated from political and budgetary controls of the Government.*
>
> *4. Competition Law should separate the investigative, prosecutorial and adjudicative functions.*

5. Competition Law should have punitive provisions for punishing the offenders besides other remedial methods (reformatory).

6. The proceedings of the Competition Law Authority should be transparent, non -discriminatory and rule-bound.

7. The Competition Law Authority should have a positive advocacy role in shaping policies affecting Competition."

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B) Adjudication

6.2.2 Central to effective implementation and enforcement of Competition Policy and Competition Law is an appropriate competent and effective adjudicative body, in the instant case, the Competition Commission of India. CCI will have to be a quasi-judicial body with autonomy and administrative power. It would be an independent statutory body without any political or budgetary control of the Government. Like the Supreme Court of India the CCI should be free to control its budget, after the Parliament votes its budgetary subvention. The remuneration of the Chairperson and Members of the CCI and all other expenditure should be a charge on the Consolidated Fund of India.

6.2.3 CCI will be a multi-member body with its Chairperson and Members chosen for their expertise, knowledge and experience in Judiciary Economics Law International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. It is imperative that those selected have a record of unimpeachable probity, integrity and solvency.

6.2.4 The number of Members of CCI is obviously relatable to its work load. It needs to be kept in view that the Mergers Commission (See below) will be a part of 1 and at least two Members will have to be detailed to deal with cases of mergers, amalgamation, acquisitions and takeovers.

It is suggested that the Headquarters may have two Benches of two members each, of which one will be the Mergers Commission Bench. The Headquarters of the CCI may be located at a Metropolitan Centre outside Delhi.

6.2.5 There will be three Benches, in addition to the Headquarters Bench and the may be located at Delhi, Calcutta, Mumbai and Chennai. Later depending upon the workload and experience more Benches may be created at other places. This means that CCI (including Mergers Commission) should have not less than ten Members including the Chairperson. The Headquarters will have one Bench of two members as

Mergers Commission. It will also have another Bench of two members to deal with the competition matters. All the other three metropolitan cities will have one Bench of two members each to d al with the competition matters, in addition to the Headquarters Bench.

6.2.6 Each Bench must have a judicial member, as it will have the power of imposing sentences of imprisonment, in addition to levying fines. A judicial member will be one who is a sitting or retired Supreme/High Court judge or one who is qualified to be a Supreme/High Court judge."

6. It was submitted that the Competition Bill was referred to the Standing Committee which, through the Rajya Sabha's Ninety Third Report on the Bill, stated, *inter alia*, that:

"7.0 The Bill describes the CCI as a body corporate {(clause 7(2)} and a quasi-judicial body (Statement of Objects and Reasons whereas it has pre-requisites of a full-fledged judicial body {clause 36(2)}. The Committee wanted 10 know the exact status of the CCI.

7.1 The Ministry in their written submission has clarified that the Bill describes the CCI as a body corporate for certain specific purposes like having perpetual succession, a common seal and power to acquire hold and dispose of movable and immovable properties although normally body corporate connotes accompany.

7.2 As to the status of the CCI being a quasi-judicial or judicial body, the four prerequisites of a judicial body as enumerated in a decision laid down by King's Bench in Cooper v. Wilson {C1937 2 KB 309), were brought to the notice of the Department for their comments. The Ministry has admitted in their written submission that the Bill (clauses 36 read with clause 40) makes it closer to a judicial body. The CCI has specific adjudicatory function in relation to abuse of dominance and anti-competitive agreement and on combinations under clause 27 and 31, respectively. The decision of CCI has extraterritorial reach under clause 32. Clause 36(3) says that the proceedings before the CCI would be judicial proceedings. The CCI can detain a person in civil prison for specific purposes. Thus, the Ministry is of the opinion that it is a judicial body.

7.3 In contradistinction to the Statement of Objects and Reasons which describes CCI as a quasi-judicial body, the Department has now submitted that it is adjudicatory. Besides, the Department, having admitted the apparent contradiction, has also submitted that CCI can sue or be sued. Here, the Committee wishes to point out that a judicial body never needs to sue anybody but it can issue orders for compliance.

Suing means filing litigation against an opposite party before another judicial body to ventilate grievances. Admittedly a judicial body shall not require to sue anyone because that is not permissible in law. Hence it can also not be sued.

7.4 The Committee notes that there is a difference between the Chairperson and Members of the CCI insofar as their status and remuneration are concerned whereas there is no difference between them in relation to their qualifications. In this context, the Committee wanted to know why the age cap of 70 years and status of a Supreme Court Judge is stipulated for Chairperson in the Bill in the light of the fact that the age of retirement of Supreme COUl1 Judge including the Chief Justice of India is 65 years.

7.5 The Ministry has submitted in their written submission that conferment of status of a Supreme court Judge on the Chairperson is designed to attract eminent persons including from sitting/retired Judges from Supreme Court/High Court. Further the age cap of70 years for Chairperson and 65 years for Members is in line with some of the extant Tribunals like the National Human Rights Commission and National Consumer Disputes Redressal Commission (NCDRC) although MRTP Act has the age cap of 65 years for the Chairman and Members. The higher age cap is meant for inviting eminent persons with experience to the CCI. The Competition Law is a socio-economic legislation and it may not be necessary to have the Chairperson, only from the judiciary. In UK for instance an industrialist is the Chairperson of the Competition Law Authority. The high judiciary, namely, the Supreme Court and the High Courts may be expected to countenance a Chairperson not from the judiciary, as the election Committee for selecting the Chairperson consists of the Chief Justice of the Supreme Court or his/her nominee."

7. All the petitioners then refer to the notification of the first Chairman of the CCI after the Act was brought into force, and the challenge to appointment, as well as provisions of the Act, before the Madras High Court and the Supreme Court (which culminated in the decision in *Braham Dutt v Union of India* 2005 (2) SCC 431). The essential challenge in those writ petitions was that the CCI envisaged by the Act was more of a judicial body having adjudicatory powers and that in the background of the doctrine of separation of powers recognized by the Constitution of India, the Chairman of the CCI had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of a High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India and further the right to

appoint the Judicial Members of the CCI should also rest with the Chief Justice of India or his nominee. The Supreme Court in its interim order dated 31.10.2003 stayed the judicial functioning of the CCI and the operation of Rule 3 of the Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules, 2003. It is stated that the Central Government then submitted before the Supreme Court that it intended to bring about certain changes in the Act**,** in light of the issues raised in the Writ Petition. The Supreme Court delivered its judgment in the matter on 20.01.2005. It disposed of the writ petition leaving open all questions regarding the validity of the enactment, including the validity of Rule 3 of the Rules to be decided after the amendment of the Act and declined to pronounce on the matters argued before it in a theoretical context and based only on general pleadings. The relevant portions of the case decided by the Supreme Court of India is as follows:

> "*5. We find that the amendments which the Union of India proposes to introduce in Parliament would have a clear bearing on the question raised for decision in the Writ Petition essentially based on the separation of powers recognized by the Constitution. The challenge that there is usurpation of judicial power and conferment of the same on a non- judicial body is sought to be met by taking the stand that an Appellate Authority would be constituted and that body would essentially be a judicial body conforming to the concept of separation of judicial powers as recognized by this Court. In the Writ Petition the challenge is essentially general in nature and how far that general challenge would be met by the proposed amendments is a question that has to be considered later, if and when, the amendments are made to the enactment. In fact, what is contended by learned counsel for the petitioner is that the prospect of an amendment or the proposal for an amendment cannot be taken note of at this stage. Since, we feel that it will be appropriate to consider the validity of the relevant provisions of the Act with particular reference to Rule 3 of the Rules and Section 8 (2) of the Act, after the enactment is amended as sought to be held out by the Union of India in its counter affidavits, we are satisfied that it will not be proper to pronounce on the question at this stage. On the whole, we feel that it will be appropriate to postpone a decision on the question after the amendments, if any, to the Act are carried out and without prejudice to the rights of the petitioner to approach this Court again with specific averments in support of the challenge with reference to the various sections of the Act on the basis of the arguments that were raised before us at the time of hearing. Therefore, we decline to answer at this stage, the challenge raised by the petitioner and leave*

open all questions to be decided in an appropriate Writ Petition, in the context of the submission in the counter affidavits filed on behalf of the Union of India that certain amendments to the enactment are proposed and a bill in that behalf would be introduced in Parliament.

6. We may observe that if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognized by the Constitution. Any way, it is for those who are concerned with the process of amendment to consider that aspect. It cannot be gainsaid that the Commission as now contemplated, has a number of adjudicatory functions as well."

8. The petitioners then refer to portions of the Standing Committee Report of 2006 on the Bill to amend the Act, so far as it related to the Central Government's views on the need to ensure transparency and fairness in selection of members, through a provision by which the Chief Justice of India or his nominee was to chair the selection committee and its views on the expression "information" substituting the then existing term "complaint".

9. The common thread of arguments of all the writ petitioners is that the CCI is essentially an adjudicatory body, given its mandate to investigate into allegations that fall within its watch (abusive behaviour due to market dominance, cartelization etc.), adjudicate the rights of parties and entities, and where necessary, impose penalties. The petitioners submit that composition of the CCI (in terms of its membership), manner of their appointment, their qualifications, the procedure adopted by it, violate principles of separation of powers and independence of the judiciary, which are essential bulwarks upon which the Constitution rests and which are assured to the people of India, in regard to adjudication of disputes. The petitioners contest the position of the UOI that CCI is basically a regulatory body, invested with certain adjudicatory attributes and that the objective of setting it up was to regulate market behaviour to ensure a "level playing" field.

10. It is argued by Mr. Amit Sibal, learned senior counsel appearing in the lead matter [W.P.(C) 6610/2014- "the Mahindra case"], that the Constitution of India guarantees adjudication by an independent body with a judicially trained mind. The CCI carries out adjudicatory and essential judicial functions. Therefore, procedure under the Act must conform to the judicial approach. However, procedure under the Act is *ultra vire*s Article 14 of the C Constitution of India and anathema to judicial decision making. Elaborating, it is submitted that both CCI and COMPAT have all the trappings of a court and are hence tribunals. Therefore (i) the composition; (ii) manner of appointment; (iii) term of office and (iv) executive control over the CCI and COMPAT must be aligned to that of a judicial body and should be in consonance with the doctrine of separation of powers and principles of preserving the independence of the judiciary. It is submitted that the penalty under Section 27 of the Act is vague, discriminatory, arbitrary and violative of Article 14 of the Constitution of India. Further, Regulation 48 of the General Regulations which dispenses with the requirement of a separate hearing prior to imposition of penalty is also bad in law. Turning to the principal argument, it is stated that in *Braham Dutt (supra)*, the Supreme Court observed that it would be appropriate for the Union of India to consider the creation of two separate bodies: one advisory and regulatory, and the other adjudicatory; and an appellate body following up the adjudicatory body. The Competition Amendment Act, 2007 was passed on a complete misreading of *Braham Dutt (supra).* The adjudicatory function of the CCI remained unchanged, but several amendments with respect to its procedure were a mismatch to its adjudicatory functions and were more suited to a corporate body.

11. Mr. Sibal urges that CCI's functions are overwhelmingly adjudicatory (to substantiate this, reference is made to Sections 3, 4, 26, 27 and 28 of the Act). It is argued that the CCI perceives itself to be a judicial body and in this regard, he placed reliance on Regulations 24, 26, 27, 29, 31, 32, and 35 of the General Regulations. Learned senior counsel submitted that the CCI clearly passed the impugned order while exercising adjudicatory/judicial functions. It was also contended that Section 22(3) of the Act is *ex facie* unconstitutional. He said that the terms used, i.e. "meetings", "voting", "second" or "casting vote" and "quorum" are anathema to

adjudicatory functions. According to the learned senior counsel, Section 22(3) particularly, which enables the Chairperson to rely on a casting vote is anathema to a judicial body. It is submitted that the Union of India ("UOI" hereafter) and the CCI failed to point out a single instance of judicial functions, in any other statute, where there is a provision for a casting vote or where a subset of those who hear and deliberate are permitted to pass the order. Learned counsel relied on *Punjab University v. Vijay Singh Lamba* (1976) 3 SCC 344, especially the observations of the court that:

> *"A court is not a committee and if by law any matter is required to be heard, say by a bench of three judges, there is no power in those three judges to resolve that only two of them will form a quorum. In fact quorum is fixed for meetings of committees and not for the sittings of courts."*

12. It was submitted that the Security Exchange Board of India Act ("SEBI"), no doubt, contains provision for a casting vote. However, that power applies only when SEBI functions as a regulatory board, and does not apply to the power of the Adjudicating Officer. Unlike the CCI, there is a wall between the regulatory and adjudicatory functions of the SEBI. It is argued that the proviso to Section 22(3) of the Act, which allows a quorum of three to pass an order is plainly contrary to the main provision, which requires a decision to be made by majority [with the CCI having up to seven members, the majority being four members]. In every determination that affects the rights of a citizen or leads to any civil consequences, the said body is bound to adopt a judicial approach. Section 22(3) militates against a judicial approach and is, therefore, *ultra vires* the Constitution.

13. The impugned order is characterized as *per* se illegal as it was passed by 3 members of the CCI taking refuge of the unconstitutional proviso to Section 22(3), despite the fact that final arguments on behalf of the Petitioners were heard by seven members. It was argued that the four members who shaped the course of the final hearings, posed questions to parties, requesting additional information, and participated in deliberations, did not participate in the final decision. The instance of one member, Mr. Bunker, who heard the final arguments of the informant on 05.03.2013, and thereafter participated in substantive hearings and deliberations

leading to the impugned order, and his not signing the impugned order is cited as incurably illegal and not merely procedurally improper.

14. The petitioners argue that the CCI's hearing procedure ingrains the concept of the "revolving door" whereby members of the body participate in any proceeding at any given point of time, without any principle or pre-determined manner, essentially destroying the guarantee of fair hearing: this is enabled by Section 22(3) of the Act and violates the basic principle that one who hears must decide. It is submitted that the "revolving door" is a death knell to collegiality and collective decision making which is essential to all judicial decision making, as a collegium has a personality that exceeds its members. This is an unconstitutional aspect embedded in Section 22(3) in unambiguous and definite terms. Therefore, it cannot be read down nor be saved by the manner in which it is administered.

15. The learned senior counsel relied on *Surendra Singh v State of UP* AIR 1954 SC 194 to underline that the essence of a tribunal's functioning is the ability of a judge sitting on it, to effectively participate and bring her mind to the final decision, till the making of that decision or judgment. Particularly, the following observations were relied on:

> *"10. In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal" pronouncement" or "delivery" in open court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest - the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter - can be cured; but not the hard core, namely, the formal intimation of the decision and its contents formally declared in a judicial way in open court. The exact way in which this is done does not matter. In some courts the judgment is delivered orally or read out, in some only the operative portion is pronounced, in some the judgment is merely signed after giving notice to the parties and laying the draft on the table for a given number of days for inspection.*
>
> *11. An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on*

the mode or manner of delivery, as that is not of the essence, except to say that ill rust be done in a judicial way in open court. But however it is done it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else uptil then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the "judgment".

12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of locus poenitentiae, and indeed last-minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallise into a full-fledged judgment and become operative. It follows that the Judge who "delivers" the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the court and be in a position to stop delivery and effect an alteration should there be any last-minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and, in a position, to change his mind but takes no steps to arrest delivery. But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a brother Judge who also heard the case. This may he merely for his information, or for consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light dawn upon him before the delivery of judgment."

16. It is argued that the CCI's reliance on the decision of the COMPATs decision in *Nissan Motor India Pvt. Ltd. v. Competition Commission of India* (Civil Appeal No. 951/2017) is unfounded, as the constitutionality of Section 22(3) was not and could not have been challenged before the COMPAT. The decision of the COMPAT does not bind this court, and has been stayed by the Supreme Court of India.

17. Next, the proviso to Section 22(3) of the Act, which invests the CCI's President with the power of a casting vote (in case of an even member tribunal, where the plurality of its opinions is equally differing) is challenged. It is submitted that no judicial tribunal with a multiplicity of members, that decides a *lis* or adjudicates a dispute over which it has jurisdiction, can, in India, permit greater weight to the decision of one or some of its members. The concept of a casting vote, say the petitioners, is an appropriate concept for corporate board rooms and not in a judicial tribunal that have plurality of members, who and exercise the same jurisdiction and powers. Mr. Sibal relied on *Shobhana Shankar Patil v Mrs. Ramachandra Shirodkar and Ors.* AIR 1996 Bom 217, where the court held that a rule that allowed the chief judge of an appellate bench to rely on a casting vote, was arbitrary. The court observed, then, as follows:

> *"The rule postulates that the opinion rendered by the senior Judge should prevail when there is conflict between two Judges. We really fail to understand as to how the seniority of the Judge can be said to be a relevant criterion for deciding an appeal under the Act. The rule appears to have been based on assumption that opinion given by the Chief Judge or a Judge having precedence in rank or seniority, more experienced is always right and preferable to the opinion of a junior Judge. In our view, this assumption is totally illogical and irrational. The seniority or a rank of a Judge may be relevant consideration in the internal administration of the Court. It may also be relevant for further promotion to the higher Court, but merely because the Judge happens to be the Chief Judge or he happens to be a senior Judge cannot be a ground for accepting his decision as correct decision by completely disregarding the decision given by the junior Judge. Needless to mention that the Judges, who are equal in rank, enjoy equal powers and jurisdiction as far as judicial work is concerned. The irrationality of the rule can be further demonstrated by a simple illustration where both the Judges are appointed on the same day and out of whom, one Judge will be necessarily senior and simply because seniority has been given to him at the time of his appointment, his opinion will always supersede*

the opinion of the junior Judge (who was also appointed on the same day). We do not see any rational or logic in giving a preference to the opinion rendered by the senior Judge in this fashion. Therefore, in our opinion, the impugned rule suffers from vice of arbitrariness and unreasonableness and on that count also, it is liable to be struck down."

18. 18. It is submitted, next, that the Act violates the doctrine of separation of powers and the independence of the judiciary. Counsel submitted that the CCI is a tribunal and satisfies the test highlighted in the case of *Cooper v. Wilson* [1937] 2 K.B. 309relied in the *Bharat Bank v Employees of Bharat Bank Ltd* AIR 1950 SC 188; *Harinagar Sugar Mills v Shyam Sundar Jhunjhunwala* AIR 1961 SC 1669 and *Jaswant Sugar Mills Ltd v Lakshmi Chand & Ors* AIR 1963 SC 677. In *Harinagar Sugar Mills (supra),* it was observed that a tribunal *"is a body which is required to act judicially and which exercises judicial power of the State does not cease to be one exercising judicial or quasi-judicial functions merely because it is not expressly required to be guided by any recognised substantive law in deciding the disputes which come before it."* The other decision cited was *Indian National Congress v Institute of Social Welfare &Ors*2002 (5) SCC 685, where the court held that the Election Commission did perform adjudicatory functions while exercising some of its powers. It was observed in that case that

"What distinguishes an administrative act from a quasi-judicial act is that in the case of quasi-judicial functions under the relevant law be statutory authority is required to act judicially. In other words where law requires that an authority before arriving at a decision must make an enquiry such a requirement of law makes the authority a quasi-judicial authority. Another test which distinguishes administrative function from quasi-judicial function is that the authority which acts quasi-judicially is required to act according to the rules, whereas the authority which acts administratively is dictated by policy and expediency."

19. Mr. Sibal relied extensively on the observations in *Union* of *India v. R. Gandhi* 2010 (11) SCC 1 and submitted that separation of powers is part of the basic structure and provides that the legislature and executive shall not, in discharge of their functions, transgress constitutional limitations. This relates to the principle of the independence of the judiciary, which provides that judicial functions shall be independent of executive influence. Separation of powers equally applies to all

legislations, but is violated in the Act. It is submitted that separation of powers prohibits one branch of the State taking over an essential function of another branch (in the present case, the Executive exercising both direct and indirect control and influencing over adjudication by the CCI). The following passage from *R. Gandhi (supra)* was highlighted:

> *"Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of the judiciary. If impartiality is the soul of the judiciary, "independence" is the lifeblood of the judiciary. Without independence, impartiality cannot. Independence is the not freedom for judges to do what they like. It is independence of judicial thought. It is the freedom from interference and pressure which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a judge to be impartial. Its existence depends however not only philosophical, ethical or moral aspects but also upon several mundane things -security in tenure, freedom from ordinary monetary worries, freedom from influence and pressures from within (from others in the judiciary) and without (from the executive)."*

20. It was argued that provisions for members' re-appointment [Sections 10 (1) and 53F], selection by a committee with majority members from the Executive (Sections 9 and 53E), and directions and supersession by the Central Government (Sections 55 and 56) clearly violate separation of powers and independence of the judiciary. Similar provisions have also been struck down in *Madras Bar Association v. Union* of *India* (2014) 10 SCC 1. It is argued that this principle has significant relevance, because the Government and its instrumentalities are commonly informants or opposite parties in proceedings before the CCI. The Ld. Senior Counsel argues that Section 18 of the Act shows that the regulatory and adjudicatory functions are discharged by adjudicatory function under Section 3 and 4 of the Act by eliminating practices having an *"appreciable adverse effect on competition"*. Stressing that the CCl's functions are predominantly reactive, unlike sectoral regulators which are proactive. The CCI, cannot be equated with bodies like SEBI, TRAI (Telecom Regulatory Authority of India), RERA (Real Estate Regulatory Authority of India), IRDA (Telecom Regulatory Authority of India) or SERC/CERC whose primary function is proactive, i.e. setting tariffs, laying down substantive guidelines, etc. Further, the CCI's power to frame regulations is extremely narrow, as can be seen

from Section 64 of the Act. CCI is closer to purely adjudicatory bodies: CAT, NIT, NCLT, etc. Therefore, on the spectrum of bodies that carry out both adjudicatory and regulatory functions, the CCI tilts heavily towards the adjudicatory side.

21. It was next argued that the absence of predominance of judicial members or those with experience in law, in the CCI is anathema to the judicial approach and renders the Act void. It was urged that since the CCI primarily performs adjudicatory functions, it must be predominantly staffed by persons of law. Though there may be a mix of judicial members and technical members, there should nevertheless be a predominance of judicial members. In this context, it is stated that Section 19 of the Act, does not derogate from the requirement of a predominance of judicial members. Minority of technical members, along with the power to call upon experts under Section 36(3) would satisfy the requirement of Section 19. Judges experienced in these fields can be appointed. On the other hand, that final arguments in the present case were heard in part by seven members, but finally signed by three non-judicial members which illustrates the perils of proceeding without judicial/legal members.

22. The argument advanced by Mr. Gopal Subramanian, learned senior counsel was that CCI adjudicates a *lis* whereas the COMPAT, is primarily appellate and has limited original jurisdiction. This is in contrast to the TRAI-TDSAT model, where the TDSAT discharges adjudicatory functions with a very wide original jurisdiction, while the TRAI is a regulatory body. Reliance was placed upon *State of Gujarat v. Utility Users Welfare Association* 2018 (6) SCC 21 where the Supreme Court held that it is mandatory that a person of law to be a member of a primarily regulatory body performing some judicial function and further that the presence of a judge in an appellate body cannot cure the defect of not having a judicial member in original adjudicatory proceedings.

23. Mr. Subramanian argued that there is no provision stipulating any qualification for a member of the Election Commission of India (hereafter "ECI"), which is a constitutional body under Article 324 of the Constitution. The ECI primarily conducts elections, and its adjudicatory aspect is only a fraction of its functions. Even the ECI, in its adjudicatory functions, as per *Kailash Gahlot & Ors. v. Election Commission* of *India* &*Ors.* (2018) 250 DLT 193 (DB) must follow the principle that one who hears

must decide, and cannot follow a 'revolving door' policy. The fact that the ECI does not have any judicial member has not been tested in a court of law and therefore cannot be relied on.

24. It was submitted that justice through an independent tribunal, comprised entirely or mainly of legally trained professionals, is a manifest guarantee held out by the Constitution of India. Therefore, a body, such as CCI, with no guarantee of any judicial composition (of legally trained and experienced minds) but which clearly performs judicial tasks leading to re-defining of legal rights and creating binding disabilities in the course of carrying on trade and commerce, is unreasonable and arbitrary. Learned counsel relied on passages from the decision in *Madras Bar Association* v *Union of India & Anr* (2014) 10 SCC 1 (hereafter "NTT Case") to say that separation of powers and independence of the judiciary are inalienable and non-derogable guarantees to the citizens of India. Observations to the effect that independent judicial tribunals for determination of the rights of citizens, are necessary are relied on. It was held that:

> *"for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the rule of law. The rule of law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will he decided by Judges who are independent of the executive. Another facet of the rule of law is equality before law. The essence of the equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model."*

25. Counsel stressed that the right to equality envisions the right to have adjudication of disputes of citizens *"adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication"* and that *"wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum such legislative Act is open to challenge if it violates the right to adjudication by an independent forum."*

26. Reliance was also placed on the observations that the personnel who man such tribunal should be sufficientlyqualified and should possess relevant experience in law or judicial office, so as to discharge the functions entrusted impartially; and furthermore, the predominance of any individuals attached to or associated with the government or the executive would undermine the rule of law and separation of powers. It was further argued that adjudicatory responsibilities do not involve technical expertise of any kind, or knowledge and that consequently, provisions enabling appointment of non-judicial members is unconstitutional.

27. It was urged that the predominantly judicial nature and function of the CCI is evident from the various provisions of the Act which show that its proceedings are akin to civil court proceedings; a tabular chart was presented to the court, which is extracted below:

RELEVANT SECTION OF THE ACT	*DETAILS*
Section 35	*States that the parties can present the case before CCI*
Regulation 29	*Provides the manner of making submissions or arguments by parties before the Tribunal.*
Section 36(2)	*While discharging its functions has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit.*
Section 19	*Determines/adjudicates the issue of contravention of the provisions of Section 3 or Section 4 of the Act.*
Section 26 (2)	*The CCI can also dispose of the matter / close the matter in case it is of the opinion that there exists no prima facie case*
Section 27(b)	*The CCI can impose penalty with unfettered powers.*

28. Mr. Subramanian also emphasized that CCI's adjudicatory nature was underlined in *Competition Commission of India v* SAIL(2010) 10 SCC 744 ("the SAIL judgment" or "*SAIL"* hereafter), particularly the following passage:

"The powers conferred by the Legislature upon the Commission under

Sections 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification. These powers of the Commission, read with provisions mentioned earlier, certainly require issuance of certain directions in order to achieve the object of the Act and to ensure its proper implementation. The power to restructure the agreement can be brought into service and matters dealt with expeditiously, rather than passing of ad interim orders in relation to such agreements, which may continue for indefinite periods. To avoid this mischief, it is necessary that wherever the Commission exercises its jurisdiction to pass ad interim restraint orders, it must do so by issuing notices for a short date and deal with such applications expeditiously. Order XXXIX, Rules 3 and 3A of the Code of Civil Procedure also have similar provisions. Certain procedural directions will help in avoiding prejudicial consequences, against any of the parties to the proceedings and the possibility of abuse of jurisdiction by the parties can be eliminated by proper exercise of discretion and for valid reasons. Courts have been issuing directions in appropriate cases and wherever the situation has demanded so. Administration of justice does not depend on individuals, but it has to be a collective effort at all levels of the judicial hierarchy, i.e. the hierarchy of the Courts or the fora before whom the matters are sub-judice, so that the persons awaiting justice can receive the same in a most expeditious and effective manner. The approach of the Commission even in its procedural matters, therefore, should be macro level rather than micro level. It must deal with all such references or applications expeditiously in accordance with law and by giving appropriate reasons. Thus, we find it necessary to issue some directions which shall remain in force till appropriate regulations in that regard are framed by the competent authority."

29. It is argued that Section19 of the Act is a provision for the CCI's enquiry into any alleged contravention of the provision of Sections 3 or 4 of the Act; Section 35 of the Act read with Regulation 29(1) of the regulations provides for making of submission or arguments by parties before the CCI; Section 27 of the Act read with Regulation 32 of the regulations gives the power to the Commission to pass various orders after enquiry into agreements or abuse of dominant position; Section 26(2) further empowers the CCI to close the matter forthwith and pass such orders as it

deems fit in case it is of the opinion that there exists no *prima facie* case; Section 35 of the Act enables a person or an enterprise to appear in person or through any other person authorized by it to present his or its case before the CCI. All these forms the core of that body's functioning, which is essentially judicial.

30. It is urged that assuming without conceding that the CCI is not predominantly performing adjudicatory functions, it has certain definite adjudicatory functions. These need to be dealt with in accordance with the NTT case. On the issue of whether there is adjudication, the material question ought to be one of *substance not form*. If one sees the impact of CCI's decisions, they are significant and no different from consequences that flow from adjudicative decisions. Here, the ld. Senior counsel relied on the observations of the Supreme Court in *A.K. Kraipak v. Union of India* (1969) 2 SCC 262 that:

> *"113. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. "*

31. It is submitted that the Supreme Court underpinned that it is impossible to delineate watertight categories of what are "administrative" and "quasi- judicial" functions. Therefore, in this event, slotting the CCI into one or other of these watertight categories is inappropriate in deciding the instant case. This is because firstly, irrespective of whether CCI is a judicial body, all statutory decision makers are delegates of state power. So, they must be independent of influence, and have duty to

act justly and fairly to uphold the rule of law. Secondly, CCI has the power to alter freely formed agreements. Whenever freedom of contract is at issue, the substance and impact of the action is material, not the form in which it is performed. Furthermore, the counsel submitted, various forms of state action are changing and merging, so the standard adopted to distinguish different forms of state action must focus on purpose of the protection and not the mechanics of it. The State is increasingly delegating its functions to new forms of entities. The Supreme Court, through its decisions, has been ensuring that the force of the Constitution is maintained through both the form and means by which power is exercised. Two notable instances of this approach are the following- *first,* the Supreme Court's shift towards a function-based test for interpreting "other authorities" under Article 12 and *secondly,* its adoption of purposive interpretation of the Constitution, through the "living constitution" approach.

32. It is submitted that existing tribunals are incomplete and not appropriate examples for building a constitutionally compatible regulator. Counsel argued that the Securities and Exchange Board of India ('SEBI') and other "new generation tribunals" are not appropriate examples. Reliance was placed on a five Judge Bench decision of the Supreme Court in *R. Gandhi (supra)* which observed that many tribunals are not independent, and ought to be reformed. It was argued that preponderance of judicial members, transparent procedure, are the best possible version of a constitutional regulator. For these reasons, it is submitted that CCI does not even meet the minimum standard for constitutionality. Characterizing the CCI as a "bureaucratic board" and not an independent decision maker, counsel submitted that this conclusion emerges from (a) the manner of selection of members of the CCI; (b) composition of the CCI; (c) lack of fixed process -as admitted by CCI in relation to the limited scope of its transaction of business rules. In fact, the Supreme Court in *R Gandhi (supra)* stated that: (i) tribunals must resemble courts not bureaucratic boards; (ii) Civil servants, or those selected by a panel constituted heavily of employees in the executive cannot select an independent entity.

33. It is further submitted that even the SEBI's structure includes certain safeguards that are not present in the CCI, such as the fact that SEBI separates the

judicial and regulatory function by providing for a dedicated adjudicatory officer (Section 15 of the SEBI Act and other similar provisions); the concept of a casting vote (as in Section 22 of the Act) does not come into play during adjudication by the SEBI.

34. Counsel submits that though superficially, CCI and ECI perform adjudicatory functions with no judicial input in the latter body, a deeper analysis of the ECI's functions show that adjudication is confined to registration of parties and recommending findings on qualification or disqualification; it lacks any power of review or imposition of penalty. On the other hand, even with such limited adjudicatory functions, it has greater functional independence; the appointment of its Commissioners (and Chief Election Commissioner) is not by a government dominated body, but rather by an independent collegium; its members have an assured age of retirement and constitutionally protected tenure of office and protected conditions of service. Despite performing judicial functions, CCI's members lack both protections and are chosen by a selection body dominated by members of the government. It was argued that Sections 55 and 56 show that CCI inherently lacks independence. These provisions are so sweeping in scope that they cast the shadow of the central government over *all* activities of the CCI. This creates a high likelihood of bias, and fatally undermines CCI's independence from the executive. Therefore, it is not necessary that these sections be directly at issue in the *lis* in this case. It is therefore, submitted that Sections 55 and 56 are so fundamentally unconstitutional that they must be struck down even though these are not directly in issue in the present case.

35. It was submitted that an overemphasis on the technical expertise or qualification of members of the CCI, cannot obscure its role as an *adjudicatory body or a judicial tribunal*, deciding serious and important question, which directly and adversely implicate those subject to its jurisdiction. It was argued that the eventual provision of appeal to a body comprising of a retired judge (even of the Supreme Court) would not take away the fact that rule of law would be subverted at the forum of first instance, if judicially trained and experienced members are not mandated to judge the dispute. Counsel submitted that the jurisdiction to decide violation of Section 3 or indulge in deleterious practise which can result potentially in a bar to the

manner of carrying on of one's trade, had grave civil consequences, which the Indian Constitution permits, only if it is adjudicated by a court or a tribunal comprised of personnel with proven judicial experience. Without that prerequisite, the guarantee of equality before law, and equal protection of law is violated. Counsel submitted that the bar to jurisdiction under Section 61 of the Act underscores the fact that the task performed by CCI is essentially judicial, ordinarily performed by civil courts: Section 9 of the Civil Procedure Code envisions jurisdiction over disputes of the kind that the CCI exercises, but for the bar or jurisdiction under Section 61. Learned counsel submitted that the bar of jurisdiction, which resulted in deprivation of the regular course of established courts that had traditional experience in adjudication, resulted in deprivation of the rule of law and violated Article 14 of the Constitution of India. Counsel also impugned the appeal provided by the Act (Section 53T) to the Supreme Court, stating that a direct appeal to the Supreme Court, which tended to exclude scrutiny through judicial review under Article 226 of the Constitution of India, was *anathema* to the rule of law

36. Appearing on behalf of Tata Motors, Dr. A.M. Singhvi and Mr. Arvind Nigam, learned senior counsel submitted that Section 27 (b) of the Act is void and arbitrary, because CCI has unfettered discretion on WHEN to impose penalty; Section 27(b) provides no guidance on when CCI should impose penalty, i.e. whether circumstances warrant the imposition of penalty. It also has unfettered discretion *as to quantum of penalty*; it has unfettered discretion to pick an arbitrary percentage figure from 0 – 10% of turnover *or* 0 times to 3 times of profits of an enterprise for imposing penalty. The Act provides no guidelines.

37. Learned senior counsel stated that the Act contains no provisions engrafting the factors to be taken into consideration CCI must consider for imposing a penalty. The separate opinion of *N.V. Ramana, J* in *Excel Crop Care India v Competition Commission of India* 2017 (8) SCC 47 highlighted the need for guidelines while imposing penalties. It is argued that non-judicial bodies in and outside India, set out elaborate guidelines for imposing penalties. It is submitted that reliance on fiscal statutes, like the Customs Act or Excise Act is inapt, because those enactments provide upper penalty limits. There is no upper absolute limit under

Section 27(b) of the Act. Section 27(b) only sets a maximum penalty percentage of 10% or profit multiple of 3. Ultimate penalty may vary from INR 0 to ₹ 1346.46 Crores (as in this case). Therefore, the absence of an upper limit in Section 27(b) allows for the exercise of unfettered powers. It is stated that CCI's reliance on *Organo Chemical Industries v. Union of India* (1979) 4 SCC 573 is also incorrect, because unlike *Organo (supra)* the petitioners in the instant case (a) were not provided an opportunity to present arguments and (b) imposition of blanket penalty of 2% of the total turnover itself shows that the CCI did not apply its mind to individual cases of each original equipment manufacturer("OEM") hereafter before imposing penalty. Further, CCl's reliance on *Presolite India v Regional Director* 1994 Supp (3), SCC 690 is disputed. It is urged that in the present cases, CCI failed to consider individual mitigating circumstances of each petitioner and imposed a blanket penalty on all OEMs.

38. It is argued that Section 27(b) is void as it does not provide for opportunity of hearing. The Act read with Regulation 48(1) specifically excludes an opportunity of hearing to parties at the time of imposing penalties for contravention under Sections 3 and 4 of the Act. Counsel disputed the CCI's position that a composite hearing for both presenting arguments against contravention and penalty is provided, and urge that it is not sufficient to uphold its *vires* under the Indian Constitution. An opportunity of hearing, must be given before imposing penalty and the person proceeded against must know that he is required to meet certain allegations, which might lead to a certain, action being taken against him- reliance is placed on *S.L. Kapoor v. Jagmohan* 1980 (4) SCC 379. It is stated, further, that the DG's report only contains findings of an investigation. The Act contemplates and the NCLAT has held in *Hyundai Motor India Ltd. v. CCI & Ors.* [Competition Appeal (AT) No.06 of 2017, decided on 19.09.2018] that the CCI must carry out an independent inquiry further to the DG's report. Therefore, the only time parties are provided with an opportunity of hearing, they do not know the CCl's charge against them.

39. As a sequitur, parties do not know what arguments to make on penalty. Had the petitioners known that the CCI was going to pass a blanket penalty on total turnover

of the OEMs, they could have used the opportunity to distinguish the cases and highlight that penalty on turnover from outside India should be excluded. Unlike the Act, the Competition and Markets Authority, UK provides a draft penalty statement, which sets out key aspects for penalty calculation, post which parties are able to present arguments.

40. It was contended that there is discrimination in the manner for imposing penalty: Regulation 48(1) of the General Regulation- specifically denies enterprises an opportunity of hearing to present arguments on penalty if CCI finds a case of contravention of Sections 3 and 4. By amendment to Regulation 48 (1)of General Regulations in 2011, CCI amended its own regulations to take away the right of parties to benefit from (a) a show cause notice and (b) reasonable opportunity to represent his case before CCI. Counsel highlighted that in contrast, opportunity of hearing is provided before imposing penalties in cartel cases under Section 46 of the Act, read with lesser Penalty Regulations, but not under Section 3 of the Act. Hearing on penalty is extended to all other cases under Chapter VI of the Act including for non-cooperation and gun-jumping, but not for penalties in respect of contraventions under Sections 3 and 4. The contrasting and differential treatment is *per se* discriminatory and not based on any *rationale.*

41. Further, submitted counsel, the Act envisions multiplicity of wide-ranging and extensive orders under Section 27(b), which further demonstrates the requirement for a hearing in this case, a finding of contravention did not only lead to penalties, but also burdensome directions on the Petitioner's business. An opportunity of hearing would have allowed the Petitioner to present its case on why the directions of the CCI were not commercially sound and would have resulted in overhauling the automotive parts industry in India.

42. Turning next to the challenge to Section 26(1) of the Act, counsel point out that the previous decision of a Division Bench was not concerned with challenge to *vires* in *Cadila Healthcare Ltd v Competition Commission of India* 2018 SCC Online (Del) 11229. The court there was concerned with a fact-based challenge. CCI had allowed DG to investigate role of parties engaged in similar conduct. In the present case, stressed the counsel, CCI did not apply its mind [as required by the

Supreme Court in *SAIL (supra)*] and merely held that the DG need not approach it to investigate the role of 14 other parties in an abuse of dominance allegation. Further, unlike in *Cadila (supra)*, no information in respect of individual petitioners, including Tata Motors was provided. It is urged, therefore, that if Section 26(1) is interpreted as a *carte blanche* to the DG to investigate parties, absent application of mind by CCI, it would be in contempt of Supreme Court decision in *SAIL (supra)*; would also be contrary to the objective of the Act, (which differs from MRTP Act by expressly granting the power to initiate investigation against parties to CCI only and not DG, thereby amounting to excessive delegation and amount to a fishing expedition.

43. Mr. V. Lakshmikumaran, learned counsel appearing on behalf of M/s. Honda Cars India Limited dwelt in length on the role of regulatory bodies in India and that of the CCI in particular. He emphasized that a regulator is a governing or independent body setting standards or striving at a fair balance between the interests of consumer and that of the service provider – by relying on P. Ramanatha Aiyar's, *The Major Law Lexicon,* (Vol.5, 4thEdn. 2010 P.5804) . It is submitted that in India, regulators were set up in different sectors to ensure that the interests of consumers and the interest of the various players in the market are balanced. Such bodies dealt in different sectors where previously the government was operating exclusively and has since liberalized or privatized the sector. It was contended that this was thought to be expedient to bring in independent bodies balancing the competing interests of the stakeholders in the field.

44. Mr. Lakshmikumaran, argued that regulators principally performed the functions which are regulatory, advisory or recommendatory, executive and in certain cases adjudicatory (the latter is incidental to regulatory framework in order to maintain the balance in the principal sector or industry concerned). In the process, the regulator is concerned mainly with issuing rules or regulations which forms the framework governing the sector and ensuring compliance by issuing directions; it advices in certain cases while also discharging adjudicatory functions. The learned counsel dealt with the provisions of the SEBI Act (Section 11 delineating the regulatory functions of SEBI; Section 15A to 15JA empowering adjudication and levy of penalties, etc.); the Telecom Regulatory Authority of India Act [Section 11(1)(b)

granting regulatory powers and section 11(1)(a) providing for recommendatory powers]; the Airports Authority of India Act (Section 12 dealing with regulatory functions to its standards for development, construction and maintenance of runway airports, etc.; Section 28B – Officers empowered to evict unauthorized persons and consequentially Section 28E – power to remove unauthorized construction; Section 29B and 28E); The Reserve Bank of India Act, 1934 (Section 17 being regulatory enabling the RBI to regulate banking in India and power to issue notice, Section 25 to 27 relating to legal tender and bank notes; Section 45JA – power of RBI to determine policy and issue directions etc.); other enactments such as *Airports Economic Regulatory Authority of India, 2008*; *The Electricity Act, 2003* (Section 79 and various sub-sections enabling determination of policy, the Tariff, Regulations of Tariffs, facilitation of inter-State transmission of electricity, licensing etc; Section 79(1) (f) – adjudication of disputes between the licensees and generating companies and advisory functions under Section 79(2) with respect for formation of National Electricity Policy, Promotion of Competition, efficiency and economy).

45. Mr. Lakshmikumaran submitted that there is a basic difference between Courts and Tribunals on the one hand and regulatory bodies on the other. Former are essentially an authority which reacts to given situations which is brought to its notice whereas the regulatory is of proactive bodies empowered to frame statutory rules and regulations. The regulatory mechanism pre-supposes upon discussion before participation and circulation of the draft papers inviting suggestions. Learned counsel relied upon *Lafarge Umiam Mining Pvt. Ltd., T.N. Godavarman Thirumulpad v. Union of India and Others* (2011) 7 SCC 338. It is submitted that the regulators are not involved in adjudicatory functions but involved rather in regulating a market or an industry and in the process independently under certain circumstances undertake functions requiring it to act in a judicial manner. The reliance was placed upon *PTC India Ltd. vs. Central Electricity Regulatory Commissioner,* (2010) 4 SCC 603, which held that regulatory functions fall in between legislative and administrative functions and that they partake legislative character as well as administrative (in the nature of directions licensing, etc.). The regulatory functions are predominantly legislative. On the other hand, authorities which are required to adjudicate are either quasi judicial

statutory bodies or tribunals. Counsel relied upon provisions of Customs Act, which creates adjudicating officials and bodies to undertake specific functions but without trapping of courts. The Appellate Tribunal under Section 129 has power of Civil Court and its proceedings are considered judicial proceedings. If one keeps this functions and rules in mind, it is clear that the Competition Commission of India is not a regulator and it is a principal authority which exercises a judicial functions conferred by the Statute. It has all the trapping of courts and is a Tribunal. It in fact determines the rights and liabilities of the parties before it.

46. It is urged by Mr. Lakshmikumaran who supplemented the submission of the previous counsel that a body which is a Tribunal and performs judicial functions as opposed to one which predominantly advices or regulates or discharges its executive functions that independently adjudicatory functions, its composition has to be of judicial members. Reliance was placed upon *Jaswant Sugar Mills vs. Lakshmi Chand*, AIR 1963 SC 677; *Harinagar Sugar Mills vs. Shyam Sunder* AIR 1961 SC 1669 and *Associated Cement Companies Ltd. vs. P.N. Sharma*, AIR 1965 SC 1595. In this context, it was urged that the CCI in exercise of its powers under Section 3 and 4 is conferred with judicial power of the state and, therefore, discharges the judicial functions. This is demonstrable from its powers and functions, having regard to Sections 27, 28, 33, 36 and 61 and Regulations 10, 12(2), 15, 24-28, 31, 32, 39, 41-43 and 45. These are essentially judicial functions which can be performed by a court. Its power is conclusive and also it is empowered to impose penalty. Highlighting Section 61 of the Act, it is submitted that the jurisdiction of the Civil Courts (which otherwise are possessed with the authority to adjudicate upon all disputes of civil nature) is expressly barred. The corollary is, therefore, that the role and functions of the Competition Commission of India are that of a court and not a regulatory body. Counsel compared the powers conferred under Section 3 and 4 with Sections 1 and 2 of the U.S. Sherman Anti-Trust Act, 1891 and submitted that those disputes are decided in courts. It is, therefore, urged that the Act is unconstitutional as it does not mandate judicial membership under Sections 8(2), 22(2) and (3). These are also arbitrary because they trench upon the rights of an individual who is denied access to the courts and right to be heard by a judicial body, comprised of judicially competent

and qualified personnel which is the standard required of by the Constitution of India. Learned counsel also submitted that Section 22(2) and (3) as far as it adopts the concepts of 'members present and voting', 'casting vote' and a 'quorum of 3 members' is opposed to recognized principles of justice, adjudication in India and in complete deviation of standards which constitutes the rule of law. It was submitted that it is the only judges or adjudicatory personnel who hear the case finally and throughout the final hearing, who are competent and empowered to decide the final order. The participation of others at intermittence stages and absence of one or many of them in the final decision vitiates it. Learned counsel relied upon the judgment of the Calcutta High Court in *Mahomed Akil vs. Asadunnisa Bibee,* 9WR 1 (FB) and the judgment in *State of Punjab vs. Khan Chand* (1974) 1 SCC 549.

47. Mr. Gurukrishnakumar, learned senior counsel appearing for Skoda Auto India Pvt. Ltd. argued that the Act sought to replace the forum dealing with anti-competitive behaviour. Both under the MRTP Act as well as the Act, the investigation is conducted by Director General (Investigation) ["DG(I)" or "DG"] under the supervision of the Commission. Further, under both the Acts, the DG submits the report to the respective Commission on the basis of which the Commission decides to enquire. The procedure for enquiry of a restrictive/unfair/monopolistic trade enquiry under the MRTP Act was that the MRTP Commission followed an adjudicatory process which involved hearings, recording of evidence, cross-examination and proper adjudication. Under the Act, this step/stage of adjudication under Section 26 of the Act is done by the CCI which is also evident from Section 36(2) of the Act. Therefore, the determination of existence of anti-competitive behaviour and consequential passing of an order, which was done by following a proper judicial process under the MRTP Act, cannot be taken away under the new law, i.e., *Competition Act*. Reliance was placed on *Union of India vs. R. Gandhi, President, Madras Bar Association* (2010) 11 SCC 1; *Madras Bar Association vs. Union of India & Anr.* (2014) 10 SCC 1.

48. Mr. Neeraj Kishan Kaul, learned senior counsel for Daimler Benz, adopted the submissions of the previous counsel who argued before him; he also urged that in the case of Benz, the findings rendered by CCI were perverse and arbitrary, because

despite submissions and reliance on materials that the company does not have a policy of spares sales by third parties, the CCI ignored these facts and proceeded to render similar findings and also impose penalty, in an utterly unwarranted manner.

49. Mr. Sanjay Jain, who appeared for the CCI, argued that the body was established to address the need for an expert regulation in the field of economic activities in the backdrop of growing complexities in the global and domestic commercial regimes. CCI and COMPAT were set up pursuant to the enactment to eliminate inequalities in opportunities in the field of trade and commerce since the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (hereafter "MRTP Act") was inadequate. It fulfilled the need for a new law eliminating practices having adverse effect on competition, to protect the interests of consumers, to ensure freedom of trade and to bring about healthy competition in the market. CCI, underlined counsel, owes its origin not to Article 323B of the Constitution of India but to Articles 38 and 39 of the Constitution of India and its character can be judged only on the touchstone of Article 38(2) of the Constitution read with the statement of objects and reasons in the amending Act and preamble of the Act.

50. It was submitted that a regulatory body or agency can be defined as a *"public authority or an agency responsible for exercising autonomous authority over some area of human activity in a regulatory or supervisory capacity".* The CCI, as evident from the Preamble and the Statement of Objects and Reason of the Act, was conceptualized as a pro-active administrative machinery armed with the requisite expertise to actively engage with the complex and ever-evolving economic landscape of the country. Economic liberalisation in the 1990's necessitated the introduction of the CCI which discharges a wide array of functions in order to achieve its administrative policy, i.e. to promote competition and protect the interest of consumers.

51. Mr. Jain argued that it is a well settled principle of law that the executive is bound to implement its policies in accordance with the Constitution, thus by necessary implication the CCI is an executive body. Furthermore, it is also no longer *res integra* that if a function is not performed by the legislature or the judiciary it is a function which is performed by the executive. CCI regulates the economic landscape

by performing a wide array of functions under the various provisions of the Act. The CCI under Section 6 of the Act is entrusted with the function of approving combinations, which are defined in Section 5 of the Act. In the process of approving combinations, the enterprises approach the CCI with the terms of proposed combination, to which CCI can make changes to, before approving the proposed combination. For it to do so CCI has to conduct an in-depth analysis of various economic factors and adjudicate / determine whether the proposed combination could cause an appreciate adverse effect on competition. It is also called upon to promote competition advocacy which includes creating awareness and imparting training on various economic issues and also giving opinion to the Central Government on policies. Furthermore, CCI is required to and has in fact entered into various Memoranda/Arrangements with agencies of foreign countries for discharging its duties and bringing about mutual cooperation. In its regulatory role, it has to adjudicate – executively- issues of *appreciable Adverse Effect on Competition and Abuse of Dominance* under Sections 3 and 4 of the Act. It is submitted that 'Executive adjudication' is a well-recognized concept within the Indian Constitutional framework and every executive authority is necessarily required to engage itself in some form or manner of adjudication for discharging its duties. The CCI, while passing orders under Section 3 and 4 of the ACT also regulates conduct of the enterprises by passing regulations and orders. The fact that CCI adjudicates does not mean that it is a judicial body; rather the species of adjudication performed by CCI is in stark contrast to that performed by Courts/judicial tribunals. The law is well settled by a catena of judgments of the Supreme Court that merely because a body in discharging its primary objective incidentally performs a functions of another branch that does not take in any way dilute or change the character of the body.

52. It is contended that an expert regulatory body such as CCI cannot be castled in the watertight compartments of separation of powers, which in the quasi federal framework of Indian Constitution are inherently overlapping. In the context of CCI, notwithstanding the multiple hats it wears, the legislature has taken care to provide for an appellate mechanism which is apart from the power of Judicial Review by the Constitutional Courts. Counsel urged that under the amended Act, post *Braham Dutt*

(supra), CCI is structured and set up as an expert regulatory body performing the role of independent regulator/watchdog for the economy in the same mould as Securities and Exchange Board of India (hereinafter referred to as "SEBI") performs *qua* the Securities market. In the course of its functioning CCI undertakes "executive adjudication" in juxtaposition to judicial adjudication in respect of all aspects entrusted under the *Competition Act*. Therefore merely because CCI also performs adjudicatory functions it does not acquire the character of judicial tribunal or Court. According to Black's Law Dictionary, Seventh Edition, Administrative Adjudication is defined as *"the process used by an administrative agency to issue regulations through an adversary proceeding. The same definition has been reiterated in Wharton's Law Lexicon, Fifteenth Edition."*

53. It is emphasized that CCI was not set up to substitute any court or tribunal or to adjudicate upon matters which earlier belonged to the domain of an Adjudicatory body akin to a Court or Tribunal. The observations in *S.P. Gupta v. Union of India*, AIR 1982 SC 149 are relied on to show that such functions could never be performed by courts. The court held:

> *"The Court does not decide issues in the abstract. It undertakes determination of a controversy provided it is necessary in order to give relief to a party and if not relief can be given because none is sought, the Court cannot take upon itself a theoretical exercise merely for the purpose of deciding academic issues, howsoever important they may be. The Court cannot embark upon an inquiry whether there was any misuse or abuse of power in a particular case, unless relief is sought by the person who is said to have been wronged by such misuse or a bust of power. The Court cannot take upon itself the role of a commission of inquiry – a knight errant roaming at will with a view to destroying evil wherever it is found…."*

54. Thus, CCI is a commission of inquiry performing regulatory functions and adjudicating even if no relief is sought from it; it is clearly not a substitute for a Court nor is it performing a function which was hitherto performed by a Court. In its primary role as a regulator, entrusted with the tasks envisaged in Section 18 of the Act (Duties of the Commission), the primary focus in selection of its members is bound to be the confluence of persons who possess expertise in the fields contemplated in

Section 8(2)("Composition of the Commission") of the Act, which does not contemplate the indispensable presence of a retired Judge or a person eligible to be a Judge.

51. Mr. Jain submitted that by virtue of the Amending Act of 2007, all such adjudications which had the trapping of "judicial adjudication" have now been divested from CCI and entrusted to a new body headed by a retired Supreme Court Judge, thus substantially meeting the spirit of observations in *Braham Dutt (supra)*. It is urged that adequate parameters are duly incorporated to guide CCI to carry out its functions under Sections 19(3)-19(7) of the Act. These parameters act as guidelines for the CCI to determine vital concepts such as *"appreciable adverse effect of competition"*, enquiry into the aspects of *"dominant position"*, *"relevant market", "relevant geographic market"* and *"relevant product market".* Even in imposition of penalties, under Section 27 of the Act is a task hedged with sufficient safeguards. Moreover, the maximum limits of penalties are provided in the Act and discretion is vested with the CCI to impose lesser or no penalty in certain cases. All orders imposing penalty under Section 27 of the Act are appealable with no precondition of a pre-deposit. Under the amended Act the order passed under Section 27 of the Act are not treated as "Decrees" of the Court. The COMPAT on its part can reduce or even completely waive the requirement of depositing the penalty at the hearing stage or for that matter setting aside the order to this effect. Therefore, it is not an unbridled or unfettered power.

55. It is argued that administrative adjudication is not an alien concept but rather its importance has been recognized in various judgments in India and internationally. *Fundacio Privida Intervida vs. Additional Commissioner, Pune Division & Anr.* 2005 (2) ALL MR 48 that under the Indian Constitution, quasi-judicial or administrative adjudication is a known feature; the observations of the Bombay High Court in this context, were relied on, that "*Sometimes, the task of adjudication is merely an incidental administration; sometimes, it is more than incidental and it begins to assume a very close resemblance with the work usually assigned to the judiciary. This practice of vesting adjudicatory functions in person, bodies or institutions outside the*

ordinary hierarchy or regular law courts is becoming increasingly pronounced with the passage of time."

56. It is urged that the CCI must impose penalty in a quasi-judicial manner. The expression *"quasi-judicial"* is an expression where an executive body exercises discretion by adopting certain judicial procedures to ensure fairness. This is described in *Gullapalli Nageswara Rao v. State of Andhra* AIR 1959 SC 1376 as follows:

> *"The concept of a quasi-judicial act implies that the act is not wholly judicially; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive powers."*

57. Furthermore, the observations of the Supreme Court in *Clariant International Ltd. v. SEBI* AIR 2004 SC 4236**,** which held that administrative adjudication has become a necessary concomitant of a welfare state and finds home in many statutes, is relied on:

> *"66. The modern sociological condition as also the needs of the time have necessitated growth of administrative law and administrative tribunal. Executive functions of the State calls for exercise of discretion. The executive also, thus, performs quasi judicial and quasi legislative functions and, in this view of the matter, the administrative adjudication has become an indispensable part of the modern state activity."*

58. CCI also relies upon the authority of the Supreme Court's decision in *Satyapal Anand v State of Madhya Pradesh & Anr*. (2014) 7 SCC 244. The court had rejected the argument of violation of "separation of powers" in the context of adjudication by the Registrar of Co-operative Societies in a state enactment and held that:

> *"11. We have already taken note of the scheme of the Act and the role and functioning of the office of the Registrar under the said scheme. Most of the powers of the Registrar are administrative in nature. While exercising those powers the Registrar is not deciding any lis. He is one of the main administrative functionaries for the purposes of carrying out the objectives of the said Act. At the same time, the Registrar is also given some quasi-judicial powers. He, as also for that matter the Additional/Joint/Deputy/Assistant Registrar are, therefore, wearing two hats, with predominant role of the administrators. It is not the case of the petitioner that the judicial function should be taken away from the Registrar and assigned to some other authority. The petitioner has pleaded for appointment of a person with legal background as*

Registrar, etc. to enable him to decide the dispute between the parties more effectively, as according to him, any person with no legal/judicial background is incapable of deciding those cases. However, same arguments can be pressed by other side in a reverse situation. If a person with legal background is appointed to any of these posts, then his appointment can be challenged on the ground that such a person though would be fit to discharge the quasi-judicial duties, but totally unfit to discharge other administrative duties which are the primary and day-to-day duties attached to the said office.

12. We would have still given some weightage to the argument of the petitioner, had it been a case where the order of the Registrar, deciding the dispute, was made final. That is not so…."

59. Learned counsel also relied on the observations in *Ujjam Bai v State of Uttar Pradesh* AIR 1962 SC 1621, to advance CCI's argument in this context, especially the following passage:

"169. In this case a further attempt is made on behalf of the State to restrict the scope of the Court's jurisdiction. Uninfluenced by judicial decisions, let us approach the question on principle. An illustration arising on the facts of the present case will highlight the point to be decided. A citizen of India is doing business in bidis. He has fundamental right to carry on that business. The State Legislature enacts the Sales Tax Act imposing a tax on the turnover and on the sales of various goods, but gives certain exemptions. It expressly declares that no tax shall be levied on the exempted goods. The said law is a reasonable restriction on the petitioner's fundamental right to carry on the business in bidis. Now on a true construction of the relevant provisions of the Act, no tax is leviable on bids. But on a wrong construction of the relevant provisions of the Act, the Sales-tax Officer imposes a tax on the turnover of the petitioner relating to the said bidis. He files successive statutory appeals to the hierarchy of tribunals but without success. The result is that he is asked to pay tax in respect of the business of bidies exempted under the Act. The imposition of the said illegal tax on the turnover of bidis is certainly an infringement of his fundamental right. He comes to this Court and prays that his fundamental right may be enforced against the Sales-tax Officer. The Officer says, "It may be true that my order is wrong; it may also be that the Supreme Court may hold that my construction of the section as accepted by the highest tribunal is perverse; still, as under the Act I have got the power to decide rightly or wrongly, my order though illegal operates as a reasonable restriction on the petitioner's fundamental right to carry on business." This argument, in my view, if accepted, would in effect make the wrong order of the Sales-tax Officer

binding on the Supreme Court, or to state it differently, a fundamental right can be defeated by a wrong order of an executive officer, and this Court would become a helpless spectator abdicating its functions in favour of the subordinate officer in the Sales-tax Department. The Constitution says in effect that neither the Parliament nor the Executive can infringe the fundamental rights of the citizens, and if they do, the person affected has a guaranteed right to approach this Court, and this Court has a duty to enforce it; but the Executive authority says, "I have a right to decide wrongly and, therefore the Supreme Court cannot enforce the fundamental right". There is nothing in the Constitution which permits such an extraordinary position. It cannot be a correct interpretation of the provisions of the Constitution if it enables any authority to subvert the paramount power conferred on the Supreme Court.

170. It is conceded that if the law is invalid, or if the officer acts with inherent want of jurisdiction, the petitioner's fundamental right can be enforced. It is said that if a valid law confers jurisdiction on the officer to decide rightly or wrongly, the petitioner has no fundamental right. What is the basis for this principle ? None is discernible in the provisions of the Constitution. There is no provision which enables the Legislature to make an order of an executive authority final so as to deprive the Supreme Court of its jurisdiction under Article 32 of the Constitution.

171. But the finality of the order is sought to be sustained on the principle of res judicata. It is argued that the Sales-tax Tribunals are judicial tribunals in the sense they are courts, and, therefore their final decisions would operate as res judicata on the principle enunciated by this Court in Daryao's case [1962]1SCR574 . Can it be said that Sales-tax authorities under the Act are judicial tribunals in the sense they are courts ? In a Welfare State the Governments is called upon to discharge multifarious duties affecting every aspect of human activity. This extension of the governmental activity necessitated the entrusting of many executive authorities with power to decide rights of parties. They are really instrumentalities of the executive designed to function in the discharge of their duties adopting, as far as possible, the principles of judicial procedure. Nonetheless, they are only executive bodies. They may have the trappings of a court, but the officers manning the same have neither the training nor the institutional conditions of a judicial officer. Every Act designed to further the social and economic progress of our country or to raise taxes, constituted some tribunal for deciding disputes arising thereunder, such as income-tax authorities, Sales-tax authorities, town planning authorities, regional transport authorities, etc. A scrutiny of the provisions of the U.P. Sales-tax Act with which we are now concerned, shows that the authorities constituted thereunder

are only such administrative tribunals as mentioned above. The preamble to the Act shows that it was enacted to provide for the levy of tax on the sale of goods in Uttar-Pradesh. The Act imposes a tax on the turnover of sales of certain commodities and provides a machinery for the levy, assessment and collection of the said tax. Under the Act the State Government is authorized to appoint certain assessing authorities. It provides for an appeal against the order of the assessing authority and for a revision in some cases and a reference to the High Courts in others. The State Government is also authorized to appoint a hierarchy of authorities or tribunals for deciding the appeals or revisions. The assessing authorities are admittedly the officer of the Sales-tax Department and there is nothing in the Act to indicate that either the assessing authority or the appellate authority need possess any legal qualification. It is true that legal qualification is prescribed for the revising authority, but that does not make him a court or make the inferior tribunals courts. The said authorities have to follow certain principles of natural justice, but that does not make them courts. The scheme of the Act clearly shows that the sales-tax authorities appointed under the Act, following the principles of natural justice, ascertain the turnover of an assessee and impose the tax. The hierarchy of tribunals are intended to safeguard the interest of the assessees as well as the State by correcting wrong orders. The fact that, following the analogy of the Income-tax Act, at the instance of the party aggrieved a reference can be made by the reviewing authority to the High Court on a question of law shows only that the help of the High Court can be requisitioned only to elucidate questions of law, but the High Court has no power to make final orders, but on receipt of the judgments of the High Court, the revising authority shall make an order in conformity with such judgment.

60. Mr. Jain argued that it is clear that a body charged with performing multiple functions can adjudicate and it is not necessary that the person(s) manning the body must have a legal background. The only aspect that emerges is that the body while adjudicating performs in a quasi-judicial manner, which mandates that the executive must adopt judicial procedures and not that the person performing a quasi-judicial function must have a judicial background. Furthermore, if a body decides between an individual and public interest at large there is no *lis per se*, which further ratifies the fact that the CCI does not perform a judicial function. CCI's adjudication is also used to regulate and monitor conduct of various companies. According to *Black's Law Dictionary, Seventh Edition,* "Administrative Adjudication" is defined as "*the process used by an administrative agency to issue regulations through an adversary*

proceeding". The same definition has been reiterated in *Wharton's Law Lexicon, Fifteenth Edition.* The method of regulating through adjudication is a well-recognized practice globally, for instance, in *Securities and Exchange Commission v. Chenery Corporation* 332 US 194. The relevant extract of the judgment has been reproduced below :

> *"…. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mould of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.*
> *In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. See Columbia Broadcasting System v. United States, 316 U.S. 407, 316 U.S. 421."*
> *Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct…."*

61. Distinguishing the judgments cited by the petitioners, CCI urges that in those judgments the Supreme Court was only concerned with the issue whether a particular body was a "tribunal" for the purposes of Article 136 of the Constitution of India, i.e. if an appeal would lie to the Supreme Court from the decision of such a body and not whether tribunals required judicial members. The fallacy of the said argument can be seen from these judgments itself wherein the Central Government/State Governments have been held to be a tribunal, therefore these purely executive bodies have been held to be tribunals. Therefore, the reliance placed by the petitioner on these

judgments to show that the tribunals must be manned by judicial members is completely misplaced.

62. Mr. Jain argued that the doctrine of separation of powers does not apply in its strict rigor in India and highlighted observations in several judgements of the Supreme Court, which said so: *Bhim Singh v Union of India* 2010 (5) SCC 538; *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299 and *Jayantilal Amritlal Shodhan v F.N. Rana* 1964 (5) SCR 294. It is submitted, therefore, that the incidental performance of quasi judicial functions by a regulatory authority, under law, cannot militate against that doctrine so as to be called arbitrary or vitiate the setting up of the agency. Counsel distinguished the decision in *Amriksingh Lyallpuri v Union of India* 2011 (6) SCC 535, (cited by the petitioners in support of their proposition that composition of COMPAT was not compatible with the decisions of the Supreme Court, as it was not a judicial tribunal); he submitted that in *Amriksingh (supra),* the provision of appeal to an *administrative body* against a quasi-judicial order was held unconstitutional. It was submitted that the COMPAT does not, however, suffer from any such fatal infirmity.

63. It was submitted that CCI is not the only executive/non-judicial body, that adjudicates and imposes penalties. Apart from regulatory body like SEBI there are several Governmental departments such as the Customs, Excise, Income Tax, Service Tax etc. which are empowered under their respective special Acts to adjudicate upon and impose penalties, without being bestowed with the tag of Court or a Tribunal. Taking away power to impose penalty from regulatory bodies will make them toothless tigers, destroying the very purpose of them being set up in the first place.

64. Learned senior counsel then submitted that the observations in *Madras Bar Association (supra)* could not be relied upon in the present case. According to him, the Supreme Court had to deal with a tribunal that fundamentally differed from the CCI on several aspects: firstly, the NTT was not a regulatory agency, but a *pure second appellate tribunal;* secondly, NTT ousted existing High Court jurisdiction whereas CCI was created by a new law; thirdly, NTT dealt with appellate disputes, whereby factual aspects were largely tested and decided by lower tax authorities unlike CCI which had regulatory overview and dealt with factual matters; fourthly, an

entire *range of legal issues- corporate law, family and personal law, taxation, finance, intellectual licensing telecom, etc.* were involved for which knowledge of law was essential, whereas such intensive legal knowledge is inessential in deciding issues of competition; fifthly, NTT decided a *lis* that invariably involved the government as a *litigant* before the tribunal, unlike CCI which *did not decide a lis, and in which the government was not necessarily or always a party*. Dealing with the petitioner's contentions as regards *R. Gandhi (supra)*, Mr. Jain highlighted that the long-established jurisdiction of existing tribunals and the High Court as regards interpretation of company law and allied enactments was sought to be ousted and replaced by a tribunal. This attempt was similar to the creation of NTT, which sought to do away with over five decades old tribunals and High Courts' jurisdiction, which was held to be unconstitutional inasmuch as *judicial power* was sought to be tribunalized thus undermining the doctrine of separation of power, leading to arbitrariness.

65. It was next argued-in the context of Section 27 that there is no need to give a separate hearing for the purpose of determination of quantum of penalty, for the reason that (a) the "opposite parties" are at liberty to address them compositely while making submissions on merits and (b) the COMPAT is empowered to reduce or stay the penalty even without insisting on full or partial pre-deposit unlike several other appellate regimes. It was submitted that as to the concept of 'relevant turnover', merely because the CCI has in a particular order, taken the total turnover or a company rather than the product specific turnover, it does not given rise to challenge being mounted for constitutional validity of the provision. In fact the COMPAT itself has interpreted the expression turnover as the relevant turnover which in turn would consider the data confined to the product in question. The matter is presently pending adjudication in the Supreme Court and hence need not be addressed in these proceedings. Suffice to state, the terms turnover, enterprise etc have been clearly defined under the Act and there is neither any vagueness nor any unconstitutionality *qua* the same.

66. Turning next to the manner of appointment of members of CCI it was urged that the composition of the selection committee is in conformity with the established

legislative norms and do not require any judicial review merely on the basis of speculative presumptions, particularly when the Chief Justice of India is the Chairperson of the Selection Committee and amongst other members two are "Expert Members". Such a high powered and well represented Selection Committee has inherent capacity to ensure fair selection in keeping with the qualifications set out in Section 8(1) of the Act. The composition of such selection committees cannot be questioned on the basis of cynicism. In a democratic body polity, trust must be reposed on a committee which comprises of the Chief Justice of India. Further, the challenge to constitutionality of the selection committee has been mounted- in these cases- on the presumption that the CCI is a judicial body, which the respondents submit to the contrary. It is contended that Sections 54-56 of the Act, in fact establish and clarify the character of the CCI as an executive body and the provisions are meant to ensure that CCI functions within the broad policy framework of the Central Government.

67. On the question of validity of Section 22 (3), it was argued that since CCI is contemplated as a regulatory body which carries out its functions in the meetings as distinct from court hearings, there is nothing irrational in providing for a minimum quorum of 3 members particularly in the light of Section 22(3) of the Act. In a regulatory mechanism where decisions are taken in a meeting, the casting vote contemplated under Section 22(3) is an effective and logical working tool. This is the only viable option in a scenario, where in a particular meeting, there are only 4 or 6 members present and the meeting results in a deadlock. In such situations the provision of casting vote enables achievability of a majority decision.

68. Mr. Jain refuted that the enactment was void as it permitted "the revolving door" procedure. It was submitted that the allegation is unfounded and misconceived since it is a settled proposition of law that validity of a law cannot be determined on the assumption that the concerned authority is likely to act in an arbitrary or irregular manner. It was further submitted that "the revolving door" allegation is based on the premise that certain members who heard the final arguments of the case, chose not to sign the final order. This is disputed as incorrect since apart from the three members who signed the final order, all the other members who had heard the final arguments

of the petitioners before the CCI had retired. Further, the cases cited by the petitioners relate to the proposition that "only one who hears must decide", i.e.; someone who has not heard the parties should not decide and that's the reason that even when new members were appointed, since they had not heard the petitioners on the final arguments, they did not sign or pass the final order. It is argued that the petitioners are seeking to take benefit of their own doings inasmuch as on the one hand they enjoyed a stay of proceedings before the CCI pursuant to their final arguments having been heard on the basis of a stay granted by the Madras High Court in WP No.26488/2013, on the other they are seeking to challenge the order on the so called revolving door policy even though a majority of the members had retired in the interregnum and could not pass the orders while they were in service due to the operation of the stay. The car makers also had committed to change its practices pursuant to the order passed by CCI, and that was taken as one of the mitigating circumstances in the impugned order. Contrary to them changing their anti-competitive practices, the petitioners have chosen to challenge the said order itself.

69. M/s. Super Cassettes has been involved in various rounds of litigations and has filed petitions to try and derail the process. This is the third round of writ petitions filed by Super Cassettes. Earlier ones being W.P. (C) No.2037 of 2013 and W.P. (C) No. 1119 of 2012.

70. It was next urged that Section 61 does not call for invalidation nor justifies mandatory inclusion of a retired Judge or a person eligible to be Judge being selected as a member of CCI. Section 9 of the CPC holds the field as a general law that unless barred, a civil court has unfettered powers to adjudicate upon almost every dispute which is of a civil nature. Nonetheless, Section 9 of the CPC for its invocation would need two basic prerequisites, (a) there must be a bilateral dispute between two parties and (b) the dispute must be of a civil nature not otherwise covered under any Special Act. It is the above provision of CPC which has necessitated pre-emptory inclusion of a provision akin to Section 61 of the Act in all special enactments. The purpose is to implement the legislative intent of avoiding exercise of overlapping jurisdictions, if any. Though in the context of the Act, the matters which are incidentally adjudicated by CCI in exercise of its regulatory functions are not in the nature of bilateral dispute

between two parties, still, the same being of a civil nature (as well), as a matter of abundant caution, the legislature wanted to rule out a possibility where under a mistaken belief, a Civil Court would end up entertaining such a matter. Section 61 only compliments the objectives of the Act and does not militate against it.

71. Counsel submitted that CCI is considered to be an expert regulatory body. While culling out the market share, relevant geographical, relevant product market there are various economic formulae, economic tools, accounting principles, understanding of socio-economic factors and algorithms which are required to be pressed into service and are used by the CCI, thus there is a need for experts. An example of one of such formulas is the Herfindahl index (also known as Herfindahl-Hirschman Index, or HHI) -a measure based on the total number and size distribution of firms in the industry which is important for determining the level of concentration in a sector. It is computed as the sum of the squares of relative size of all firms in the industry.

72. Mr. Jain concluded his submissions, urging that the grounds in support of the petitioner's case that the doctrine of separation of powers or independence of the judiciary, being violated resulting in the invalidation of the Act are insubstantial. He submitted that even if *arguendo*, any particular procedure in a given case or group of cases is found to be irregular, that cannot lead to the declaration by the court, that the legislation is unconstitutional.

Provisions of the Act

73. The present case concerns the constitutionality of Section 8, 9, 15, 17, 22, 26, 17, 36, 53C, 53D, 55, 56 and 61 of the *Competition Act, 2002* and Regulations 37, 41, 44, 45 and 48 of the *Competition Commission of India (General Regulations, 2009*). They are extracted below:

> ***"Section 8 : Composition of Commission:***
> *(1) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.*
>
> *(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and*

such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

(3) The Chairperson and other Members shall be whole-time Members.]

Section 9 : Selection Committee for Chairperson and Members of Commission

(1) The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of--
(a) the Chief Justice of India or his nominee.....Chairperson;
(b) the Secretary in the Ministry of Corporate Affairs.....Member;
(c) the Secretary in the Ministry of Law and Justice.....Member;
(d) two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy.....Members.

(2) The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.]

Section 15 : Vacancy, etc. not to invalidate proceedings of Commission

No act or proceeding of the Commission shall be invalid merely by reason of— (a) any vacancy in, or any defect in the constitution of, the Commission; or (b) any defect in the appointment of a person acting as a Chairperson or as a Member; or (c) any irregularity in the procedure of the Commission not affecting the merits of the case

Section 22 : Meetings of Commission

(1) The Commission shall meet at such times and such places, and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be provided by regulations.

(2) The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or casting vote:

Provided that the quorum for such meeting shall be three Members.]

Section 26 : Procedure for inquiry on complaints under section 19

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

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

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

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

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

Provided that in case the investigation is caused to be made based on a reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

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

(6) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission agrees with the recommendation

of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

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

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

Section 27 : Orders by Commission after inquiry into agreements or abuse of dominant position

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:--

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

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

2[* *]*

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

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

3[* *]*

(g) pass such other 4[order or issue such directions] as it may deem fit.

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

Section 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; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; (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.]

Section 53C. Composition of Appellate Tribunal.- *(Omitted by the Finance Act, 2017)*

The Appellate Tribunal shall consist of a Chairperson and not more than two other Members to be appointed by the Central Government.

Section 53D. Qualifications for appointment of Chairperson and Members of Appellate Tribunal.—(*Omitted by the Finance Act, 2017)*

(1) The Chairperson of the Appellate Tribunal shall be a person, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(2) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, competition matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal.

Section 55: Power of Central Government to issue directions
(1) Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time: Provided that the Commission shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub- section.
(2) The decision of the Central Government whether a question is one of policy or not shall be final.

Section 56:Power of Central Government to supersede Commission
(1) If at any time the Central Government is of the opinion—
(a) that on account of circumstances beyond the control of the Commission, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
(b) that the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by

or under the provisions of this Act and as a result of such default the financial position of the Commission or the administration of the Commission has suffered; or
(c) that circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification and for reasons to be specified therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification: Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the Commission to make representations against the proposed supersession and shall consider representations, if any, of the Commission.

(2) Upon the publication of a notification under sub-section (1) superseding the Commission,—
(a) the Chairperson and other Members shall as from the date of supersession, vacate their offices as such;
(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Commission shall, until the Commission is reconstituted under subsection (3), be exercised and discharged by the Central Government or such authority as the Central Government may specify in this behalf;
(c) all properties owned or controlled by the Commission shall, until the Commission is reconstituted under sub-section (3), vest in the Central Government.

(3) On or before the expiration of the period of supersession specified in the notification issued under subsection (1), the Central Government shall reconstitute the Commission by a fresh appointment of its Chairperson and other Members and in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment.

(4) The Central Government shall cause a notification issued under sub- section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

Section 61: Exclusion of jurisdiction of civil courts
No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the 89 [Commission or the Appellate Tribunal] is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

The Competition Commission of India (General) Regulations, 2009

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 50. Provided further that no request for inspection or certified copies of internal documents shall be allowed.
(2) The Commission may, on an application of a person, who is not a party to the proceedings, on sufficient cause demonstrated, allow such person inspection of documents or records mentioned in sub-regulation (1) on payment of fee as specified in regulation 50.
(3) An inspection shall be allowed only in the presence of an officer so authorized by the Secretary: Provided that the inspection of documents or copying thereof as per sub-regulation (1) or sub-regulation (2) shall be allowed under the supervision of and subject to the time limits to be specified by the Secretary or an officer authorized by him in this behalf.
(4) An officer of the Central or State Government or the Director General or a statutory authority shall be allowed inspection and obtain copies of documents or records mentioned in sub-regulation (1) on making written request to the Secretary for the purpose.

41. Taking of evidence. *–*
(1) Subject to the provisions of the Act, the Commission or the Director General, as the case may be, may determine the manner in which evidence may be adduced in the proceedings before them.
(2) Without prejudice to sub-regulation (1), the Commission or the Director General, for the purpose of inquiry or investigation, as the case may be, may –
(a) admit evidence taken in the form of verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail, telephone records including authenticated mobile telephone records, written signed unsworn statements of individuals or signed responses to written questionnaires or interviews or comments or opinions or analyses of experts based upon market surveys or economic studies or other authoritative texts or otherwise, as material evidence;
(b) admit on record every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact provided it is duly certified by a gazetted officer of the Central Government or by a State Government or a statutory authority, as the case may be or a Magistrate or a Notary appointed under the Notaries Act, 1952 (53 of 1952) or the Secretary of the Commission;
(c) admit the entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business, including

entries in any public or other official book, register or record or an electronic record, made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, as documentary evidence;
(d) admit the opinion of any person acquainted with the handwriting of the person by whom a document is supposed to have been written or signed, as relevant fact to prove the handwriting of the person by whom the document was written or signed;
(e) admit the opinion of the handwriting experts or the experts in identifying finger impressions or the persons specially skilled in interpretation of foreign law or of science or art;
(f) take notice of the facts of which notice can be taken by a court of law under section 57 of the Indian Evidence Act, 1872 (1 of 1872);
(g) accept the facts, which parties to the proceedings admit or agree in writing as proved;
(h) presume that any document purporting to be a certified copy of any record of any authority, court or government of any country not forming part of India as genuine and accurate, if the document purports to be certified in any manner which Is certified by any representative of the National Government of such country to be the manner commonly in use in that country for the certification of copies of such records, including certification by the Embassy or the High Commission of that country in India.
(i) admit such documents including electronic records in evidence as may be considered relevant and material for the proceedings.

(3) Subject to the provision of sub-regulation (2), the following sections of the Indian Evidence Act, 1872 (1 of 1872), in so far as they are applicable to the matters relating to, – (a) section 22-A –when oral admission as to contents of electronic records are relevant;
(b) section 47-A - opinion as to digital signature when relevant;
(c) section 65-B - admissibility of electronic records;
(d) section 67-A - proof as to digital signature;
(e) section 73-A - proof as to verification of digital signature;
(f) section 81-A - presumption as to Gazettes in electronic forms;
(g) section 85-A - presumption as to electronic agreements;
(h) section 85-B - presumption as to electronic records and electronic signatures;
(i) section 85-C - presumption as to digital signature certificates;
(j) section 88-A - presumption as to electronic messages;
(k) section 89 – presumption as to due execution etc., of documents not produced;
(l) section 90-A - presumption as to electronic records five years old; may be applicable for the purpose of inquiry or investigation, by the Commission or the Director General, as the case may be.

(4) The Commission or the Director General, as the case may be, may call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter.
(5) If the Commission or the Director General, as the case may be, directs evidence by a party to be led by way of oral submission, the Commission or the Director General, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross examine the person giving the evidence.

(6) The Commission or the Director General, as the case may be, may, if considered necessary or expedient, direct that the evidence of any of the parties to be recorded by an officer or person designated for the said purpose.

(7) The Commission may direct the parties to file written note of arguments or submissions in the matter.

44. Power of Commission to call for information etc. –
(*1) The Commission may, at any time before passing orders in a proceeding, require any of the parties or any other person whom the Commission considers appropriate, to produce such documents or other material objects as evidence as the Commission may consider necessary for the purpose of enabling it to pass orders.*
(2) The Commission or the Director General, as the case may be, may direct the summoning of the witnesses, discovery and production of any document or other material objects producible in evidence, requisition of any public record from any office, examination by an officer of the Commission the books, accounts or other documents or information in the custody or control of any person which the Commission considers relevant for the purpose.
(3) The Commission or the Director General, as the case may be, at any time, summon and enforce the attendance of any person and examine him, or cause him to be examined on oath.

45. Power of Commission or Director General to issue commissions for examination of witnesses or documents. –
(1) Subject to the provisions of clause (d) of sub-section (2) of section 36 and subsection (2) of section 41 of the Act, the Commission or the Director General, as the case may be, either on its or his own motion or on an application made by a party to any proceeding before the Commission or the Director General, may issue a commission for the examination on questionnaires or otherwise of the specified witness (es), –
(a) residing within India;

(b) who is about to leave India before the date on which he or she is required to be examined as a witness;
(c) Who, being in the service of the Central Government, a State Government or a statutory authority, cannot, in the opinion of the Commission or the Director General, as the case may be, attend without detriment to the public service;
(d) who is unable to attend due to sickness or infirmity;
(e) who resides at a place which is more than five hundred kilometres distance from the office of the Commission or the Director General, as the case may be, and whose attendance, in the opinion of the Commission or the Director General, as the case may be, cannot be procured without incurring unnecessary expense within the stipulated time;
(f) not being covered under any of the situations mentioned in clauses (a) to (e), if his or her evidence is considered necessary in the interest of justice.

(2) Subject to the provisions of sub-regulation (1), the Commission or the Director General, as the case may be, either on its or his own motion or on an application made by a party to any proceeding before the Commission or the Director General, may also issue a commission for the examination on questionnaires or otherwise of any witness residing at any place not within India if satisfied that the evidence of such witness is necessary and may issue a letter of request to the Indian High Commission or the Indian Embassy to facilitate the execution of the commission, under this regulation.

(3) Subject to the provisions of sub-regulations (1) and (2), the Commission or the Director General, as the case may be, either on its or his own motion or on an application made by a party to any proceeding before the Commission or the Director General, may also issue a commission for the examination of specific document(s) whether available in any place situated within or without India and whether or not held in the custody of any witness being examined on questionnaires as per sub-regulations (1) and (2).

(4) A commission for the examination of a witness on questionnaires or otherwise or for examination of a document issued under sub-regulation (1) or (2) or (3) may be issued to any public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860) or a counsel and such public servant or the counsel, as the case may be, shall be appointed as "the commissioner" only for the purposes of executing the commission.

(5) Every public servant or the counsel, referred to in sub-regulation (4), upon receiving a commission under sub-regulation (4) shall

examine the witness or the document, as the case may be, or cause the witness or the document to be examined pursuant thereto and on due execution, shall return the commission together with the evidence taken under it to the Commission or the Director General, as the case may be.

(6) The Commission or the Director General, as the case may be, shall furnish the commissioner appointed under sub-regulation (4) with such part of record of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify that the commission is restricted to finding the facts through the examination as directed and the Commissioner is merely required to transmit the record of the proceedings to the Commission on completion of the examination.

(7) Any Commissioner appointed under this regulation may, unless otherwise directed by the order of appointment – (a) examine the witness himself; (b) call for and examine the documents and other things relevant to the subject of inquiry.

(8) The Commission or the Director General, as the case may be, issuing a commission under this regulation shall fix a date on or before which the commission shall be returned after execution, and the date so fixed shall not be extended except, for reasons to be recorded, the Commission or the Director General, as the case may be, is satisfied that there is sufficient cause for extending the date.

48. Procedure for imposition of penalty under the Act. –
(1) Notwithstanding anything to the contrary contained in any regulations framed under the Act, no order or direction imposing a penalty under Chapter VI of the Act shall be made unless the person or the enterprise or a party to the proceeding, during an ordinary meeting of the Commission, has been given a show cause notice and reasonable opportunity to represent his case before the Commission.

(2) In case the Commission decides to issue show cause notice to any person or enterprise or a party to the proceedings, as the case may be, under sub- regulation (1), the Secretary shall issue a show cause notice giving not less than fifteen days asking for submission of the explanation in writing within the period stipulated in the notice.

(3) The Commission shall, on receipt of the explanation, and after oral hearing if granted, proceed to decide the matter of imposition of penalty on the facts and circumstances of the case."

The Issues needing determination

74. This court is of the view that the issues involved in these batch of petitions are the following:

(1) Is the CCI a tribunal exercising *judicial* functions, or is it performing administrative and investigative functions *and also adjudicating issues before it;*

(2) Is the CCI unconstitutional inasmuch as it violates the separation of powers principle, which underlies the Constitution – and is now recognized as a *basic or essential feature* of the Constitution of India

(3) Is Section 22 (3) unconstitutional for the reasons urged by the petitioners;

(4) Does the *"revolving door"* practise vitiate any provision of the Act or the decisions rendered by the CCI;

(5) Was the power exercised by the CCI to expand the scope of inquiry and notice under Section 26 (1) in an illegal and in an overboard manner;

(6) Is Section 27 (b) of the Act and the provision for penalties unconstitutional or the orders impugned arbitrary, for the reason that no separate hearing is provided, and the statute provides no guideline for exercise of discretion.

Analysis and Conclusions

Re Point No. 1: Is the CCI a tribunal exercising judicial functions, or does it perform administrative and investigative functions as well as adjudicates issues before it

75. On this aspect, there can be little scope for debate; the *SAIL (supra)* judgment of the Supreme Court, which considered the *effect* of orders made under Section 26 (1), analysed Sections 3, 4, 19, 26 and various regulations, and ruled on the effect of the enactment: *"Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4*

read with Section 19 of the Act." This enunciation of the law binds the courts; furthermore, there can be no other view, given that *SAIL (supra)* delineated the role of CCI, which decides whether to commence an inquiry or investigation, under Section 26 (1). The court unambiguously ruled that at that stage, the function was *administrative:*

> *"Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26 (1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami v Union of India [(1992) 4 SCC 605] explained the expression `inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High-Power Judicial Committee constituted, were neither civil nor criminal but sui generis."*

76. Characterizing the proceeding before CCI as one akin to the preliminary stages of a departmental proceeding, the court, in *SAIL (supra)*, held that *prima facie* opinion formation was merely an administrative function and that *inquiry* into the information or complaint (received by CCI) commences *after* such opinion was formed, for which notice to the opposite party is not a pre-requisite, though it may seek information in that regard, in view of Regulation 17:

> *"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 (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 of hearing is not contemplated under the provisions of Section 26 (1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously. 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."

77. It is therefore, clear that though information or complaint which *may trigger an inquiry*, (but not necessarily so, in all cases) is received by the CCI, the initial steps it takes are *not always towards, or in aid of adjudication. They are to ascertain fuller details and inquire into the veracity (or perhaps) seriousness* of the contents of the information, to discern whether such investigation and further steps towards adjudication are necessary. It is important to flag this function, because a court or tribunal, which has *adjudicatory* functions, is seized of the *lis* or the dispute, when the suitor or litigant approaches it. The issuance of notice or summons, by the court, in exercise of compulsive jurisdiction (like in a suit, or civil proceeding, or by a tribunal, in an appeal before it) or in discretionary jurisdiction (like in writ proceedings) are *judicial acts,* necessarily in furtherance of the *adjudicatory function* which the court or tribunal performs. At the stage when CCI entertains and directs an inquiry, *it does not perform any adjudicatory function; the function is merely administrative.* This position has been reiterated in *Competition Commission of India v Bharat Sanchar Nigam Ltd* 2019 (2) SCC 521.

78. At the next stage, *after CCI directs investigation,* the Director General (DG), after investigation, has to report to it [Section 26 (2)]. If the recommendation of the DG is that no case exists, the CCI is nevertheless obliged to forward a report to the informant/complainant, receive its or his comments and afford a hearing [Section 26 (5)]. After the hearing, it may dismiss the complaint [Section 26 (6)]; or direct further inquiry [Section 26 (7)]. If, on the other hand, the DG's report recommends that there exists some contravention of provisions of the Act, the CCI has to proceed further, and inquire into that [Section 26 (3) read with Section 26 (8)]. The CCI has limited powers of the civil court [Section 36 (2)] in matters such as (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; (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. The CCI can also require the opinion of experts [Section 36 (3)]. Significantly, CCI has *no power to review its orders:* previously, Section 37 permitted review; however, the 2007 amendment repealed that provision; it has limited rectification power, under Section 38. In case of imposition of penalty, one mode of recovery is through reference to the concerned income tax authority [Section 39 (2)]; such officer or income tax authority can then recover the penalty as if the party concerned were an *"assessee in default"* under provisions of the Income tax Act [Section 39 (3)]. These *investigative* powers are also conferred *concurrently* upon the DG [Section 41 (2)].

79. The powers of the CCI and duties cast upon it include an advisory role, whereby the Central or any State Government can seek its opinion on any aspect of its competition policy and make any reference to its impact; the CCI has to give its opinion within 60 days of receipt of such a reference [Section 49 (1)]. The opinion, however, is not binding. CCI is also invested with the duty of competition advocacy (Section 49 (3)) in the discharge of which, it has to *"take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues."*

80. In the discharge of investigative functions under the Act and regulations, a striking feature which can be noticed is that the bodies constituted under it (the CCI and the DG) are not concerned with any *lis*, in the sense of a dispute between two parties over a legal relationship, status or private property; it is rather, having regard to the peculiar remit of the Act, is [as stated in *Excel Crop Care (supra)*]:

> *"to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure "level playing field" for all market players that helps markets to be competitive. It sets "rules of the game" that protect the competition process itself, rather than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare."*

81. The Director General appointed under Section 16(1) of the Act is a specialised investigating wing of the CCI.

82. In *Excel Crop Care (supra)*, the Supreme Court underlined the crux of the CCI's role, through investigation: and that it should not merely examine the informant's grievance, but consider whether there is anything *systemic*:

> *"For this purpose, no doubt, the starting point of inquiry would be the allegations contained in the complaint. However, while carrying out this investigation, if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed Under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this*

argument of the Appellants as well touching upon the jurisdiction of the DG."

83. In view of these specific functions, this court is of opinion that there can be no manner of doubt that the CCI does not perform *exclusive adjudicatory functions to be called a tribunal.* A tribunal – and one entrusted solely with *the judicial power of the state* (the touchstone on which *L. Chandra Kumar v. Union of India and Ors.* 1995 (1) SCC 400, *R. Gandhi (supra)*and *Madras Bar Association(supra)* are premised) is seen as a *substitute for courts.* However, the creation of CCI and investing it with a multifarious functions, which extend to directing (and overseeing) investigation and fact gathering, advising the government on policy (as an expert body) and advocating competition, in addition to issuing directions or orders against specific entities or companies *with the aim of eliminating a practice found pernicious or one which constitutes a barrier to competition and fair dealing in the marketplace.*

84. However, the above finding that the CCI is not a tribunal exercising exclusive judicial power, does not lead to the conclusion that its orders are any less *quasi-judicial*- at the stage when they attain finality. They are, for the simple reason that the consequences are far reaching, to those entities and companies which are subjected to directions (cease and desist orders, directions to alter agreements, etc). The right to freedom of trade, to the extent that it impinges on the right of the entity to exercise free choice about contractual terms, or whom to associate with (in regard to association and merger) are undeniably implicated. These orders, however, are subject to appeal, to a tribunal (COMPAT). CCI is also amenable to judicial review under Article 226 of the Constitution of India as regards the directions it makes *procedurally.* For instance, if it can be shown that investigation has been launched without a reasoned *prima facie* expression of its opinion, under Section 26 (2), the CCI's orders can be corrected in writ proceedings. Similarly, in regard to conduct of proceedings during investigation (i.e. the fact gathering exercise) the jurisdiction of the High Courts to ensure fair procedure and compliance with natural justice is assured [Ref. *Competition Commission of India and Anr. v Oriental Rubber Industries Pvt Ltd.* 2018 (251) DLT 137 and *Cadila Healthcare Ltd and Anr. v. Competition Commission of India and Ors.* 2018 (252) DLT 647].

85. In view of the above discussion, it is held that CCI does not perform only or purely adjudicatory functions so as to be characterized as a tribunal solely discharging judicial powers of the state; it is rather, a body that is in parts administrative, expert (having regard to its advisory and advocacy roles) and *quasi-judicial* -when it proceeds to issue final orders, directions and (or) penalties.

> *Point No. 2 Is the CCI unconstitutional inasmuch as it violates the separation of powers principle, which underlies the Constitution – and is now recognized as a basic or essential feature of the Constitution of India*

86. The recurring theme of the petitioners' attack on CCI was that it exercises powers that have wide ramifications that potentially implicate the right to carry on trade, and occupation and that the exercise of such powers must necessarily be entrusted with a tribunal that is judicial- in turn, implying that its personnel should be either *exclusively or substantially,* judges or persons trained in law. Various counsel took pains to contrast the CCI with the regulatory models and legislations in the country [TRAI and TDSAT, the APTEL in the electricity/energy sector; SEBI and Securities Appellate Tribunal, for the securities market and the Reserve Bank of India (RBI)]. The observations in *Braham Dutt (supra)* and the observations of the Dasgupta Commission report (which led to enactment of the MRTP Act and formation of the MRTP Commission as well as the Parliamentary committee report prepared in anticipation of the Act) too were relied on.

87. There can be no two opinions that CCI performs important regulatory tasks. No doubt, it has no *subordinate legislative power* over the aspect of market behaviour, which its task is to regulate, but that places no limitation in the manner of its regulating entities, markets, contractual relationships and associations once it determines, with respect to the undesirable effect upon competition in the "relevant market" of a particular product or service. The term "regulation" is broad, and has many hues. Reference in this connection can also be made to the judgment in *U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association and Ors.* (2004) 5 SCC 430] where the court interpreted the word "regulation" in the U.*P. Sugarcane (Regulation of Supply and Purchase) Act, 1953* and observed that:

"20. ... 'Regulate' means to control or to adjust by Rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the Regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute."

88. It is hence plain that the expression "regulate" is adaptable enough to include the power to issue directions. [Also see *Star India Private Limited v. Department of Industrial Policy and Promotion &Ors*. 2019 (2) SCC 104].

89. Interestingly, in an article entitled *Rulemaking versus Adjudication: a Psychological perspective* [Jeffrey J. Rachlinski 32 FLA. ST. U. L. REV. 529 (2005)] this very aspect, i.e statutory bodies regulating through adjudication, was discussed:

"Federal administrative agencies in the United States have long had wide discretion to choose between rulemaking and adjudication as their tool for adopting a particular regulatory policy.2Even when rulemaking seems sensible, courts will permit agencies to adopt policy through case-by-case adjudication.3Most agencies also possess congressionally delegated authority to adopt substantive rules through administrative rulemaking procedures that will have the full force of law behind them. 4 With few exceptions, neither the courts nor Congress have placed any meaningful restrictions on a federal agency's power to choose between rulemaking and adjudication.5Furthermore, the standard of review of agency decisions is essentially identical, whether the agency has used either the rulemaking or adjudication process.6

Federal agencies have made full use of this discretion to choose among policymaking instruments. Some agencies, notably the National Labor Relations Board (NLRB), make policy largely through the adjudication process, while others, notably the Environmental Protection Agency (EPA), proceed largely through the rulemaking through adjudication and others through rulemaking.

Implicit in the deference that both Congress and the courts have shown to agencies as to the choice between rulemaking and adjudication is faith that the agency itself is in the best position to identify the appropriate means of proceeding. An agency's choice of policy- making instruments, however, probably does not reflect a straight- forward effort to identify the method that will produce the best substantive decision. The agency will be primarily concerned with choosing a policymaking method that will allow it to be efficient and yet survive judicial review.

Each technique also has advantages and disadvantages for the agency. Policies adopted through rulemaking cannot be applied retroactively; hence an agency that believes that it cannot easily predict the problems it will encounter might choose to proceed by adjudication. Policies adopted through adjudication, however, are often less definitive, thereby making it harder for the targets of the agency's regulatory effort to conform their conduct to the policy that the agency is attempting to adopt. A change in agency policy adopted through adjudication can also come as quite a surprise to the first party to whom it is applied. Courts sometimes deem it unacceptable for the agency to penalize the first entity that violates a new policy announced through adjudication. The Administrative Procedure Act (APA) also creates differences between the two processes. The APA explicitly insists that an independent administrative law judge pre- sides over an adjudication—a requirement not duplicated by the rulemaking processes.9This requirement, however, applies largely to the trial-level decision maker in an adjudication. The appeals process will eventually allow the agency itself to interject its policy concerns into the process. Likewise, even though ex-parte contact and influence by political entities is thought to be less appropriate in an adjudicatory proceeding than in rulemaking, once again, this applies largely to the initial trial-level determination and not to the appeals process."

90. Each state devices its legislation and policies to suit the peculiar needs of its populace, its constitutional ethos and the felt necessities of the times its society exists in. There is no "one size fits all" approach, likewise, in the manner a state or a particular society is expected to, or can behave; the dynamics of a rapidly changing economy, with the imperatives of global trade and its interface with technology invariably dictate the choices that governments make in response to any need for laws, or institutions- including regulatory institutions. Therefore, there is no one magic formula, or a tipping point, where regulatory models are considered ideal. The standards for the *kind* of regulation and the model of institutions created by legislatures and executive governments, must necessarily respond to the need of the times; they cannot be static and answering to an unwavering or immutable perfect form or formula. So too, the various regulatory legislations of the Union (the *Securities Exchange Board of India Act, 1992* (SEBI Act); the *Telecom Regulatory Authority of India Act, 1997* (TRAI Act, governing the telecom sector); the *Electricity Act, 2003* (regulating the electricity sector) and the *Airports Economic Regulatory*

Authority of India Act, 2008 (regulating the airports segment) have followed different evolutionary paths. These laws have also been amended, to cater to changing circumstances. This court proposes to briefly discuss each of them.

(a) The securities market regulatory model: SEBI

91. The SEBI Act envisages two *kinds of adjudication.* The first is a civil adjudicatory process. The second is a criminal proceeding. In civil adjudication, adjudicatory powers are deployed. A decision rendered by the Adjudicating Officer is, in interim cases, subject to an appeal before the Securities Appellate Tribunal (Section 15K) followed by a statutory appeal before the Supreme Court (Section 15Z). SEBI's powers include the power to suspend the trading of any security in a recognized stock-exchange; to restrain (a trader, etc) from accessing the securities market and prohibit any person associated with the securities market from buying, selling or dealing in securities; the power to suspend any office-bearer of any stock-exchange or self-regulatory organization from holding such position; the power to impound and retain the proceeds or securities in respect of any transaction which is under investigation; the power to attach after passing of an order on an application made for approval (by the Judicial Magistrate of First Class having jurisdiction) for a period not exceeding one month, one or more bank account(s) of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of the SEBI Act, or the rules/regulations framed thereunder; and the power to direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation. If SEBI, after due investigation, discerns that a person has violated (or is likely to violate) any provision of the SEBI Act, or any rules/regulations made thereunder, it is authorized under Section 11D of the SEBI Act, to pass an order requiring the person concerned, to cease and desist from committing or causing such violation. Chapter VIA of the SEBI Act provides for penalties and adjudication. Under it, a penalty can be levied, for failure to furnish information, return or report to the Board (Section 15A inserted with retrospective effect from 25.01.1995); a penalty can be imposed for failure by any person to enter

into such agreement, under Section 15B; by Section 15C, penalty can be inflicted for failure to redress investors' grievances; by Section 15D penalty can be imposed for certain defaults in case of mutual funds. Penalty can be levied for failure to observe rules and regulations by an asset management company (by Section 15E); a penalty can be imposed for default in case of stock brokers – by Section 15F. Penalty can also be imposed for insider trading – by Section 15G. Section 15-I (1) of the SEBI Act empowers the SEBI to appoint *"any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry.."*.The enquiry and orders which ensue from that proceeding can be penalties- most of these penalties have an upper ceiling limit of Rs. One Crore. SEBI also possesses powers, after ascertaining through investigation and appropriate proceedings, under Sections 11, 11B and 11(4) of the SEBI Act (and Regulation 11 of Regulations), to pass orders that have wide ranging repercussions, including prohibiting individuals and entities (i.e directors, companies etc) for specified periods from buying, selling or dealing in securities in any manner whatsoever or accessing the securities market directly or indirectly, or not dealing in mutual funds, etc. The behaviour that is proscribed, is elaborately dealt with in provisions of the SEBI Act and Regulations (Sections 12A and 12B), etc.

92. Section 4 of the SEBI Act deals with its composition; its power consists of Chairman, two Members (from amongst officers of the Union Government and Finance Ministry dealing with administration of the Companies Act.), one member from the Reserve Bank of India (RBI) and five other members (of whom at least three are to be whole time members) to be appointed by the Central Government. The Chairman of SEBI has the powers of superintendence and direction of its affairs subject to express regulations. Notably, the Chairman and all members are to be appointed by the Central Government and the member from the RBI is to be nominated by the RBI; Central Government in turn has the power to nominate five members under Section 4(1)(b). Section 5 of the SEBI Act does not prescribe a specific term of office and conditions of service and leaves it to the Regulations to do so. Section 7(3) mandates that all issues which are to be considered by SEBI are to be decided by majority of votes and in the event of equality of votes, the Chairperson would have a casting vote.

93. Speaking about the powers of the SEBI, the Supreme Court, in *Clariant International Ltd. and Anr. vs. Securities & Exchange Board of India* 2004 (8) SCC 524, had remarked that:

> *"77. The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise of such wide ranging power is that it must comply with the Constitution and the Act. In that view of the matter, where an expert Tribunal has been constituted, the scrutiny at its end must be held to be of wide import. The Tribunal, another expert body, must, thus, be allowed to exercise its own jurisdiction conferred on it by the statute without any limitation."*

Later, in *National Securities Depository Ltd. v Securities and Exchange Board of India* 2017 (5) SCC 517 the court again said, about SEBI that

> "*The Board is indisputably an expert body. But when it exercises its quasi-judicial functions; its decisions are subject to appeal. The Appellate Tribunal is also an expert Tribunal.*"

(b) The Telecom Regulatory model: TRAI and TDSAT

94. The telecom sector witnessed a two-stage evolution; the first, with creation of the TRAI, which performed regulatory (including *quasi* legislative functions- it continues to do so, even till this date); and adjudicatory functions. However, the rulings given by it in the performance of its functions are appealable to the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). The TRAI is the primary *regulatory authority,* whose statutory remit includes making recommendations in regard to matters enumerated in Section 11(1)(a); and in the course of its regulatory functioning [Sections 11(1)(d) read with Section 12 (4) and 13] issue *directions to licensees and service providers over whom it exercises jurisdiction.* The regulation making authority of the TRAI is derived from Section 36; its powers to frame such subordinate regulation are in respect of matters enumerated in Section 11 (1) (b).

95. The TRAI is comprised of a Chairman and other members. Section 4 of the TRAI Act merely prescribes that its members shall be appointed by the Central Government "from amongst members who have special knowledge of, and professional experience in telecommunication, industry, finance, accountancy, law,

management or consumer affairs". Proviso to Section 4 states that no one who has or holds any position in the Central Government can be appointed as a member unless she or he acted as Secretary or Additional Secretary or any equivalent post in the Central Government or the State Government for not less than three years. Under Section 5(2), the Chairperson and members of TRAI hold office for a term not exceeding three years or until they attain the age of 65 years, whichever is earlier. Section 8(3) mandates that all decisions of the TRAI are to be decided by majority of its members and in the event of equality of votes, the Chairperson would have a casting vote.

96. The TDSAT is a creation of the Act, through an amendment (that introduced Chapter IV in the TRAI Act) with effect from 24.01.2000. It is created by Section 14; its jurisdiction is to *inter alia,* adjudicate *inter se* disputes between service providers, licensees and licensors; also between a service provider and a group of consumers. Every *"direction, decision or order"* by the TRAI- made, in the course of its regulatory power, is subject to appeal to TDSAT (Section 14A (2)).

97. The composition of TDSAT is dealt with Section 14B. The Tribunal comprises of a Chairman and not more than two members – to be appointed by the Central Government. These are to be selected by the Central Government in consultation with the Chief Justice of India [Section 14B(2); Section 14B(3)] confers the option of Bench formation of the TDSAT and the distribution of work. Section 14(c) of the TRAI Act states that the Chairperson should have been a former Judge of the Supreme Court or the Chief Justice of the High Court [Section 14C (a)]. As far as members are concerned, the essential qualification and experience is that the individual concerned should have held the post of Secretary to the State Government or any equivalent post of State Government for a period not less than two years or one well-versed in the field of technology, telecommunication, industry, commerce or administration. The term of office of TDSAT member is provided in Section 14D. For Chairperson, the tenure is not exceeding three years and the outer limit for Chairperson tenure is attainment of 70 years and in the case of members – 65 years.

(c)The Electricity sector: provisions of the Electricity Act, 2003

98. In the Electricity Sector, at the primary level, a dual regulatory regime has been provided for. The Central Electricity Regulatory Commission is created by Section 76. Its Chairperson and members have to possess adequate knowledge and experience in or have shown capacity in dealing with problems relating to engineering, law, economic, commerce, finance or management. One of the members should have qualification and experience in the field of engineering with specification of generation, transmission or electricity distribution [Section 77(a)]; One has to possess qualification and experience in the field of Finance [Section 77(b)]; two persons should have experience and qualification in the field of Economics, Commerce, Law or Management. The Central Government has the option of appointing a Chairperson from amongst the former Judges of the Supreme Court or Chief Justice of a High Court under Section 77(2) after consultation with the Chief Justice of India. Section 78 provides for constitution of Selection Committee to recommend members.

99. The functions of the Central Commission include regulations of tariff of generating companies under or controlled by Central Government; tariff of generating companies other than those under or controlled by Central Government, if they enter into or otherwise for a composite segment of generation and sale of electricity in more than one State; Regulation of Interstate transmission of electricity; determination of tariff for inter-state transmission of electricity; issuance of licenses for functioning as transmission licensee and electricity trader with respect to inter-state operations and adjudication of disputes involving generating companies or transmission licensees in regard to matter enumerated in Section 79(1)(a) to (d); levy of fees; specifying the Grid Code with Grid standards specification and enforcement of standards; fixing of trading margin wherever deemed necessary, etc. The Central Commission also composition with advisory powers under Section 79(2) with respect to formation of National Electricity Policy, promotion of competition, investment, Electricity Segments, etc.

State Commissions:

100. The other body at the primary level is constituted in the States – The State Electricity Regulatory Commissions, under Section 82(1). The Chairperson and members of the State Commissions are to be appointed by the concerned State Government on the recommendations of a Selection Committee under Section 85 – by virtue of Section 82(5). Like in the case of the Central Commission, Section 89 follows the similar pattern. The tenure of Chairperson or members shall be for five years. The qualification of Chairperson and Members of the State Commission is provided under Section 84. They should be from amongst persons of integrity and standing with adequate knowledge and having shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management. The Chairperson can, however, be appointed from amongst those who were Judges of High Courts [Section 84(2)] subject to previous consultation with the concerned Chief Justice of that High Court.

101. The functions of the State Commission are outlined under Section 86 and they include determination of tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, within the State; regulating electricity purchase and procurement process of distribution licensees including the price at which electricity should be procured from generating companies; facilitation of intra-state transmission and wheeling of electricity; promote co-generation and generation of electricity from renewable sources of energy; specify the grid code with what is provided for under Section 79(1)(h); fixation of trading margins in intra-state trading of electricity, enforcement of standards with respect to quality, continuity and reliability of service by licensees.

102. By Part XI (of the Electricity Act), Section 110, the Appellate Tribunal for Electricity stands established. Its jurisdiction is to decide appeals against orders made by Adjudicating Officers under the Act or any order of an appropriate Commission [which is defined by Section 2(4)] as the Central Regulatory Commission or the State Regulatory Commission or wherever two or more States have a Single Commission, the Joint Commission [under Section 83).

103. The Electricity Appellate Tribunal comprises of a Chairperson and three members; under Section 112(2) option of constituting benches has been prescribed; Section 113 stipulates qualification for appointment of Chairperson. A Chairperson [Section 113(1)(a)] has to be a Judge of the Supreme Court or a Former Chief Justice of a High Court; in the case of a member of the Tribunal, one qualified to be a Judge of a High Court or has been a Secretary of the Central Government dealing with the Economic Affairs or the matters of infrastructure or a person of ability and standing of adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulations or economic, commerce, law or management. The term of office under Section 114 is three years; the Chairperson and members can be considered for re-appointment for a second term of three years. The outer age limit after which appointments are impermissible - in the case of Chairperson is 70 years of age and in case of members – till 65 years.

104. Decisions of the Tribunal are to be taken by majority and in case of difference by two members panel, a reference is to be made to the Chairperson, who has to hear the point herself or refer the case for hearing to another member or members. By Section 120(3), the order of the Tribunal is executable as a decree of a Civil Court. Such powers to execute the decree are conferred upon the Tribunal itself. The Tribunal's decision and orders are appealable to the Supreme Court under Section 125, on the grounds specified under Section 100 of the CPC.

(d) Airports regulation: the Airports Authority of India Act and the Airports Economic Regulatory Authority Act, 2008

105. The first regulation in the field of airport regulation is the Airports Authority Act, 1994; it establishes the Airports Authority of India (AAI), whose functions-under Section 12 to manage civil airports, civil enclaves and aeronautical communications. By Section 12 (2) and (3), the AAI is invested with manifold regulatory duties including providing for air traffic and air transport service in every airport. It has the overarching duty to plan, conceive and establish airports and provide every kind of regulatory direction in that regard; also provide technical services such as navigational aids, etc. Section 3 provides for constitution of the AAI; Section 3 (3)

prescribes that the AAI shall be comprised of a Chairperson and eight members- all to be appointed by the Central Government. One of them is the Director General of Civil Aviation, *ex-officio.* Furthermore, *per* Section 3 (5), the members and chairperson shall be chosen amongst those having special knowledge in air transport or any other transport services, financial, commercial fields or administration. Every whole time member has a tenure of 5 years; part time members have a tenure of three years (Section 5).

106. Chapter VA of the AAI Act provides for adjudication of disputes relating to eviction, levy of damages for unauthorized occupation, etc. AAI can appoint eviction officers (Section 28B); these officers, after following the procedure prescribed, i.e. prior notice and hearing, etc, have the power to evict those in occupation without authorization, of the AAI's premises (Section 28D); direct removal of unauthorized structures from the AAI's properties (Section 28F); direct payment of rent and damages after determining the amounts, (Section 28G). Eviction officers have powers of civil courts, in regard to summoning witnesses, recording evidence etc.

107. Section 28I of the Act provides for an Airport Appellate Tribunal consisting of a Chairperson, to be appointed by the Central Government; the qualification of such person is that she or he should have been a judge of a High Court; the appointment is to be after prior consultation with the Chief Justice of India. The tenure of office of the chairperson is three years. Section 28K confers appellate jurisdiction to the tribunal; any person aggrieved by the order of an eviction officer, can appeal to the Airport Appellate Tribunal, which can pass appropriate orders. These orders have the force of a civil court's decree.

Airports Economic regulation: the Airports Economic Regulatory Authority Act

108. The second regulator in the airport segment is the Airports Economic Regulatory Authority, established through the Airports Economic Regulatory Authority Act (AERA Act), in 2008. By virtue of Section 4, the AERA has a Chairperson and two other members, appointed by the Central Government. They are to be from amongst persons of ability and integrity having *"adequate knowledge of, and professional experience in, aviation, economics, law, commerce or consumer*

affairs". A person who is or has been in the service of Government *"shall not be appointed as a Member unless such person has held the post of Secretary or Additional Secretary to the Government of India or any equivalent post in the Central or State Government for a total period of not less than three years."* Selection of individuals to these positions is by a committee, under Section 5, comprised of high ranking officers of the Central Government, including the Cabinet Secretary. Section 6 prescribes that the term of the Chairman and others is to be five years; the outer age limit for the chairperson is 65 years and the members is 62 years.

109. The functions of AERA include, under Section 13, determination of tariff for the aeronautical services, in all major airports, taking into consideration several factors, i.e. the capital expenditure incurred and timely investment in improvement of airport facilities; the service provided, its quality and other relevant factors; the cost for improving efficiency; economic and viable operation of major airports; revenue received from services other than the aeronautical services; the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise; any other factor which may be relevant for the purposes of this Act. Different tariff structures may be determined for different airports having regard to all or any of the above considerations specified. AERA also has to determine the amount of the development fees in respect of major airports; determine the amount of the passengers service fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934; monitor the set performance standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any authority authorised by it in this behalf. In the exercise of its powers, the AERA can issue directions to the service providers, under Section 15.

110. Section 17 of the AERA Act stipulates the establishment of the Airports Economic Regulatory Authority Tribunal (AERAT), which can adjudicate disputes between two or more service providers; or between a service provider and a group of consumer. Appeals against orders of eviction under Section 28K by eviction officers, under the AAI Act, are also available; furthermore, appeals against directions and orders by AERA (Section 15) lie to AERAT. By Section 19, the tribunal is to consist of *"a Chairperson and not more than two Members to be appointed, by notification in*

the Official Gazette, by the Central Government". The Chairperson or a member holding a post as such in any other tribunal, established under any law for the time being in force, in addition to his being the Chairperson or a Member of that Tribunal, may be appointed as the Chairperson or a Member, as the case may be, of the Appellate Tribunal under the Act. By Section 19 (2) *"the selection of Chairperson and Members of the Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India or his nominee."*

111. In the case of Chairperson of AERA, the qualification is that she or he is, or should have been, a Judge of the Supreme Court or the Chief Justice of a High Court. In the case of a Member, has held the post of Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a total period of not less than two years in the Ministries or Departments dealing with aviation or economics or law or a person who is well-versed in the field of aviation or economics or law. The term of office of the chairperson, and members, *per* Section 21, is *"a term not exceeding three years from the date on which he enters upon his office"*. The age limit for Chairperson is 70 years; for member it is sixty-five years.

Petroleum Regulation

112. The Petroleum and Natural Gas Regulatory Board Act, 2006 (hereafter as "the PNGRB Act") was framed to promote *competitive markets and protect the interests of consumers by ensuring fair trade and competition among the entities*. The Board under Section 11 of the PNGRB Act has to protect the interest of consumers by passing fair trade and competition among entities and through its regulations enable access to common carriers or contract carriers. To achieve those objectives, the Board has tariff framing authority : through regulations under Section 22(1). By virtue of Section 28, the PNGRB Board is empowered to entertain complaints or upon its satisfaction upon information, that anyone contravenes provisions of the Act or its directions or authorize the terms and conditions subject to which authorization is guaranteed to carriers and other service providers (under Section 15 and 19) or retail service obligations etc. It can entertain such complaints. These complaints and information can be the subject matter of an enquiry during the course of which

opportunity should be given to the concerned allegedly erring authority. If the Board determines that the concerned service providers or entity has acted in violation provisions of the Act or the Board's directions, it can impose civil penalty for an amount up to ₹1 crore for each contravention and in case of continuing failure with additional penalty up to ₹10 lakhs for every day.

113. The Board is set up under Section 3 of the PNGRB Act and consists of Chairperson, Member (Legal) and three other members all of whom are to be appointed by the Central Government. The Chairperson has to be from amongst persons from of eminence in the fields of petroleum and natural gas industry, management, finance, law, administration or consumer affairs -as in the case of the members too. However, in the case of Member (Legal), the individual should be qualified to be the Judge of the High Court or should have been Member of the Indian Legal Service and has held a post in Grade I of that Service for at least three years. The Selection Committee under Section 4(2) of the Act is to comprise of Member of the Planning Commission, in-charge of the energy sector and four Secretaries to the Government of India. The term of office of the Chairperson and other members is for five years or till they attained the age of 65 years whichever is earlier. Meeting of the Board have to be through a majority and in case of equality of votes, by Section 8(3), the Chairperson would have the casting vote. By Section 24 of the PNGRB Act, the Board has powers to settle disputes between two entities or between the entity or any other person. Section 26 outlines the power of investigation to aid the dispute settlement jurisdiction.

114. The Appellate Tribunal – by virtue of Section 30 is the appellate tribunal constituted under Section 110-111 of the Electricity Act 2003.By Section 30(2), the Central Government can, in addition to the other members of the Electricity Tribunal, appoint technical Member (Petroleum and Natural Gas) in the Appellate Tribunal for electricity or designated technical member of that Tribunal having the concerned qualifications. The qualifications for a Technical Member (Petroleum and Natural Gas) are spelt out by Section 31(2) i.e. the individual should have been a Secretary for at least one year in the Ministry or Department of the Central Government having adequate experience in the energy sector especially in the matters relating to the

Petroleum and Natural Gas or should be a person of an ability and standing, having adequate knowledge of or experience in dealing with matters relating to exploration, production, transmission pipelines, marketing or regulation of petroleum, petroleum products or natural gas, economics, commerce, law or management. The jurisdiction of the Appellate Tribunal as is spelt out by Section 33; any order or decision of the Board is appealable by any person aggrieved to the Tribunal. The appeal against any order of the Appellate Tribunal shall lie with the Supreme Court (Section 37) on grounds specified in Section 100 of the CPC.

115. It is evident from the above enumeration of powers conferred upon the TRAI, the SEBI, the Electricity Commissions, the AAI, the AERA the PNGRB, that a two stage pattern has evolved in regulation of various sectors of the economy: the telecom, the securities, the power, airports and petroleum sectors. At the first stage the legislation provides for a primary regulator: in most cases, apart from regulatory duties, the concerned body also possesses regulation framing powers and power to issue directions, - after consulting or issuing notices to the concerned parties (and hearing them). These orders or directions are then appealable to tribunals (Securities Appellate Tribunal or SAT against orders of SEBI, TDSAT in the case of orders of TRAI; the Electricity Appellate Tribunal in respect of various orders, including tariff fixation orders of the concerned commissions, such as the state or central commissions, the Airport Appellate Tribunal against orders of the AAI and lastly, AERAT, against orders of AERA). In all these cases, composition of the primary authority – which have sweeping powers in the concerned segment, *is not amongst members who are predominantly from the judicial or legal field.* Expertise in law is one amongst the many fields prescribed as eligible qualification, in the case of membership of these authorities or statutory regulatory bodies. Likewise, the predominant membership of the appellate tribunals (TDSAT, Electricity appellate Tribunal, SAT, AERA) *is not from the judicial or legal field.* Undoubtedly, the chairperson of such tribunals should have possessed judicial experience as Judges of Supreme Court, or Chief Justice of any High Court, or judge of High Court. But in all these tribunals (barring one) the other members are *not necessarily from the judicial and legal field.*

116. The plurality and multifarious tasks conferred upon each regulatory body and the plenitude of their powers and authority in the respective fields occupied by them leaves no manner of doubt to this Court, that the functions of each of them have lasting impact on those it seeks to regulate. The impact can be diverse- as it may operate as a direction in *rem against a class of service providers,* (terms of licensing, grant of licensing, permitting interconnection in the telecom segment) or operate in *rem* against both service providers and consumers (as in the case of tariff fixation). In the case of SEBI, the directions can be drastic (as for instance, when for any violation or infraction of the enactment or the prescribed regulations, the trader or stockbroker, fund house, etc. can be prohibited from operating for specific duration). Such action can result in deprivation of the right to trade or carry on business or profession; it may be a monetary sanction as in the case of penalty, or damages, etc. Yet, these drastic actions may have the effect of decrees (when the directions or orders are made by appellate bodies). *But the primary determinations are made by regulatory bodies.* This model or pattern inures under the *Competition Act,* as well.

117. In the United States of America, courts- notably the US Supreme Court- have grappled with problems arising from regulatory adjudication. The clearest statement of the scope of such decision making- which resembles an adjudicatory outcome by courts- was made in *Securities Exchange Commission v. Chenery Corp*., 332 U.S. 194 (1947) arose from an order of the commission (SEC) refusing to approve a utility company's bankruptcy reorganization plan, due to that plan's favourable treatment of management's stock purchases during the reorganization period. The Commission originally had based its disapproval on its understanding of general corporation law principles. The Supreme Court initially struck down that decision as a misreading of the principles. On remand, the SEC reaffirmed its rejection of the reorganization plan. But this time SEC relied on its interpretation of the standards of the Public Utility Holding Company Act of 1935.When the Supreme Court decided the appeal for the second time, it affirmed SEC's order. The court clarified that SEC would be allowed to establish such an interpretation by means of a particularized order rather than a general regulation and observed that:

"Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity. In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem maybe so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case by case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primary in the informed discretion of the administrative agency."

118. Somewhat similar observations were made by the Supreme Court in *PTC India v Central Electricity Regulatory Commission* 2010 (4) SCC 603. The court stated as follows, after analysing provisions of the Electricity Act:

"49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law.

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling

provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow."

119. *PTC India,* (a Constitution Bench decision) as well as the decision of the Supreme Court in *Bharat Sanchar Nigam Ltd v Telecom Regulatory Authority of India* 2014 (3) SCC 222 have unequivocally ruled that the appellate bodies (i.e. the Electricity Appellate Tribunal, per Sections 110-111 of the Electricity Act and the TDSAT (per Section 14(d) of the TRAI Act) do not possess the power of judicial review, to decide upon the validity of regulations framed by the primary regulator (i.e. the TRAI and the Appropriate commissions). In *Cellular Operators Association of India v Telecom Regulatory Authority of India* 2016 (7) SCC 703, the Supreme Court observed as follows:

"We have seen that the 2000 Amendment has taken away adjudicatory functions from the TRAI, leaving it with administrative and legislative functions. By Section 14 of the Act, adjudicatory functions have been vested in an Appellate Tribunal, where disputes between a group of consumers and the service providers are to be adjudicated by the Appellate Tribunal. In stark contrast, under the scheme of the Electricity Act, 2003, the Central Electricity Regulatory Commission and the various State Electricity Regulatory Commissions have to discharge legislative, administrative, and quasi-judicial functions. This is clear on a reading of Section 79 (1)(f) and Section 86 (1) (f) of the Electricity Act.."

120. The question then is, whether conferment of power on the CCI, whose orders and decisions have a lasting impact on the economic ability and freedom of business, trade and commerce (in the course of which business relationships are ordered and contracts of long duration are entered) are the result of an *adjudicatory* process which does not meet the standards required of by the Constitution in respect of decision of disputes by courts.

121. The petitioners relied on two kinds of decisions: on the one hand, the first line of decisions [*Bharat Bank (supra)*; *Harinagar Sugar Mills (supra); Jaswant Sugar Mills Ltd(supra)* etc.]. In *Bharat Bank(supra)*. the Supreme Court held that the term

"tribunal" used in Article 136 does not mean the same thing as "court" but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State *and are invested with judicial as distinguished from purely administrative or executive functions.* In *Harinagar Sugar Mills (supra),* the court held that under Section 111(3) of the Companies Act, the Central Government, while acting as an Appellate Authority, had to act judicially and was entrusted with the judicial powers of the State to adjudicate upon rights of the parties in civil matters when there was a *lis* between the contesting parties, and so, the conclusion was that it acts as a tribunal and not as an executive body. *Jaswant Sugar Mills (supra)* held that the Conciliation Officer acting under clause 29 of a statutory order promulgated in 1954 under the *U.P. Industrial Disputes Act, 1947,* has to act judicially in granting or refusing permission to alter the terms of employment of workmen at the instance of the employer, but even so, he was not a tribunal, because he was not invested with the judicial power of the State, as he was empowered merely to lift the ban statutorily imposed on the employer's rights, and was not authorized to make a final order or binding decision in any dispute. *Engineering Mazdoor Sabha representing Workmen employed under the Hind Cycles Ltd. v Hind Cycles Ltd., Bombay* (1963) Suppl (1) SCR 625, referred to the trappings of a court and it was observed that sometimes a rough and ready test is applied in determining the status of an adjudicating body by enquiring whether the said body or authority is clothed with the trappings of a court. In that connection, it was stated that the presence of the said trappings does not necessarily make the tribunal a court. The arbitrator appointed under Section 10-A was, held to be not a tribunal.

122. In *Associated Cement (supra),* the court revisited the issue as to what body would be characterized as a tribunal, exercising the judicial power of the state. The court analyzed the provisions of the Constitution and contrasted it with the provisions of other constitutions, which insisted upon the separation of powers of various organs or departments of government and held as follows:

> *"The use of the expression "judicial power" in the context, cannot be characterised as constitutionally impermissible or inappropriate, because our Constitution does not provide, as does Chapter III of the Australian Constitution, that judicial power can be conferred only on*

courts properly so-called. If such a consideration was relevant and material, then it would no doubt, be inappropriate to say that certain authorities or bodies which are given the power to deal with disputes between parties and finally determine them, are tribunals because the judicial power of the State has been statutorily transferred to them. In that case, the more appropriate expression to use would be that the powers which they exercise are quasi-judicial in character, and tribunals appointed under such a scheme of rigid separation of powers cannot be held to discharge the same judicial function as the courts. However, these considerations are, strictly speaking, in-applicable to the Indian Constitution, because though it is based on a broad separation of powers, there is no rigidity or exclusiveness involved in it as under Section 71 as well as other provisions of Chapter III of the Australian Constitution; and so, it would not be inappropriate to say that the main test in determining the status of any authority in the context of Article 136(1) is whether or not inherent judicial power of the State has been transferred to it."

123. In *R. Gandhi (supra)*, the Supreme Court had to deal with provisions of the National Company Law Tribunal, which sought to replace the jurisdiction and powers of the Company Law Board and the appellate tribunal, which sought to supplant the jurisdiction of the High Court, which had existed for a long time. The court held that:

"87. The Constitution contemplates judicial power being exercised by both courts and Tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by Legislative enactments. High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create Tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to Tribunals.

88. The argument that there cannot be `whole-sale transfer of powers' is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to Tribunals. The competence of the Parliament to make a law creating Tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act , empowered to deal with disputes arising under the said Act and the

statute substitutes the word `Tribunal' in place of `High Court' necessarily there will be `whole-sale transfer' of company law matters to the Tribunals. It is an inevitable consequence of creation of Tribunal, for such disputes, and will no way affect the validity of the law creating the Tribunal.

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106. We may summarize the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for `Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the

separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.…"

124. The leading authority relied upon by the Petitioners was the *Madras Bar Association (supra)* judgment. It would be essential to extract some of the observations and findings of the Supreme Court in that judgment, dealing with the transfer of judicial powers to tribunals. They are reproduced as under:

"108…The position that Parliament had the power to amend the Constitution, and to create a court/tribunal to discharge functions which the High Court was discharging, was reiterated, in Union of India v Madras Bar Association case (supra). It was concluded, that the Parliament was competent to enact a law, transferring the jurisdiction exercised by High Courts, in regard to any specified subject, to any court/tribunal. But it was clarified, that Parliament could not transfer power vested in the High Courts, by the Constitution itself. We therefore have no hesitation in concluding, that appellate powers vested in the High Court under different statutory provisions, can definitely be transferred from the High Court to other courts/tribunals, subject to the satisfaction of norms declared by this Court. Herein the jurisdiction transferred by the NTT Act was with regard to specified subjects under tax related statutes. That, in our opinion, would be permissible in terms of the position expressed above. Has the NTT Act transferred any power vested in courts by the Constitution? The answer is in the negative. The power of "judicial review" vested in the High Court under Articles 226 and 227 of the Constitution, has remained intact. This aspect of the matter, has a substantial bearing, to the issue in hand. And will also lead to some important inferences. Therefore, it must never be overlooked, that since the power of "judicial review" exercised by the High Court under Articles 226 and 227 of the Constitution has remained unaltered, the power vested in High Courts to exercise judicial superintendence over the benches of the NTT within their respective jurisdiction, has been consciously preserved. This position was confirmed by the learned Attorney General for India, during the course of hearing. Since the above jurisdiction of the High Court has not been ousted, the NTT will be deemed to be discharging a supplemental role, rather than a substitutional role. In the above view of the matter, the submission that the NTT Act violates the "basic structure" of the Constitution, cannot be acquiesced to.

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112. Before we proceed with the matter further, it is necessary to keep in mind the composition of the adjudicatory authorities which have historically dealt with the matters arising out of tax laws. First, we shall deal with the composition of the Appellate Tribunals. All Appellate Tribunals which are relevant for the present controversy were essentially comprised of Judicial Members, besides Accountant or Technical Members. To qualify for appointment as a Judicial Member, it was essential that the incumbent had held a judicial office in India for a period of 10 years, or had practiced as an Advocate for a similar period. It is the above qualification, which enabled the enactments to provide, by a fiction of law, that all the said Appellate Tribunals were discharging "judicial proceedings". The next stage of appellate determination, has been traditionally vested with the High Courts. The income-tax legislation, the customs legislation, as well as, the central excise legislation uniformly provided, that in exercise of its appellate jurisdiction, the jurisdictional High Court would adjudicate appeals arising out of orders passed by the respective Appellate Tribunals. The said appeals were by a legislative determination, to be heard by benches comprising of at least two judges of the High Court. Adjudication at the hands of a bench consisting of at least two judges, by itself is indicative of the legal complications, insofar as the appellate adjudicatory role, of the jurisdictional High Court was concerned. It would, therefore, not be incorrect to conclude, by accepting the submissions advanced at the hands of the learned counsel for the petitioners, that before and after promulgation of the Constitution, till the enactment of the NTT Act, all legislative provisions vested the appellate power of adjudication, arising out of the Income Tax Act, the Customs Act and the Excise Act, on questions of law, with the jurisdictional High Courts.

113. Having recorded the above conclusion, the next issue to be determined is whether the adjudication of the disputes arising out of the provisions under reference, must remain within the realm of the jurisdictional High Courts? The instant proposition has two perspectives. Firstly, whether constitutional interpretation in the manner accepted the world over (details whereof have been narrated by us under the heading – "The Issues canvassed on behalf of the petitioners", under the sub-title – "The second contention"), would be a constitutional mandate, for the appellate jurisdiction pertaining to tax matters, to remain with the High Court? Secondly, whether the express provisions of the Constitution mandate, that tax issues should be decided by the concerned jurisdictional High Court concerned?

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124. One needs to also examine sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act, with pointed reference to the role of the Central Government in determining the sitting of benches of the NTT. The Central Government has been authorized to notify the area in relation to which each bench would exercise jurisdiction, to determine the constitution of the benches, and finally, to exercise the power of transfer of Members of one bench to another bench. One cannot lose sight of the fact, that the Central Government will be a stakeholder in each and every appeal/case, which would be filed before the NTT. It cannot, therefore, be appropriate to allow the Central Government to play any role, with reference to the places where the benches would be set up, the areas over which the benches would exercise jurisdiction, the composition and the constitution of the benches, as also, the transfer of the Members from one bench to another. It would be inappropriate for the Central Government, to have any administrative dealings with the NTT or its Members. In the jurisdictional High Courts, such power is exercised exclusively by the Chief Justice, in the best interest of the administration of justice. Allowing the Central Government to participate in the aforestated administrative functioning of the NTT, in our view, would impinge upon the independence and fairness of the Members of the NTT. For the NTT Act to be valid, the Chairperson and Members of the NTT should be possessed of the same independence and security, as the judges of the jurisdictional High Courts (which the NTT is mandated to substitute). Vesting of the power of determining the jurisdiction, and the postings of different Members, with the Central Government, in our considered view, would undermine the independence and fairness of the Chairperson and the Members of the NTT, as they would always be worried to preserve their jurisdiction based on their preferences/inclinations in terms of work, and conveniences in terms of place of posting. An unsuitable/disadvantageous Chairperson or Member could be easily moved to an insignificant jurisdiction, or to an inconvenient posting. This could be done to chastise him, to accept a position he would not voluntarily accede to. We are, therefore of the considered view, that Section 5 of the NTT Act is not sustainable in law, as it does not ensure that the alternative adjudicatory authority, is totally insulated from all forms of interference, pressure or influence from co-ordinate branches of Government. There is therefore no alternative, but to hold that sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act are unconstitutional.

128. There seems to be no doubt, whatsoever, that the Members of a court/tribunal to which adjudicatory functions are transferred, must be manned by judges/members whose stature and qualifications are commensurate to the court from which the adjudicatory process has been transferred. This position is recognized the world over.

Constitutional conventions in respect of Jamaica, Ceylon, Australia and Canada, on this aspect of the matter have been delineated above. The opinion of the Privy Council expressed by Lord Diplock in Hind case (supra), has been shown as being followed in countries which have constitutions on the Westminster model. The Indian Constitution is one such Constitution. The position has been clearly recorded while interpreting constitutions framed on the above model, namely, that even though the legislature can transfer judicial power from a traditional court, to an analogous court/tribunal with a different name, the court/tribunal to which such power is transferred, should be possessed of the same salient characteristics, standards and parameters, as the court the power whereof was being transferred. It is not possible for us to accept, that Accountant Members and Technical Members have the stature and qualification possessed by judges of High Courts.

129. It was not disputed, that the NTT has been created to handle matters which were earlier within the appellate purview of the jurisdictional High Courts. We are accordingly satisfied, that the appointment of Accountant Members and Technical Members of the Appellate Tribunals to the NTT, would be in clear violation of the constitutional conventions recognized by courts, the world over. References on questions of law (under the three legislative enactments in question), were by a legislative mandate, required to be adjudicated by a bench of at least two judges of the jurisdictional High Court. When the remedy of reference (before the High Court) was converted into an appellate remedy (under the three legislative enactments in question), again by a legislative mandate, the appeal was to be heard by a bench of at least two judges, of the jurisdictional High Court. One cannot lose sight of the fact, that hitherto before, the issues which will vest in the jurisdiction of the NTT, were being decided by a bench of at least two judges of the High Court. The onerous and complicated nature of the adjudicatory process is clear. We may also simultaneously notice, that the power of "judicial review" vested in the High Courts under Articles 226 and 227 of the Constitution has not been expressly taken away by the NTT Act. During the course of hearing, we had expressed our opinion in respect of the power of "judicial review" vested in the High Courts under Articles 226 and 227 of the Constitution. In our view, the power stood denuded, on account of the fact that, Section 24 of the NTT Act vested with an aggrieved party, a remedy of appeal against an order passed by the NTT, directly to the Supreme Court. Section 24 aforementioned is being extracted hereunder:

*"**24. Appeal to Supreme Court**.- Any person including any department of the Government aggrieved by any decision or order of the National Tax Tribunal may file an appeal to the Supreme Court within sixty days*

from the date of communication of the decision or order of the National Tax Tribunal to him:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within such time as it may deem fit."

In view of the aforestated appellate remedy, from an order passed by the NTT directly to the Supreme Court, there would hardly be any occasion, to raise a challenge on a tax matter, arising out of the provisions of the Income Tax Act , the Customs Act and the Excise Act before a jurisdictional High Court. Even though the learned Attorney General pointed out, that the power of "judicial review" under Articles 226 and 227 of the Constitution had not been taken away, yet he acknowledged, that there would be implicit limitations where such power would be exercisable. Therefore, all the more, the composition of the NTT would have to be on the same parameters as judges of the High Courts. Since the appointments of the Chairperson/Members of the NTT are not on the parameters expressed hereinabove, the same are unsustainable under the declared law. A perusal of Section 6 of the NTT Act leaves no room for any doubt, that none of the above parameters is satisfied insofar as the appointment of Chairperson and other Members of the NTT is concerned. In the above view of the matter, Section 6(2)(b) of the NTT Act is liable to be declared unconstitutional. We declare it to be so.

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Conclusions*:*

134. (i) The Parliament has the power to enact legislation, and to vest adjudicatory functions, earlier vested in the High Court, with an alternative court/tribunal. Exercise of such power by the Parliament would not per se violate the "basic structure" of the Constitution.

135. (ii) Recognized constitutional conventions pertaining to the Westminster model, do not debar the legislating authority from enacting legislation to vest adjudicatory functions, earlier vested in a superior court, with an alternative court/tribunal. Exercise of such power by the Parliament would per se not violate any constitutional convention.

136. (iii) The "basic structure" of the Constitution will stand violated, if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure, that the newly created court/tribunal, conforms with the salient characteristics and standards, of the court sought to be substituted.

137. (iv) Constitutional conventions, pertaining to constitutions styled on the Westminster model, will also stand breached, if while enacting legislation, pertaining to transfer of judicial power, conventions and salient characteristics of the court sought to be replaced, are not incorporated in the court/tribunal sought to be created.

138.(v) The prayer made in Writ Petition (C) No.621 of 2007 is declined. Company Secretaries are held ineligible, for representing a party to an appeal before the NTT.

139.(vi) Examined on the touchstone of conclusions (iii) and (iv) above, Sections 5, 6, 7, 8 and 13 of the NTT Act (to the extent indicated hereinabove), are held to be unconstitutional. Since the aforesaid provisions, constitute the edifice of the NTT Act, and without these provisions the remaining provisions are rendered ineffective and inconsequential, the entire enactment is declared unconstitutional…."

125. In *Madras Bar Association (supra)* and *R. Gandhi (supra)*, therefore, the common ground was whether Parliament could *transfer* jurisdiction vested in courts to specially created tribunals. This principle finds clearest enunciation in *Madras Bar Association (supra),* where the court also spoke of the *ratio* in *R. Gandhi (supra)* to that effect. The relevant observations are that *"It was concluded, that the Parliament was competent to enact a law, transferring the jurisdiction exercised by High Courts, in regard to any specified subject, to any court/tribunal. But it was clarified, that Parliament could not transfer power vested in the High Courts, by the Constitution itself. We therefore have no hesitation in concluding, that appellate powers vested in the High Court under different statutory provisions, can definitely be transferred from the High Court to other courts/tribunals, subject to the satisfaction of norms declared by this Court."*

126. Earlier, this Court noticed the seminal judgments of the Supreme Court in *Bharat Bank (supra), Harinagar Sugar Mills (supra), Jaswant Sugar Mills (supra), Associated Cement (supra) etc.* Each of those decisions were rendered in the context of a dispute whether orders made by statutory bodies were appealable by special leave to the Supreme Court, under Article 136 of the Constitution, as orders made by *judicial tribunals.* These decisions held – having regard to the peculiarities of the statute concerned that as long as an order was a judicial order, and made in exercise of undoubted judicial power, it was amenable to special leave to appeal, under Article

136 of the Constitution. In one of the decisions, i.e. *Associated Cement (supra),* the court juxtaposed provisions of the Indian Constitution with provisions in other constitutions and held that the rigid doctrine of separation of powers was inapplicable to India.

127. It would be necessary to trace the development of law on the question of creation of tribunals, in the backdrop of the debate whether such bodies can be invested with powers and jurisdiction *hitherto exercised by courts of law and not tribunals.* The first decision on this aspect is the Constitution Bench ruling in *S.P. Sampath Kumar v Union of India* 1987 (1) SCC 124. The court had to decide whether the enactment of the Administrative Tribunals Act, 1985, and the divestment of *all jurisdiction of all courts- including the judicial review power* under Article 226- in the wake of enactment of Article 324A (inserted by the forty second amendment to the Constitution) was permissible. The court held as follows:

> *"Though judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution, but if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set is no less effective than the High Court.."*

128. The problems felt when the Administrative Tribunals were set up, i.e. complete exclusion of judicial review [under Article 226 of the Constitution by virtue of Article 323A (2) (b) and 323B (3) (b)] resulted in a reference to a larger bench of (seven judges); this led to the decision in *L. Chandra Kumar (supra).* The court, in *L. Chandra Kumar (supra),* held, *inter alia*, that:

> *"90. In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed upto expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our*

times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

91. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

92. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a First Appellate Court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of Tribunals under Article 227of the Constitution. In R.K. Jain's case, after taking note of these facts, it was

suggested that the possibility of an appeal from the Tribunals on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the afore-stated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

93. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

94. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as

mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

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96. We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the administrative members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times, IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting-up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of judicial members and those with grass- roots experience would best serve this purpose. To hold that the Tribunal should consist only of judicial members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that administrative members are chosen from amongst those who have some background to deal with such cases."

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In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution."

129. It is thus clear that in *Sampath Kumar (supra)* and *L. Chandra Kumar (supra)*, the issue which confronted the court was *complete exclusion of judicial review;* the High Courts' jurisdiction in service matters, under Article 226 of the Constitution *was completely ousted.* The Administrative tribunals were created under the Act, and by reason of Article 323A (2)(d) and Article 323B (3) (d), such *jurisdiction* of the courts was ousted. *L. Chandra Kumar (supra)* declared that the amendment which introduced those provisions was *violative of the basic structure or essential features, inasmuch as the entire exclusion of such judicial review from the High Court, and its conferment on a body which was not an effective substitute, was impermissible.* Resultantly, the amendments were declared unconstitutional; as a consequence, on the one hand, the tribunal's jurisdiction to determine the *vires* of rules (barring rules and subordinate legislation under the parent statute, i.e. the Administrative Tribunals Act) was upheld; at the same time, *judicial review jurisdiction over its orders,* and the power of the High Court of superintendence over those tribunals, was reinstated. The court emphatically declined the argument that *all, or predominant* membership of those tribunals should be from the judiciary or trained lawyers, or those possessing qualifications to be judges.

130. If one keeps the background of *Sampath Kumar (supra)* and *L. Chandra Kumar (supra)* and what was held in them- especially the latter and juxtaposes the later decisions (*R. Gandhi (supra)* and *Madras Bar Association*), the Supreme Court was concerned in preserving the powers of the High Courts. In the first two decisions, the issue was ousting judicial review jurisdiction altogether and conferring it on a body, which while a tribunal, no doubt, but was found to be inefficacious or ineffective (in its membership etc.). Therefore, judicial review over such tribunals' decisions was reinstated in *L. Chandra Kumar (supra).* In the later decisions *R. Gandhi (supra)* and *Madras Bar Association (supra),* the tribunals created by new statutes *supplanted established jurisdiction and powers of High Courts, in regard to important matters concerning administration of law and justice:* i.e. income tax law, company law jurisdiction, etc. (and its interface with securities law). The court's overarching concern was that the steady erosion of judicial power, - inch by inch, as it were, *insidiously,* meant that the important *judicial functions reserved by the*

Constitution were sought to be taken away. Inevitably, what would then be left (if the statutes had been left alone) would have been a rump of the court's jurisdiction, a *pale shadow of courts' judicial authority.* This concern- at the effect of such steady erosion of judicial power from the court, in essence led to the court holding that in each case, the statute was unconstitutional.

131. The separation of powers discussion- in *both R. Gandhi (supra)* and *Madras Bar Association (supra)* was in the context of the divestment of courts' jurisdiction and their conferment upon bodies which had the trappings of tribunals, but *were found not to be as effective.* Even in *R. Gandhi (supra)* there are observations that the principle of separation of powers does not *strictosensu* apply to the Indian Constitution. Such observations can be found in *Associated Cement (supra)* and also in *Bhim Singh* (supra). In the latter, after noticing *Indira Nehru Gandhi v Raj Narain*1975 Suppl SCC 1 and observations in *Kesavananda Bharti v State of Kerala* 1975 Supp. SCR 1, the court held that:

> *"This court has previously held that the taking away of the judicial function through legislation would be violative of separation of powers. As Chandrachud, J. noted in Indira Nehru Gandhi case (supra), "the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances." [para. 689] This is because such legislation upsets the balance between the various organs of the State thus harming the system of accountability in the Constitution. Thus, the test for the violation of separation of powers must be precisely this. A law would be violative of separation of powers not if it results in some overlap of functions of different branches of the State, but if it takes over an essential function of the other branch leading to lapse in constitutional accountability. It is through this test that we must analyze the present Scheme."*

132. Thus, in considering the complaint that a law violates the separation of powers feature of the constitution (which is a part of the basic structure) what is necessary for the court to examine is whether the executive or any other branch *"takes over an essential function".* These ideas find resonance in the earliest decision of the court in *Rai Sahib Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549, when the Supreme Court held that:

> *"…it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law."*

133. If these observations are kept in mind, the fact that some powers under an enactment, which clothe the authorities with a broad range of powers (and jurisdiction) – such as administrative, *quasi* legislative and *quasi*-judicial *per se* would not make that body a judicial or purely administrative one. Previously, this Court noticed various decisions which held that the bodies created under the TRAI Act and the Electricity Act are acknowledged to be *regulatory* ones; in the case of TRAI, one of the rulings of the Supreme Court stated that regulation can take shape through subordinate legislation (i.e. rule making, regulation framing) or through *"litigation"* i.e. *quasi*-judicial determination in the course of decisions, directions and orders, after fact gathering i.e. granting opportunity to the parties concerned. In the case of the Electricity Commissions, it was held that they do perform *quasi*-judicial functions. As regards primary authorities under SEBI (i.e. the Board and the adjudicatory officers) there is no question that they do perform adjudicatory functions. The consequence of these functions (i.e. *quasi*-judicial determinations leading to orders and directions) is serious and parties concerned or service providers as a class are potentially impacted, sometimes gravely. In the case of SEBI, the Board's decisions can in fact lead to commercial shut down for specified periods, if the direction to stop trading is given. Undoubtedly, these result in serious civil consequences. In all these cases- as in the case of the Act, the remedy of appeal is available as a right; the appellate tribunals uniformly are chaired by a judicially trained person (former High Court Chief Justice or former Supreme Court judge) in a couple of tribunals, *in addition, other members drawn from the legal field are necessary.* However, as regards the primary regulator, i.e. the bodies such as TRAI, SEBI, Electricity Commissions, AAI, AERA, PNGRB *the statutes do not mandate*

that the members concerned (including adjudicating officers under Section 15I of SEBI Act) should be legally qualified or possess judicial experience.

134. *Gullapalli Nageswara Rao (supra)* recognized the broad *functionality* test to determine whether a body or tribunal has a duty to act judicially; it held that:

> *"whether an Administrative Tribunal has a duty to act judicially should be gathered from the provisions of the particular statute and the rules made thereunder, and they clearly express the view that if an authority is called upon to decide respective rights of contesting parties or, to put it in other words, if there is a lis, ordinarily there will be a duty on the part of the said authority to act judicially. …"*

135. Now, to deal with the provisions of the *Competition Act*. As noticed before, the CCI – upon receiving complaints, is *not bound to launch an action.* The information is not in the nature of a *lis.* This is quite unlike a dispute which courts adjudicate; or disputes which statutory tribunals (i.e. the Income Tax Appellate Tribunal or the Customs, Excise & Service Tax or the Goods and Service Tax Tribunal) decide. They are disputes in the course of dealings by individuals or entities, *and in the nature of lis.* Furthermore, another important distinguishing feature is that the CCI's powers to scrutinize the information compel it to first form a *prima facie* opinion. At that stage, there is no dispute; even the informant is not heard. *SAIL (supra)* and subsequent decisions of the Supreme Court have iterated that this function is *administrative* and not *quasi*-judicial. There is no parallel to this procedure amongst any other tribunal *which exercises judicial power of the state.* Every judicial tribunal has to issue notice to the disputant parties and is obliged to hear them in accordance with the prescribed procedure, and render a reasoned decision. The CCI, even at the stage of forming a *prima facie* opinion acts within jurisdiction if it determines that no case is made out.

136. The second important feature is that unlike *judicial tribunals,* which depend entirely on the records of the lower statutory authorities and also what is produced before them, regulatory bodies (SEBI and CCI) have independent investigative mechanisms, which *act as fact gathering statutory authorities.* Depending upon the particular sectoral needs, these investigative bodies might be given powers to take depositions on oath, etc. (as in the case of DG under the *Competition Act*)- the DG has powers that are concurrent to the CCI. This is another unique feature, which sets apart

such regulatory bodies from pure judicial tribunals which are charged with deciding the subject matter over which they exercise jurisdiction. Upon the completion of the record, and the submission of report, such regulators (both SEBI, under Section 11 of the SEBI Act and CCI, under Section 26 of the *Competition Act*) have to hear the parties; in the case of CCI, it might have to record further evidence; in any case, it has to hear the parties on the report submitted to it. It is thereafter that the CCI or the SEBI issues directions or orders.

137. The overall and comprehensive picture which unfolds on a reading of the various relevant provisions of the *Competition Act* is that not all of the CCI's powers are *quasi*-judicial or judicial; when it considers a complaint or information and records a *prima facie* opinion, it acts *administratively.* It does not issue notice, but rather orders investigation, in the course of which the DG collects materials, including calling for records, statements, documents, etc. and also wherever needed, recording evidence on oath. At that stage, it is possible that one party or the other might seek cross-examination. Nevertheless, the stage is only one of *investigation.* The report furnished by the DG *does not decide any lis, nor results in any adverse consequence.* The report has to be considered by the CCI, after hearing the parties concerned (before which they are furnished with copies of the report). It is only after the report is submitted and a hearing given, that an order (a *quasi*-judicial one) is made; it could result in closure of information or some directions (with a fully reasoned order dealing with all contentions) to the entity or entities concerned – or imposition of penalty.

138. The Raghavan Committee, whose report led to the enactment of the Act and setting up of CCI, stated that:

> *"2. The Competition Law Authority should be a multi-member body comprised of eminent and erudite persons of integrity from the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. Having an appropriate provision for their removal only with the concurrence of the Apex Court may ensure their independent functioning.*
> *3. The Competition Law Authority should be independent and insulated from political and budgetary controls of the Government.*
> *4. Competition Law should separate the investigative, prosecutorial and adjudicative functions….*

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6.1.3 In many developed countries and economies in transition, the judiciary therein may be inexperienced in dealing with free market problems. Such problems relating to free and fair trade and relating to restrictive and other prohibited trade practices like abuse of dominance require a certain level of specialised knowledge in economics, trade and the relevant law for adjudication. Even if the judiciary has the reputation and exposure to commerce and market related matters, the Competition Law administration will be better handled if a specialized agency is set up for the purpose. With due respect to the judiciary around the world and in particular India, it needs to be underscored that in the era of specialisation Competition Law would be better administered and consumer welfare better sub-served, if placed in the hands of a specialised agency.

6.1.4 It is therefore recommended that for the administration and enforcement of Competition Law in India, a Specialised Court/Tribunal which can be christened "COMPETITION COMMISSION OF INDIA" may be established. The Competition Commission of India CCI will hear competition cases and also play the role of competition advocacy. The composition of the CCI needs to be tailored to the requirements of the competition policy and the Competition Law. CCI should be empowered to adopt procedures and rule of evidence specifically suited to competition cases.

6. I.5 Principles Governing Competition Law And Authority

a) CCI should be a multi-member body comprised of eminent and erudite persons of integrity and objectivity in the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration.

b) CCI should be independent and insulated from political and budgetary controls of the Government. The independent functioning of the CCI member need to be ensured by having appropriate provision for their removal only with the concurrence of the Supreme Court.

c) CCI should separate the investigative, prosecutorial and adjudicative functions.

d) The proceedings of CCI should be transparent, non-discriminatory and rule-bound.

e) CCI should have a positive advocacy role in shaping policies affecting competition.

To ensure the above, Competition Law should:

(i) provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.

(ii) have extra-territorial reach.

(iii) have punitive provisions for punishing the offenders besides other remedial methods

(reformatory).

6.1.6 Competition Commission - A Framework of the Administrative Structure It may be noted that in the view of the Committee, the Competition Commission of India should be the sole recipient of all complaints regarding infringement of the Competition Act from whatsoever sources it may be' an individual, a firm or an entity or the Central or State Governments. The Competition Commission will also have suo motu powers for initiating action against any perceived infringement.

6.1.7 Keeping in view the above principles, a suggested framework of CCI is described below.

Under the extant MRTP Act, there is a requirement for registration of agreements leading to restrictive trade practices. It is not clear from experience as to what purpose the registration serves, apart from adding to unnecessary paper work. The new Competition Law should scrap the registration requirements altogether

6.1.8 Investigation, Prosecution, Adjudication, Mergers Commission And Competition Advocacy"

139. All the petitioners had urged that given the nature of tasks conferred upon the CCI, i.e. to probe into the allegations of anti-competitive agreements, which under Section 3(3) directly or indirectly (a) determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market which is the consequence of anti-competitive arrangement; directly or indirectly results in bid rigging or collusive bidding, and also investigate into the matters provided in Section 3(4), i.e. agreements at different stages or levels of production generally in different markets, including by any arrangement, exclusive of supply arrangement, distribution arrangement, refusal to deal or resale price maintenance, the implications of exercise of jurisdiction by CCI have a far reaching effect. It was urged that by Section 27, the CCI can direct any association or enterprise etc. involved in the agreement or possession of dominant position, to discontinue or not to enter into such agreements which results in the direct restriction or even prohibition of the right to trade and enter into contracts. The CCI's jurisdiction to direct modification of agreements in the manner specified by it or to abide by other orders, such as payment of costs etc. are equally important implications. Furthermore, the power to issue penalty after adjudication under Section

27(b) only reinforces the essential judicial nature and content of the powers outlined in Sections 3 and 4.

140. It was submitted, in the same vein that given the nature of adjudicatory functions for which the Act was conceived and brought into force, unlike other regulators, the CCI does not decide and apply pre-existing norms that dictate behaviour of an enterprise but rather adjudicates through regulation. In the submissions of one of the learned counsel, Mr. Lakshmikumaran, the CCI, in effect, regulates and does not apply existing norms – *because there are no existing norms and that the norms that do exist are of a general character.* Necessarily, therefore, the task of the CCI is closer or rather even identical to those of adjudicating bodies, Tribunals or Courts. As a corollary, the personnel who man the CCI should be drawn predominantly from the legal field with legal expertise or judicial experience. Section 8 was attacked on the ground that it only *provides* an option of a member with legal or judicial experience and does not *compel* it. Learned counsel seriously questioned certain other provisions, such as the terms of office of the Chairman and other Members (5 years) and the proviso to Section 12 (permitting employment under the State/Central Government, of Members or Chairman who cease to hold office). It was also pointed out that the power to issue interim orders, and execute orders of imposing monetary penalty etc., are which that have a judicial flavour. Serious objection was taken to the powers under Sections 55 and 56 conferred upon the Central Government – to issue directions to the CCI on questions of policy and the power to supersede the Commission on its perceived inability to discharge the functions conferred upon it.

141. This Court has already, for reasons elaborated in the preceding section of this judgement, held that the CCI does not perform *purely adjudicatory functions* like in the case of deciding a list between two competing parties. It is tasked with investigating into complaints received and information provided to it by individual entities and those aggrieved by patterns of behaviour perceived to be barriers in the course of trade and business, which would have the undesirable effect of injecting anti-competitive elements. Now, this task is not a straight forward adjudicatory one. The Commission has to, through an administrative process, sift the complaint or information and arrive at an opinion which the Supreme Court has characterized in

SAIL (supra) to be of *"administrative nature"*. With that, the CCI directs investigation into the complaint or information, by the DG. In the course of this investigation and inquiry, again not an adjudicatory function, as no rights of any party are decided or determined, the representatives of the parties as well as the officials and employees of the concerned entities which are allegedly involved in the anti-competitive practices, are examined, and wherever necessary, depositions under oath are recorded. By virtue of decisions of the courts, in this fact-gathering exercise, wherever adverse evidence or deposition is collected, the opportunity of cross-examination is provided. The DG then analyses the material and evidence and prepares a report, stating whether the complaint is made out fully or in part. It is thereafter that the adjudicatory mode is launched, as it were. Even at this stage, the CCI may not proceed further and close the matter after hearing the parties. Conversely, if the DG in a given case reports that no further action or order is warranted after hearing the individual or the applicant as well as the parties who are alleged to be involved in the objectionable behaviour, the CCI can direct a further enquiry and thereafter proceed further in the matter with the hearing. It is only at this stage after the culmination of the investigation that the CCI enters into an adjudicatory phase. Undoubtedly, at this *final* stage, it decides the rights and liabilities of the parties. Given these overall realities, the question is, can it be said that the CCI's composition ought to be substantially or predominantly drawn from those possessing legal expertise or judicial experience as is urged.

142. In the previous segment of this section, this Court had juxtaposed powers conferred by the Parliament upon the CCI with the role discharged by various regulatory authorities – SEBI, Electricity Commissions, AAI, AERA, PNGRB etc. In some cases, the primary regulatory body such as the SEBI and even the electricity commission are conferred with adjudicatory powers. In the case of SEBI, the powers conferred are akin to CCI as it too investigates into complaints and after giving the kind of opportunity which the statute mandates, imposes sanctions and, wherever necessary, issue appropriate directions. These directions are as consequential and substantive in seriousness as in the case of CCI's directions. For instance, SEBI's direction to cease and desist with a particular kind of practice in the securities market

or barring fully or in part the activities of a stockholder, fund house or any other individual dealing in securities, can virtually spell a civil death for the time that such sanction or injunctive direction prevails. Undoubtedly, in both the cases, the right to carry on trade practice provision guaranteed under Article 19(1)(g) is restricted. *Per se* that it is done after following such a procedure without the aid of a court or without the intervention of a judicial tribunal, in the opinion of this Court, does not result in the restriction being an unreasonable one.

143. If one sees in sequence, the three decisions – *L. Chandra Kumar (supra)*, *R. Gandhi (supra)* and *Madras Bar Association (supra)* – as noticed previously, the court's overarching concern was the judicial power, whenever parcelled away from the mainstream adjudicatory bodies (courts) or established tribunals, such as the ITAT, and in the case of the High Court, [dealt with by the *Madras Bar Association (supra)*] or the jurisdiction of the CLB and the High Court conferred upon the then established NCLT – dealt with by *R. Gandhi (supra)* was frowned upon and contrary to the *doctrine of separation of powers* as the alternative mechanisms were inefficacious and ineffective.

144. The *Competition Act* does not take away or supplant the jurisdiction of the pre-existing jurisdiction of any court or tribunal. The decision of the Seven Judges' in *L. Chandra Kumar (supra)* is authority for the proposition that in the case of service matters, the Administrative Tribunal (which had replaced the HC) is the primary adjudicatory body, then also the court did not accede to the proposition that all particulars ought to be drawn from the judicial branch or should be so qualified. Given the multiple tasks that the Act requires CCI to discharge (advisory, advocacy, investigation and adjudication), it cannot be held that the CCI must necessarily comprise of lawyers or those possessing judicial experience or those entitled to hold office as judges, to conform with the provisions of the Constitution. CCI's task as the primary regulator of marketplace and watchdog in regard to anti-competitive practices was conceived by the Parliament to be as a composite regulator and expert body which is also undoubtedly required to adjudicate at a stage. That stage, however, cannot be given such primacy as to hold that the CCI is *per se* or purely a judicial tribunal. As an adjudicatory body, there can be, no doubt, of course, that its orders are

quasi-judicial and must be preceded by adherence to a fair procedure. As to what is a fair procedure has been elaborately dealt with by Section 26 and various regulations that mandate the kind of opportunity that various interested parties are to be given. Equally, in the course of such proceedings, the CCI is required to make procedural orders -which, a line of decisions require- are to be based on reasons. The final adjudicatory order, of course, has to contain elaborate reasoning. In that sense, the CCI is, no doubt, a Tribunal. But it is emphasized again that it is not purely a judicial Tribunal but discharges multifarious functions, *one* of which is adjudicatory.

145. As regards the challenge to Sections 61 of the Act, this Court notices that such provisions are not alien to the body of law. Similar provisions exist in the Income Tax Act (Section 293); Goods and Services Tax Act, 2017 (Section 162); Securities and Exchange Board of India Act (Section 20A); Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Section 18); Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Section 34); Telecom Regulatory Authority of India Act, 1997 (Section 15) etc. This Court notices that firstly, the Act creates new rights and casts new obligations. The decision which is to be taken by the CCI is preconditioned upon a detailed fact gathering and fact analysis carried out by a body specially designated with the task, i.e. the DG. That official's powers are circumscribed by the Act and regulations. Furthermore, the conduct of proceedings and the application of principles by the CCI after the report of the DG- with assistance of parties' counsel or their representatives, is not only factual and legal, but substantially depends upon analysis of a complex matrix of economic impact on competition of the particular entities' behaviour. As such, CCI does not decide a traditional *lis* which is premised on an adversarial proceeding, which the courts are wont to, in their regular course of work.

146. This court notices, in this context, the observations of the Supreme Court, in *Union of India v Delhi High Court Bar Association*, 2002 (4) SCC 275, when it decided and upheld the bar to jurisdiction of civil courts enacted by Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The court held that:

> *"The manner in which a dispute is to be adjudicated upon is decided by the procedural laws which are enacted from time to time. It is because of the enactment of the Code of Civil Procedure that normally all disputes between the parties of a civil nature would be adjudicated upon by the civil courts. There is no absolute right in anyone to demand that his dispute is to be adjudicated upon only by a civil court. The decision of the Delhi High Court proceeds on the assumption that there is such a right. As we have already observed, it is by reason of the provisions of the Code of Civil Procedure that the civil courts had the right, prior to the enactment of the Debt Recovery Act, to decide the suits for recovery filed by the banks and financial institutions. This forum, namely, that of a civil court, now stands replaced by a banking tribunal in respect of the debts due to the bank. When in the Constitution Articles 323A and 323B contemplate establishment of a tribunal and that does not erode the independence of the judiciary, there is no reason to presume that the banking tribunals and the appellate tribunals so constituted would not be independent, or that justice would be denied to the defendants or that the independence of the judiciary would stand eroded."*

147. Significantly, similar considerations prevailed in *Jagdish Singh v Heeralal* 2014 (1) SCC 479, when the Supreme Court held that the civil courts' jurisdiction is barred in cases arising under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. For these reasons, the challenge to the bar to jurisdiction of civil courts, contained in Section 61 fails.

148. The next challenge addressed was with respect to Section 53T, which provides for an appeal to the Supreme Court. The submission here was that this tends to exclude scrutiny by the High Court altogether and places a heavy burden on parties adversely affected by the COMPAT's orders. This court is of opinion that given the fact that no citizen can claim a vested right to an appeal- according to the consistent line of authorities (*Anant Mills v State of Gujarat* AIR 1975 SC 1234; *Ganga Bai v Vijay Kumar* AIR 1974 SC 1126). The right once conferred, can be taken away only by law. However, no one can complain that the lack of a further appeal, or that provision of further appeal, is not to their convenience- as is being done, in this case. There may be of course some merit in the thought that if an appeal is provided to the High Court, jurisprudence can develop in the regulatory field, thus generating a body of regulatory law and standards that is available to the regulatory field. However, that can hardly be a ground for holding a law unconstitutional; the policy choice in that

regard is to be made by Parliament, not the courts. Therefore, it is held that Section 53T is valid- similar provisions have been made in the TRAI Act, SEBI Act, Electricity Act, etc.

149. As far as the argument that the CCI's membership (i.e. the Chairman and members) *qualification and experience* are concerned, the Act visualizes that individuals with qualifications and expertise in diverse fields can be appointed; these include persons from the legal field. This statutory provision *ipso facto*, however, does not satisfy the test of constitutionality, in view of the decisions of the Supreme Court in *Utility Users' Welfare Association (supra)*. In that decision, the Supreme Court dealt with a challenge to Section 113 on the ground that appointment of a judicial member was not mandated, which rendered the functioning of the State Commission (under the Electricity Act) questionable in law. The previous ruling in *Tamil Nadu Generation and Distribution Corporation Limited v. PPN Power Generating Co. Private Ltd*. (2014) 11 SCC 53 was cited. In *Tamil Nadu Generation (supra)* the court had made observations indicating that the chairman of such commission had to be necessarily a person with judicial experience. In *Utility Users' Welfare Association (supra)*, resolving the issue, the court clarified that the appointment of such judicial personnel was optional. However, the court further held that:

> *"106. In Madras Bar Association28 (MJ-II), the Constitution Bench, referring to the decision in Madras Bar Association29 (MJ-I) observed that members of tribunals discharging judicial functions could only be drawn from sources possessed of expertise in law and competent to discharge judicial functions. We are conscious of the fact that the case (MJ-I) dealt with a factual matrix where the powers vested in courts were sought to be transferred to the tribunal, but what is relevant is the aspect of judicial functions with all the 'trappings of the court' and exercise of judicial power, at least, in respect of same part of the functioning of the State Commission. Thus, if the Chairman of the Commission is not a man of law, there should, at least, be a member who is drawn from the legal field. The observations of the Constitution Bench in Madras Bar Association30 (MJ-II) constitutes a declaration on the concept of basic structure with reference to the concepts of "separation of powers", "rule of law" and "judicial review". The first question raised before the Constitution Bench as to whether judicial*

review was part of the basic structure of the Constitution was, thus, answered in the affirmative.

107. We are, thus, of the view that it is mandatory to have a person of law, as a member of the State Commission. When we say so, it does not imply that any person from the field of law can be picked up. It has to be a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

108. In Brahm Dutt v. Union of India, it has been observed that if there are advisory and regulatory functions as well as adjudicatory functions to be performed, it may be appropriate to create two separate bodies for the same. That is, however, an aspect, which is in the wisdom of the legislature and that course is certainly open for the future if the legislature deems it so. However, at present there is a single Commission, which inter alia performs adjudicatory functions and, thus, the presence of a man of law as a member is a necessity in order to sustain the provision, as otherwise, it would fall foul of the principles of separation of powers and judicial review, which have been read to be a part of the basic structure of the Constitution.

109. We are also not in a position to accept the plea advanced by the learned Attorney General that since there is a presence of a Judge in the Appellate Tribunal that would obviate the need of a man of law as a member of the State Commission. The original proceedings cannot be cured of its defect merely by providing a right of appeal.

110. We are, thus, of the unequivocal view that for all adjudicatory functions, the Bench must necessarily have at least one member, who is or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law and who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge."

150. It follows, therefore, that in line with the above declaration of law, at all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary.

151. The related aspect is the selection procedure. Objection was taken to Section 53D stating that whereas it envisages the Chairperson of a tribunal as a retired judge, there is no obligation that at least one of the other members ought to be a trained judicial personnel. The court is undoubtedly of the opinion that the Appellate Tribunal

performs judicial functions; it hears and decides appeals from orders of CCI. However, the mandate that the Chairman should have been a Supreme Court judge or a Chief Justice of a High Court, in the opinion of this court, sufficiently guarantees the application of a judicial mind and, more importantly, application of judicial principles to the issues brought/agitated before that tribunal. This Court notices that the appellate tribunal provisions contained in regulatory enactments in various sectors (telecom, electricity, petroleum and natural gas, airports, securities etc.) follow an identical pattern.

152. With respect to the selection procedure contained in Section 8 (for members of CCI) the court perceives no infirmity in the impugned provision, having regard to the view taken previously, mandatorily, the CCI should have a judicial member, in keeping with the *dicta* in *Madras Bar Association (supra),* as reiterated in *R. Gandhi (supra)* and the recent ruling in *Utility Users Welfare Association (supra).* This would consequently mean that the provision of Section 8 has to be resorted to for selection at all times. This, in the opinion of the court is sufficient safeguard to ensure that executive domination in the selection process (of the panel, shortlisting the names for appointment) does not prevail. The structure of the provision (Section 9 of the Act) is that five members -including the Chief Justice of India (or his nominee) as the chair, man it. At the same time, the composition also ensures the participation of two outside independent experts.

153. As far as the selection to the appellate tribunal (COMPAT) goes (Section 53E), the court notices that the recent decision in *Swiss Ribbons Pvt. Ltd v Union of India* 2019 SCC OnLine SC 73, has outlined the correct perspective, having regard to the decisions in *R. Gandhi (supra)* and *Madras Bar Association (supra).* The court had observed as follows:

> *"13. Shri Rohatgi has argued that contrary to the judgments in Madras Bar Association (I) (supra) and Madras Bar Association (III) (supra), Section 412(2) of the Companies Act, 2013 continued on the statute book, as a result of which, the two Judicial Members of the Selection Committee get outweighed by three bureaucrats.*

14. On 03.01.2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended as follows:

412. Selection of Members of Tribunal and Appellate Tribunal.--

xxx xxxxxx

(2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of--

(a) Chief Justice of India or his nominee-- Chairperson;

(b) a senior Judge of the Supreme Court or Chief Justice of High Court--Member;

(c) Secretary in the Ministry of Corporate Affairs--Member; and

(d) Secretary in the Ministry of Law and Justice--Member.

(2-A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote.

This was brought into force by a notification dated 09.02.2018. However, an additional affidavit has been filed during the course of these proceedings by the Union of India. This affidavit is filed by one Dr. Raj Singh, Regional Director (Northern Region) of the Ministry of Corporate Affairs. This affidavit makes it clear that, acting in compliance with the directions of the Supreme Court in the aforesaid judgments, a Selection Committee was constituted to make appointments of Members of the NCLT in the year 2015 itself. Thus, by an Order dated 27.07.2015, (i) Justice Gogoi (as he then was), (ii) Justice Ramana, (iii) Secretary, Department of Legal Affairs, Ministry of Law and Justice, and (iv) Secretary, Corporate Affairs, were constituted as the Selection Committee. This Selection Committee was reconstituted on 22.02.2017 to make further appointments. In compliance of the directions of this Court, advertisements dated 10.08.2015 were issued inviting applications for Judicial and Technical Members as a result of which, all the present Members of the NCLT and NCLAT have been appointed. This being the case, we need not detain ourselves any further with regard to the first submission of Shri Rohatgi."

154. In this context, it is significant that the Constitution Bench judgment in the second case of *Madras Bar Association v. Union of India* 2015 (8) SCC 583

[hereafter "the *Madras Bar Association-II*"] dealt with the issue concerning the composition of Selection Committees for the National Company Appellate Tribunal. There too, Section 412 of the Companies Act 2013, was in issue. Before the amendment noticed in *Swiss Ribbons (supra)*, the Committee comprised of five members, including the Chief Justice of India or his nominee as Chairperson and a senior judge of the Supreme Court or the Chief Justice of the High Court and three other Secretary level members. In *Madras Bar Association-II (supra)* it was held as follows:

> *"25. This issue pertains to the constitution of Selection Committee for selecting the Members of NCLT and NCLAT. Provision in this respect is contained in Section 412 of the Act, 2013. Sub-section (2) thereof provides for the Selection Committee consisting of:*
>
> *(a) Chief Justice of India or his nominee-Chairperson;*
> *(b) a senior Judge of the Supreme Court or a Chief Justice of High Court--Member;*
> *(c) Secretary in the Ministry of Corporate Affairs--Member;*
> *(d) Secretary in the Ministry of Law and Justice--Member; and (e) Secretary in the Department of Financial Services in the Ministry of Finance--Member.*
> *Provision in this behalf which was contained in Section 10FX, validity thereof was questioned in 2010 judgment, was to the following effect:*
> *10FX. Selection Committee: (1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of:*
>
> *(a) Chief Justice of India or his nominee Chairperson;*
> *(b) Secretary in the Ministry of Finance and Member; Company Affairs*
> *(c) Secretary in the Ministry of Labour Member;*
> *(d) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department) Member;*
> *(e) Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs) Member.*
>
> *(2) The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee.*
>
> *26. The aforesaid structure of the Selection Committee was found fault with by the Constitution Bench in 2010 judgment. The Court*

specifically remarked that instead of 5 members Selection Committee, it should be 4 members Selection Committee and even the composition of such a Selection Committee was mandated in Direction No. (viii) of para 120 and this sub-para we reproduce once again hereinbelow:

(viii) Instead of a five-member Selection Committee with Chief Justice "of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and Secretary in the Ministry of Law and Justice as members mentioned in Section 10FX, the Selection Committee should broadly be on the following lines:

(a) Chief Justice of India or his nominee-Chairperson (with a casting vote);
(b) A senior Judge of the Supreme Court or Chief Justice of High Court-Member;
(c) Secretary in the Ministry of Finance and Company Affairs-Member; and
(d) Secretary in the Ministry of Law and Justice-Member.

27. Notwithstanding the above, there is a deviation in the composition of Selection Committee that is prescribed Under Section 412(2) of the Act, 2013. The deviations are as under:

(i) Though the Chief Justice of India or his nominee is to act as Chairperson, he is not given the power of a casting vote. It is because of the reason that instead of four member Committee, the composition of Committee in the impugned provision is that of five members.

(ii) This Court had suggested one Member who could be either Secretary in the Ministry of Finance or in Company Affairs (we may point out that the word "and" contained in Clause (c) of sub-para (viii) of para 120 seems to be typographical mistake and has to be read as "or", as otherwise it won't make any sense).

(iii) Now, from both the Ministries, namely from the Ministry of Corporate Affairs as well as Ministry of Finance, one Member each is included. Effect of this composition is to make it a five members Selection Committee which was not found to be valid in 2010 judgment. Reason is simple, out of these five Members, three are from the administrative branch/bureaucracy as against two from judiciary which will result in predominant say of the members belonging to the administrative branch, is situation that was specifically diverted from.

The composition of Selection Committee contained in Section 412(2) of the Act, 2013 is sought to be justified by the Respondents by arguing

that the recommended composition in the 2010 judgment was in broad terms. It is argued that in view of subsuming of BIFR and AAIFR which are in the administrative jurisdiction of Department of Financial Services, Secretary DFS has been included. No casting vote has been provided for the Chairman as over the period of time the selection processes in such committees have crystallized in a manner that the recommendations have been unanimous and there is no instance of voting in such committees in Ministry of Corporate Affairs. Moreover other similar statutory bodies/tribunals also do not provide for 'casting vote' to Chairperson of Selection Committee. Further, the Committee will be deciding its own modalities as provided in the Act. The following argument is also raised to justify this provision: (i) Robust and healthy practices have evolved in deliberations of Selection Committees. Till now there is no known case of any material disagreement in such committees. (ii) The intention is to man the Selection Committee with persons of relevant experience and knowledge.

28. We are of the opinion that this again does not constitute any valid or legal justification having regard to the fact that this very issue stands concluded by the 2010 judgment which is now a binding precedent and, thus, binds the Respondent equally. The prime consideration in the mind of the Bench was that it is the Chairperson, viz. Chief Justice of India, or his nominee who is to be given the final say in the matter of selection with right to have a casting vote. That is the ratio of the judgment and reasons for providing such a composition are not far to seek. In the face of the all pervading prescript available on this very issue in the form of a binding precedent, there is no scope for any relaxation as sought to be achieved through the impugned provision and we find it to be incompatible with the mandatory dicta of 2010 judgment. Therefore, we hold that provisions of Section 412(2) of the Act, 2013 are not valid and direction is issued to remove the defect by bringing this provision in accord with sub-para (viii) of para 120 of 2010 judgment."

155. Having regard to the above discussion, it is, therefore, held that necessarily, the composition of the Committee, which selects from amongst names to fill the position of Chairperson and members of the Company Appellate Tribunal has to conform to the dicta in *Madras Bar Association-I (supra)* and *Madras Bar Association-II (supra). Swiss Ribbons (supra)* too is an authority on this aspect; the amended provisions of the Companies Act which was faulted in *Madras Bar Association-II (supra)* was approved. Consequently, Section 53E, as it stood, before the amendment by the Finance Act, 2017, is exposed to the vice of unconstitutionality. The court notices that unlike a mere appellate tribunal, COMPAT also possesses special jurisdiction to

award damages through adjudication of "claims" under Section 53N. This power, in addition to the appellate power makes it imperative that the personnel chosen for the task assigned to the COMPAT, (from whose orders, appeals lie to the Supreme Court directly under Section 53T) are with the approval of the Chief Justice, and at least a judge of the Supreme Court, following the pattern indicated in *Madras Bar Association-II* and reiterated in *Swiss Ribbons* (supra). Consequently, Section 53E- as it stood prior to amendment, cannot be sustained.

156. The above observations are, however, not determinative or seem to be dispositive of the issue entirely- that the validity of Section 53E which was repealed by Sections 171(d) of the Finance Act, 2017 and instead replaced by the provisions in Section 184 of the Finance Act, 2017 are pending consideration before the Supreme Court.

157. As regards the objections with respect to the tenure and term of office and the potentiality of the Central Government to supersede CCI as well as its powers to issue directions, this Court notices, that in all the regulatory enactments creating bodies, which the Parliament hitherto enacted, (SEBI, AAI, Electricity Act, PNG etc.) similar provisions have been made. For instance, under Sections 39 and 40 of the AAI Act and Sections 49 and 42 of the AERA Act, the Central Government is empowered to issue directions to AAI and AERA and supersede the authorities under certain conditions. Likewise, under Section 25 of the TRAI Act, the Central Government has powers to issue directions to TRAI; the Central Government has also powers under Section 7 of the RBI Act, to issue directions. By Sections 106 to 109, likewise, directions can be issued by the concerned government – State or Central to the Central Commission, State Commission or Joint Commission respectively. Given the pattern of all these regulatory legislations, these provisions, in the opinion of the court, do not in any manner detract from or undermine the express authority conferred upon the CCI.

158. As a matter of fact, by virtue of Section 11 of the Act, the tenure of its members is assured and protected. The procedure for removal of members or Chairman is spelt out in Section 11(3)(3); the safeguard provided is that in the event of a member acquiring official or other interest, likely to affect prejudicially her

functions as a member or abusing her position, is rendered prejudicial to public interest, are matters exclusively to be decided by a reference made to the Supreme Court by the Central Government. This provision, in the opinion of the court, sufficiently entrenches the office of the Chairman and the members of the CCI and insulates them from arbitrary inroads by the executive.

Re. Point No.3 – Section 22(3) unconstitutional for the reasons urged by the petitioners

Re. Point No.4 – Revolving door policy vitiating any law, policy or practice rendered by the CCI

159. Both these points are taken up together because common arguments were addressed by all counsels on this aspect. Section 22(1) provides that the CCI would meet at such times and places and observe such procedure as is provided by the regulations. Section 22(2) enacts that in the event of Chairperson's inability to attend a meeting of the Commission, the senior most person present would preside over it. Section 22(3) stipulates that all questions which come up for consideration in a meeting would be decided by majority of members present and voting and that in the event of equality of votes, the Chairperson or the Member presiding would have a second or casting vote. The proviso to Section 22 (3) stipulates a minimum quorum of at least three members for any meeting.

160. The petitioners' argument was that Section 22(3), to the extent it enables the Chairperson or the senior member presiding a board meeting to vote twice, i.e. have a casting vote is *anathema* to judicial functioning. It is submitted that the concept of casting vote is relatable to board meeting in private environs such as company board meetings etc. and cannot have any place where the duty to act judicially and give reasons for such decisions are mandated. It was urged consequently that having regard to the stipulation of a minimum quorum (3 members) wherever there is a difference of opinion, in the CCI where the quorum is of even members – 4 or 6 invariably, the Chairperson or the member presiding would have his say because, he would necessarily vote twice.

161. On behalf of the CCI, it was further urged that such provision for a casting vote is not *anathema* to all statutory bodies and finds place and mention in several statutes, such as SEBI, TRAI etc. Further, under Section 81(1)(A)(b) of the old Companies

Act, 1956 – deals with further issue of capital; Section 149(2B), - deals with restrictions on commencement of business and Section 189(1), which prescribed for ordinary and special resolutions, the law envisioned a casting vote by the Chairman of the meeting in the case of equality of votes. The concept of a casting vote, in the opinion of this Court, is better confined to the realm of meetings where decision to run a body or even select personnel or in regard to decisions with respect to day-to-day functioning of a body or entity, including the choice of selection of personnel etc. are decided. On the other hand, an adjudicatory function presupposes a fair procedure whereby the tribunal comprised of an impartial member or members hearing the parties render their decisions objectively on the given facts and apply a pre-existing norm. This in turn means that each member of the tribunal (where plurality of members exist) applies her (or his) mind independently and arrive at decisions which could be common. In this broad spectrum, various permutations are possible. For example, in a 3 member tribunal, it is likely that each member may express a different opinion but all may agree on a common conclusion. On the other hand, two may agree upon a common opinion and express in it in one opinion and the third may differ for stated reasons. Equally, it is possible that there is complete unanimity on all aspects resulting in one common opinion or decision. Each potential decision is premised upon application of mind by every member who participated in the tribunal. Furthermore, a strong element of collegiality is necessary either in all stages of functioning and at least, at the stage of the decision making. This collegiality or collaborative process and requirement of application mind is entirely subverted if one member, Chairperson, senior member or any member characterized by any appellation is conferred a second or casting vote. The principle of each member's opinion and view carrying the same weight is destroyed in such instance.

162. In the considered opinion of this Court, there can be no two opinions that a casting vote, which potentially can lead to as adjudicatory result or consequence, is *anathema* to and destroys the Rule of Law in the context of Indian Constitution. In this regard, the petitioners had relied upon the Division Bench decision of the Bombay High Court in *Shobhana Shankar Patil (supra)* where the Court was of the opinion that seniority of a judge – either as the Chief Judge or a presiding member,

resulting in the entrustment upon him or her, the extra or casting vote would be entirely irrational; the court demonstrated, this irrationality, by illustrating that where both judges are appointed on the same day, one of whom is designated as senior merely because such status is conferred upon him at the time of appointment. That would not in any manner explain *why a casting vote is conferred on such individual member*.

163. The court further is of the opinion that the principle of equal weight for the decisions of each participant of a *quasi*-judicial tribunal is undoubtedly destroyed by Section 22(3) and further that the provision is incapable of compartmentalization or "reading down". This can be shown by an illustration whereby the decision taken by a majority of four members might be to question a complaint and record that there is no *prima facie* opinion. The potential mischief which the casting vote provision can result in is that the Chairperson may well take recourse to the second or casting vote and tip the balance the other way and direct that a *prima facie* case exists in order to investigate into the matter further. There can be several such illustrations where the potential repercussions can be felt in the ultimate adjudicatory result. Consequently, the provision of Section 22(3) is incapable of a clear or neat segregation and has to be declared void in entirety. As a consequence, the only provision which would survive then is the proviso which mandates a minimum quorum of three members (including the Chairman). The proviso then would stand on its own and act as a norm since *per se* it is harmonious and caters to situations and contingencies where the entire Commission of seven members may be unable to sit and composition larger than 3 may not be able to function for several reasons.

164. As regards point No. 4, the most serious objection to Section 22(3) as a whole was that it places or permits "the revolving door policy" that enables members to participate in one or the other proceedings or desist from participation at their will. To better appreciate this practice, the court would rely upon a tabular chart prepared by one of the parties in that regard with respect to participation of one or the other members in the course of the hearing, which culminated in its final hearings:

CCI Order dated	*Summary of the order*	*Members present/signed*
5.2.2013 *6.2.2013*	*FINAL ARGUMENTS HEARD BY CCI*	*HC Gupta* *Anurag Goel*

7.2.2013 *8.2.2013*	*Tata Motors was heard on 5.2.2013*	*M L Tayal* *Ashok Chawla* *R Prasad* *Geeta Gouri* *S N Dhingra*
5 March 2013 (Vol IV, @ pg 798-802)	*CCI requested for additional information from the informant and the other OEMs (including Tata Motors).*	*H C Gupta* *Anurag Goel* *M L Tayal* *Ashok Chawla* *Geeta Gouri* *S N Dhingra* ***(R Prasad (retired on 28.02.2013), who heard Tata Motors was not present for this ordinary meeting.)***
9.5.2013	*CCI considered the additional information submitted by the OEMs, pursuant to its order dated 5 March 2013 (including the objections to the informant and response to the additional CCI queries filed by Tata Motors on 22 April 2013 @b Vol IV, pgs 803-842)* *The order noted that the oral arguments and the submissions made on behalf of the parties have been concluded. However, in case the CCI has any query, the parties concerned may be directed to answer the queries of the CCI.*	*HC Gupta* *Anurag Goel* *M L Tayal* *Ashok Chawla* *Geeta Gouri* *S N Dhingra* *S.L. Bunker* ***(R Prasad (retired on 28.02.2013), who heard Tata Motors was not present for this ordinary meeting;*** ***Bunker, who was present at this meeting was not present during the oral submission made by Tata and only joined the CCI on 25 March 2013).***
28.5.2013	*CCI requested for further additional information from parties (including Tata).*	*HC Gupta* *Anurag Goel* *Ashok Chawla* *Geeta Gouri* *S N Dhingra* *S.L. Bunker* *M L Tayal* ***[R Prasad (retired on 28.02.2013), who heard***

		Tata Motors was not present for this ordinary meeting.] ***Bunker, who was present at this meeting was not present during the oral submissions made by Tata and only joined the CCI on 25 March 2013)***
24.7.2013	*CCI recorded that Mahindra, Nissan Motor and BMW had filed application seeking fresh oral hearings in the matter on ground that there was change in the constitution of the quorum of the CCI. CCI dismissed these applications after recording that the only those members who heard the parties will pass the final order.*	*Anurag Goel* *Ashok Chawla* *Geeta Gouri* *S N Dhingra* *S.L. Bunker* *M.L. Tayal* ***[R Prasad (retired on 28.02.2013) and HC Gupta, who heard Tata Motors were not present for this ordinary meeting.*** ***Bunker, who was present at this meeting was not present during the oral submissions made by Tata and only joined the CCI on 25 March 2013.)***
08.08.2013	*CCI considered the additional information filed by Tata Motors on 30 July 2013 and 5 August 2013 (Vol IV, @ 905-917)*	*Anurag Goel* *Ashok Chawla* *Geeta Gouri* *S N Dhingra* *S.L. Bunker* *M.L. Tayal* ***(R Prasad (retired on 28.02.2013) and HC Gupta, who heard Tata Motors were not present for this ordinary meeting.*** ***Bunker, who was present at this meeting was not present during the oral submissions made by Tata and only joined the CCI on 25 March 2013)***
25.8.2014	*[CCI FINAL ORDER]*	*Anurag Goel* *Ashok Chawla* *M L Tayal*

		(R Prasad (retired on 28.02.2013), HC Gupta (retired on 24.11.2013), Geeta Gouri (retired on 15.04.2014) and Dhingra (March 2014) who heard Tata Motors were not present for this ordinary meeting. Also, the members HC Gupta, Dhingra and Geeta Gouri considered the additional submissions filed by Tata Motors post the conclusion of the oral submissions. ***Bunker, was <u>not</u> present during the oral submissions made by Tata (only joined the CCI on 25 March 2013) considered the additional submissions filed by Tata Motors post the oral submissions.)***

165. There can be no two opinions about the impropriety of a decision which is contrary to the principle that a tribunal or adjudicatory body is bound to render its decision, after hearing the parties; if the body comprises of one or several members, it is a necessary corollary that *only those who hear should decide.* The decisions of the Supreme Court in *Gullapalli Nageswara Rao (supra)*; *Union of India v Shiv Raj & Others* (2014) 6 SCC 564 establish this rule. The ratio of these judgments is that one who hears must decide and violation of this rule will render the final order void.

166. The question here is, did anyone who did not hear the complaints decide it? The record and the tabular chart, listing the members who heard the matters on 05.02.2013 to 08.02.2013, shows that those who participated were Mr. HC Gupta, Anurag Goel, M L Tayal, Ashok Chawla, R Prasad, Justice S.N. Dhingra (Retd) and Ms. Geeta Gouri. On 05.03.2013, when CCI requested for additional information from the informant and the other OEMs, the same members – *except Mr. R. Prasad* participated; he had retired, in the meanwhile. On 09.05.2013, the same combination

(Mr. HC Gupta, Anurag Goel, M L Tayal, Ashok Chawla, Justice S.N. Dhingra (Retd) and Ms. Geeta Gouri) were present. Instead of R Prasad, Mr. Bunker, was present at this meeting. *He was not present during the oral submissions and he joined the CCI on 25 March 2013*. On 08.08.2013, five equipment manufacturers (OEMs) made submissions; on this date, Mr. Anurag Goel, M L Tayal, Ashok Chawla, Justice S.N. Dhingra (Retd) and Ms. Geeta Gouri (from the original combination who heard the matter consecutively on 5th-8th February, 2013) were present; two (R. Prasad, who had retired and H.C. Gupta) were not present; *Mr. Bunker was present like in the previous hearing.* The final order was made on 25.08.2014; it was by three members, i.e. Mr. Anurag Goel, Ashok Chawla and M.L. Tayal.

167. It is evident that Mr. Bunker, who was not present in the initial hearings on 05.02.2013 to 08.02.2013 and 05.03.2013, joined the hearings of 09.05.2013 and 08.08.2013. Those who had initially heard, but retired, in the meanwhile, before the final order was made, were Mr. R. Prasad, Justice S.N. Dhingra (Retd); Mr. H.C. Gupta and Ms. Geeta Gouri. The petitioners had urged that the hearings in which Mr. Bunker participated (i.e. on two dates) tainted the procedure and furthermore, that the retirement (or end of tenure) of four members resulted in violation of law and rules of natural justice. Their submission was, firstly that a tribunal acts as one body; the *quoram* rule (per proviso to Section 22 (3)) cannot be stretched to such levels as to render access to justice, an illusion, whereby a larger body comprising of several members hears the matter and the ultimate decision is rendered by a minority of such body or tribunal, for whatever reasons.

168. In *Bharat Bank* (supra), the fact situation was that the chairman of the tribunal was unable to attend the proceedings, since he was entrusted with another assignment. The argument made was two-fold, that the remaining two members had to be formally constituted as the tribunal; more crucially, it was contended that the award that was made included the participation of the chairman, who then returned. The Supreme Court held that the award was vitiated. In *Automotive Tyre Manufacturers Association v. The Designated Authority &Ors*(2011) 2 SCC 258, the issue was that one Designated Authority under the Customs Tariff Act heard the parties; he was transferred; another official took charge. He issued notice to the parties and asked

them to provide written submissions. The Supreme Court considered the submission that the parties were given notice to appear, and did not do so; it however, rejected it as unsubstantiated. In the light of these facts, it was held that the decision was vitiated because one who heard did not decide the matter.

169. In *Ossein and Gelatine Manufacturers Association of India v Modi Alkalies & Chemicals Limited &Ors*1989 (4) SCC 264, the court held as follows:

> *"5. On the issue of natural justice, we are satisfied that no prejudice has been caused to the assessee by any of the circumstances pointed out by the appellant. It is the true that the order has been passed by an officer different from the one who heard the parties. However, the proceedings were not in the nature of formal judicial hearings. They were in the nature of meetings and full minutes were recorded of all the points discussed at each meeting. It has not been brought to our notice that any salient point urged by the petitioners has been missed. On the contrary, the order itself summarises and deals with all the important objections of the petitioners. This circumstance has not, therefore, caused any prejudice to the petitioners. The delay in the passing of the order also does not, in the above circumstances, vitiate the order in the absence of any suggestion that there has been a change of circumstances in the interregnum brought to the notice of the authorities or that the authority passing the order has forgotten to deal with any particular aspect by reason of such delay. The argument that the application of the Modis had referred to bonemeal as the raw material used and this was later changed to "crushed bones" is pointless because it is not disputed that all along the petitioners were aware that the reference to bonemeal was incorrect and that the Modis were going to use crushed bones in their project. The last contention that some documents were produced at the hearing by the Modis which the petitioners could not deal with effectively is also without force as, admittedly, the assessee's representatives were shown those documents but did not seek any time for considering them and countering their effect. There has, therefore, been, in fact, no prejudice the petitioners. They have had a fair hearing and the Government's decision has been reached after considering all the pros and cons. We are unable to find any ground to interfere therewith.*
>
> *6. There was some discussion before us on a larger question as to whether the requirements of natural justice can be said to have been complied with where the objections of parties heard by one officer but the order of passed by another. Sri Salve, referring to certain passages in Local Government Board v. Alridge 1915 A.C. 120, Ridge v. Daldwin 1964 A.C. 40, Regina v. Race Relations Board. Ex parte Selvarajan 1975 1 WIR 1686 and in de Smith's Judicial Review of Administrative*

Action (Fourth Adn. p. 219-220) submitted that this was not necessarily so and that the contents of natural justice will vary with the nature of the enquiry, the object of the proceeding and whether the decision involved is an "institutional' decision or one taken by an officer specially empowered to do it. Sri Divan, on the other hand pointed out that the majority judgment in Gullappalli Nageswara Rao v. ASRTC (1959) Supp. 1 S.C.R. 319 has disapproved of Alridge's case and that natural justice demands that the hearing and order should be by the same officer. This is a very interesting question and Alridge's case has been dealt with by wade (Administrative Law, 6th Edition) at pp. 507 et. seq.) We are of opinion that it is unnecessary to enter into a decision of this issue for the purposes of the present case. Here the issue is one of grant of approval by the Government and not any particular officer statutorily designated. It is also perfectly clear on the records that the officer who passed the order has taken full note of all the objections put forward by the petitioners. We are fully satisfied, therefore, that the requirements of natural justice have been fulfilled in the present case."

170. In *Tan Boon Chee David v Medical Council of Singapore* [1980] 2 MLJ 116, the Singapore High Court expressed disapproval at the manner the Singapore Medical Council had conducted an inquiry casually, and passed strictures upon the council for committing a glaring breach of natural justice. The appellant was held guilty of misconduct and suspended from medical practice. The inquiry had been held over two days; the record however, disclosed that the attendance of members of the Council were erratic and furthermore, members walked in and out of the inquiry as and when they liked when evidence of the witnesses was recorded. The High Court held the inquiry to be vitiated, stating that:

"... a person who has not seen and heard a witness is as a rule incapable of estimating the value of his evidence. It was therefore improper for members of the Council to walk in and out of the Inquiry while evidence was being recorded or to be absent altogether... such conduct is not only improper and unfair to the practitioner ... but it also tends to destroy confidence in the fairness of the Council's decision..."

171. It is clear that on the question whether in a particular case, a suitor or litigant can justly complain of violation of principles of natural justice- on the aspect that a tribunal of varied composition rendered decision through only some members, when at earlier stages, all members had participated and heard, is not capable of any one answer. Much depends on the factual context. Here, the three members who did

finally decide the complaints (Mr. Anurag Goel, Ashok Chawla and M.L. Tayal) *were present throughout all the dates of final hearing.* No doubt, as time passed, four original members (Mr. R. Prasad ,H.C. Gupta, Justice S.N. Dhingra (Retd), and Ms. Geeta Gouri) retired or completed their tenure. That fact is not disputed; in these circumstances, in the opinion of the court, the mere fact that Mr. Bunker participated in two intervening hearings, but was not a party to the final decision, *per se* does not amount to violation of principles of natural justice.

172. That proviso to Section 22(3) permits the possibility of the "revolving door" in the opinion of the court, does not result in its invalidity. It is well settled that the possibility of abuse of power is not a ground to hold the law, or provision of a law, arbitrary. In *Sushil Kumar Sharma v Union of India and Ors.* (2005) 6 SCC 281 it was observed as follows:

> *"11. It is well settled that mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal hand" (see: A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, Authorised Official and Income-Tax Officer and Anr.) (1956) 29 ITR 349 (SC)".*

173. Again, in *Budhan Choudhary & Ors. v State of Bihar* 1955 CriLJ 374, the Supreme Court repelled the contention holding that on the possibility of abuse of a provision by the authority, the legislation may not be held arbitrary or discriminatory and violative of Article 14 of the Constitution:

> *"13. From the decided cases in India as well as in United States of America, the principle appears to be well settled that if a statutory provision is otherwise intra-vires, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, ultra-vires or unconstitutional. In such cases, "action" and not the "section" may be vulnerable. If it is so, the court by upholding the provision of law, may still set aside the action, order or decision and grant appropriate relief to the person aggrieved."*

174. Likewise, it was said, in *State of Rajasthan v Union of India* (1978) 1 SCR 1 it was observed that:

> *"it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief."*

175. In view of the above discussion, it is held that the mere circumstance that in a given case or group of cases, the practise of "revolving door" hearing is resorted to, would not *ipso facto*, constitute a valid ground to declare Section 22 invalid or arbitrary. Whether in a particular case, the concerned party has been prejudiced would have to therefore, be examined, in the light of the facts and circumstances of that case.

176. Only three parties, Nissan Motors, BMW and Mahindra & Mahindra had raised an issue with regard to the varying composition of the members who heard the matter. The relevant extract of the application dated 19.10.2012 filed by Mahindra & Mahindra is as follows:

> *"d. This Respondent requests this Hon'ble Commission to ensure that the varying quorum of honourable members who have heard the matter would not result in any injustice to the Respondents or adversely impact the outcome of the Hon'ble Commission's judgment in the Case No.3 of 2011."*

177. These contentions were dealt with by the Commission in its order dated 24.07.2013 in the following manner:

> *"4. Nissan Motor India Pvt. Ltd. and BMW filed applications under Section 36(1) seeking fresh oral hearing in this matter by the Commission on the ground that there was a change in the constitution of quorum of the Commission. Mahindra & Mahindra filed application dated 10th July, 2013 requesting to ensure that the varying quorum of members who have heard the matter would not result in any injustice to the Respondents or adversely impact the outcome of the Hon'ble Commission in the matter. After the matter was heard, one new Member had joined the Commission, however, only those Members of the Commission who heard the matter and were present at the time of arguments, shall decide the matter in question. The application is, therefore, dismissed."*

178. It appears that the parties who had raised this issue were satisfied that no prejudice would be caused to them in view of this order of the CCI. As far as the other

parties are concerned, they did not raise the issue at all and were evidently not apprehensive about the consequences of the procedure adopted in this regard.

179. Having so concluded, this Court is nevertheless of the opinion that a hearing by a larger body and decision by a smaller number (for compelling reasons or otherwise) does lead to undesirable and perhaps at times avoidable situations. To address this, the court hereby directs that when all evidence (i.e. report, its objections/affidavits etc.) are completed, the CCI should set down the case for *final hearing.* At the next stage, when hearing commences, the membership of the CCI should be constant (i.e. if 3 or 5 members commence hearing, they should continue to hear and participate in all proceedings on all hearing dates); the same number of members (of the CCI) should write the final order (or orders, as the case may be). This procedure should be assimilated in the form of regulations, and followed by the CCI and all its members in all the final hearings; it would impart a certain formality to the procedure. Furthermore, the court hereby directs that no member of the CCI should take a recess *individually, during the course of hearing, or "take a break" to rejoin the proceeding later*. Such "walk out and walk in" practise is *deleterious to principles of natural justice*, and gravely undermines public confidence in the CCI's functioning. Once the hearing commences, *all members (who hear the case, be they in quorums of 3 or 5 or seven) should continue to be part of the proceeding, and all hearings, en banc*. An analogy may also be drawn to the hearings in courts before benches of more than one member. Hearings may take place from time to time before benches of varying composition, but once the final hearing has commenced, the matter is heard and decided only by the same bench. There is no addition, deletion or substitution in the composition of the bench during the course of final hearing. If at all, it becomes impossible to continue the hearing before the same bench (for example, due to one of the judges having demitted office), the matter is heard afresh by the new bench even if the composition is partly common with the previous bench. A similar example may be given of hearings in the Supreme Court – if a matter is heard in part by a bench of two judges, further hearings are held only before that bench, and not before the bench of three judges even if both the original members of the bench are also part of the three judge bench. The invariable practice of the courts, which also ought to be followed by

the CCI, is that the bench which hears the matter decides it, and that every member who participates in the hearing, is also party to the final decision.

180. Furthermore, the court is of the opinion that the CCI should be manned fully with all nine members. This will enable the Chairman to ensure that substantial numbers (of at least five) are present at every substantial hearing and final hearing. Furthermore, the Central Government should seriously consider recruiting legal practitioners who regularly practise in the field of company law, competition, securities and other related fields, with sufficient experience (of over 7 years, as in the case of District Judges, under the Constitution) as technical members. This will eventually promote wider participation in CCI's decision making process and result in these lawyers' grooming for responsible positions in their later years: this can foster expertise which will be valuable to the legal and judicial system.

Was the power exercised by the CCI to expand the scope of inquiry and notice under Section 26 (1) in an illegal and overbroad manner

181. The petitioners had impugned the expansion of scope of the initial inquiry. The facts here are that based on the complaint by the informant and supplementary materials, the CCI recorded its *prima facie* opinion that the complaints needed investigation by its order of 24.02.2011. On 19.04.2011, the DG conducted investigation into the allegations made by the informant and submitted his investigation report. That DG Report requested for permission to expand the scope of its investigation to include other car manufacturers. By its order of 26.04.2011, CCI expanded the scope of investigation being conducted by the DG to include the petitioners herein and certain other car manufacturers operating in India. The DG thereafter issued notice to the other car manufacturers, i.e. the petitioners on 04.05.2011 under Section 36 (2) read with Section 41 (2) of the Act, seeking detailed information and documents from them with reference to an investigation being conducted into certain anti-competitive practices alleged to be prevalent in the sale, maintenance, service and repair market of the cars manufactured in India in Case No. 03/2011. The DG's request for expansion reads as follows:

" In terms of CGI Order 03/2011 dated February 24, 2011, the Hon'ble Commission has directed the office of DG to investigate the captioned case against HSIL, VIPL and FIAL. The informant has inter-alia alleged anti- competitive practices by these entities such as:

a. genuine spare parts, diagnostic tools, technological information etc
are not made available to independent repair workshops;
b. restrictions are imposed on original equipment suppliers (OESs)
forcing them not to supply spare parts in the open market.
c. Dealers are prohibited from taking dealership of other car manufactures.
2…..
3. However, in view of the fact that these practices may not be confined to these entities, the case involves larger issue related to prevalent conduct of the players in the automobile sector and its implication on the consumers at large it is suggested that the investigation may not be restricted to the opposite parties mentioned in the order. Accordingly, it is proposed that the scope of the investigation may be expanded to examine the practices, in the areas under consideration, of all the car manufacturers in India. A list of car manufacturers in India, as obtained from SIAM (Society of Indian Automobile Manufacturers) is placed at Annexure I.

Submitted for consideration and approval please."

182. The note of the investigating officer (which was before the CCI), records that:

"the scope of investigation needs to be widened in this case, considering the fact that restrictive trade practices on sale of spare parts, dealership etc. are also resorted by other car manufacturers. There appears a prima facie case, against the other car manufacturer as per list obtained from Society of Indian automobile manufacturer (SIAM) & therefore requires investigation for verification in the larger interest of the consumers. It is therefore required that CCI may kindly issue necessary direction to initiate investigation against other car manufacturers."

183. The Commission in its order dated 26.04.2011 recorded as follows:

"ORDER
The information was referred to DG on 08.03.2011 for investigation and submission of report within 60 days.
2. The DG vie not dated 19.04.2011 has requested for directions to initiate investigation against other car manufacturers, inter alia starting that the scope of investigation needs to widened in this case.

3. The Commission considered the DG's note in the ordinary meeting-held on 26.04.2011 and approved the request to initiate investigation against other car manufacturers also as mentioned in the note of DG dated 19.04.2011.

4. Commission further observed that whenever Commission orders of investigation in any case it need not be confined to the parties mentioned in the information. The investigation is ordered on certain issue and all the parties which are covered by that issue should be investigated. There is no need to obtain the orders of Commission on each individual case."

184. The final order of the CCI further records the following findings – while dealing with the issue of validity of the expansion of hearing by a separate order under Section 26 (1):

" The direction of the Commission was with respect to alleged anti-competitive conduct by the said industry in general and not specifically qua the car manufacturers named in the information. This is apparent from the order of the Commission dated April 26, 2011 which was passed after considering the request of the DG when he found, at that stage that alleged anticompetitive conduct was not confined to the named entities in the information but was prevalent across the industry. Further, while directing the DG to investigate against those car manufacturers also who were not specifically named in the information, the Commission treated the almost similar conduct of all car manufacturers equally and gave mandate to the DG that he can investigate the matter against not only the named car manufacturers but against other car manufacturers as well.

20.3.7 In the present case the DG brought the matter to the Commission and thereafter exercising its power under the Act, the Commission allowed the request in order to achieve the objectives of the Act, as mentioned in the preamble an discharge of its functions under section 18 of the Act. The Commission, therefore, cannot be said to have committed any irregularity by allowing the request of DG for doing thorough and complete investigation as mandated under the Act for achieving its objectives. It is also noted that all OPs were given ample opportunity by the DG to present their case and without exception all of them have indeed taken that opportunity to make detailed submissions. Further, all OPs have not only submitted their detailed objections to the report of the DG but they have been heard at length by the Commission and they were further allowed to submit written arguments. All these facts demonstrate that principles of natural justice were followed by the Commission at every stage of inquiry and none of the OPs has claimed that DG has drawn findings against it without affording sufficient opportunity of hearing.

20.3.8 The Commission is of the opinion that the objections taken by the Ops regarding jurisdiction of the Commission are not only contrary to the scheme of that but also do not capture the factual position in the correct perspective. Based on above discussion the contention raised by the OPs has no force and is liable to be rejected."

185. This Court is of the opinion that the argument with respect to illegality of the CCI's procedure, in expanding the scope of inquiry under Section 26 (1) is insubstantial. At the stage the CCI decides to act on a complaint, and directs investigation, it does not always have all information or material in respect of the *general pattern or method adopted by parties* that vitiates the marketplace. It is only the information given to it. Premised on that information, the DG is tasked to look into the matter. During the course of that inquiry, *based on that solitary complaint or information,* facts leading to pervasive practises that amount to abuse of dominant position on the part of one or more individuals or entities may be possibly unearthed. At that stage, the investigation is *quasi inquisitorial, to the extent that the report given is inconclusive of the rights of the parties; however, to the extent that evidence is gathered, the material can be final.* Neither is the DG's power limited by a remand or restricted to the matters that fall within the complaint and nothing else. The *Excel Crop Care (supra)* case has explained the DG's powers in broad terms: (*"if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report….If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition"*). The assumption of jurisdiction of the CCI, then is upon receipt of complaint or information, when the *"Commission is of the opinion that there exists a prima facie case"* [as per Section 26 (1)]. The following order is administrative [as per *SAIL (supra)*]; however, that order should disclose application of mind and should be reasoned [as per *SAIL (supra)*]. Till that time, with the enunciation of law confined to *SAIL (supra),* it could arguably have been said that in the absence of a specific order as regards its role, by CCI, the DG could not have inquired into a particular

party's conduct. However, with *Excel Crop Care (supra)* specifically dealing with the question of alleged "subject matter" expansion (in the absence of any specific order under Section 26 (1)) and the Supreme Court clarifying that the subject matter included not only the one alleged, but other allied and unenumerated ones, involving others (i.e. third parties), the issue is no longer untouched; the petitioners are precluded from stating that a specific order authorizing transactions by it, was a necessary condition for the DG's inquiry into its conduct.

186. This Court is further reinforced in its conclusion in this regard by the express terms of the statute: Section 26 (1) talks of action by CCI directing the DG to inquire into "the matter". At this stage, there is no individual; the scope of inquiry is the *tendency of market behaviour, of the kind frowned upon in Sections 3 and 4.* The stage at which CCI can call upon parties to react is when it receives a report from DG stating that there is no material calling for action, it has to issue notice to the concerned parties (i.e. the complainant) before it proceeds to close the case [Sections 26 (5) and (6)]. On the other hand, if the DG's report recommends otherwise, it is obliged to proceed and investigate further [Sections 26 (7) and (8)]. Again Section 27 talks of different "parties" [*"enterprise or association of enterprises or person or association of persons"*- per Section 27 (a)]. Likewise, the steps outlined in Section 26 are amplified in the procedure mandated by Regulation 20 and 21, which requires participation by "the parties", in the event a report after DG's inquiry, which is likely to result in an adverse order, under Sections 27-34 of the Act. Consequently, the argument that a specific order by CCI applying its mind into the role played by each of them was essential before the DG could have proceeded with the inquiry, is unmerited and, therefore, rejected.

Re Point No. 6 Is Section 27 (b) of the Act and the provision for penalties unconstitutional or the orders impugned arbitrary, for the reason that no separate hearing is provided, and the statute provides no guideline for exercise of discretion.

187. This issue is an important one; during the hearing, counsel had highlighted that in the absence of a statutorily mandated notice and hearing procedure preceding penalty, Section 27 (b) is arbitrary and unreasonable. Section 27 reads as follows:

*"**Orders by Commission after inquiry into agreements or abuse of dominant position***

***27.** Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—*

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

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

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

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

(e) direct the enterprises concerned to abide by such other orders as the

Commission may pass and comply with the directions, including payment of costs, if any;

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

*(g) pass such other [order or issue such directions] as it may deem fit. [**Provided** that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.]"*

188. It is evident- from the scheme of the Act, that after carrying out the investigation, the DG files the report before the CCI which is shared with the opposite parties. In the present case, the DG made his report. This report formed the basis of further proceedings before the CCI which held proceedings and hearings on various dates. The final order in this case was made after a series of final hearing, on 25.08.2014. The final order dealt with 14 opposite parties, and made a detailed analysis with respect to prevalent anti-competitive prices and also dealt with the arguments of the equipment manufacturers, such as the petitioners. There is a discussion with respect to the justification for imposition of penalty and the quantum. Having regard to these facts, it is now essential to consider whether the absence of a mandatory provision, which precedes the imposition of penalty under Section 27(b) renders it unconstitutional and arbitrary.

189. The common refrain of all petitioners on this aspect is that *sans* a mandated pre-penalty notice and hearing, an adverse action by way of monetary penalty cannot be imposed and that the provision which enables such penalty without hearing is void. In this respect, the learned counsel has relied upon the judgments reported as *S.L. Kapoor v. Jagmohan and Ors.* 1980 (4) SCC 379; *Swadeshi Cotton Mills v. Union of India* 1981 (1) SCC 664; and *Canara Bank vs V.K. Awasthy* 2005 (6) SCC 321. The other allied aspect with respect to Section 27(b) is that it provides no guidance or guidelines as to how penalty is to be imposed and what would be the quantum of penalty. The further complaint is that in the present case, the CCI has taken a uniform and arbitrary rate of 2% without differentiating between individual facts of the other case and moreover departed from its own prescribed foundation of the "relevant market". The CCI, had, on the other hand, distinguished the rulings relied upon by the petitioners and relied upon certain other decisions to say that providing a statutorily mandated prior hearing as condition precedent for imposition of penalty is inessential. In this regard, Sh. Sanjay Jain relied upon *F.N. Roy (supra)*; *Organic Chemicals (supra)* and *Prestolite India Limited* 1994 (Suppl) (3) SCC 390. CCI's previous decision in *Indian Foundation of Transport Research and Training* [Case No.61/2012 dated 16.02.2015; *M/s. Rohit Medical Store v. Macleods Pharmaceutical Ltd.* [Case No.78/2012 dated 29.01.2015]; *M/s. Swastik Stevedoves Pvt. Ltd. v. M/s. Dumper*

Owner's Association Case No.42/2012 dated 21.01.2015]. This Court notices that the Act envisions that the Statement of Objects and Reasons of the Act underlines that Parliament intended CCI to be a regulatory body. Its uniqueness perhaps is in the manner it interprets various facets and dimensions of anti-competitive behaviour, outlined in Sections 3 and 4 of the Act, on a case-by-case basis. This case-by-case enshrining of principles is not unknown. As noted in a previous part of this judgment in *Chenery Corporation (supra),* the US Supreme Court held that formulation of regulations through an adjudicatory mode is not *anathema* to law. *PTC India (supra)* – a Constitution Bench judgment of the Supreme Court too underlined that law can come into existence through litigation as well.

190. If these principles are kept in mind, the CCI's determinations are not only declaratory of what constitutes anti-competitive or impermissible dominant behaviour in the marketplace, but also ensure that such behaviour is appropriately sanctioned. In this regard, the court notices that Section 46 of the Act embodies a very salient principle, i.e. that at the initial stage, if an entity or an entity trader, manufacturer or dealer etc. makes full disclosure, it can be imposed with lesser penalty in the ultimate analysis of a finding with respect to objectionable behaviour either under Sections 3 or 4. Section 46 of the Act reads as follows:

> *"46. Power to impose lesser penalty.—The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:*
>
> *Provided that lesser penalty shall not be imposed by the Commission in cases where proceedings for the violation of any of the provisions of this Act or the rules or the regulations have been instituted or any investigation has been directed to be made under section 26 before making of such disclosure:*
>
> *Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who first made the full, true and vital disclosures under this section:*

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,—
(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
(b) had given false evidence; or
(c) the disclosure made is not vital,
and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person have been liable, had lesser penalty not been imposed."

191. It is quite evident from a bare reading of the provision that if a full and necessary disclosure is made at the outset of the investigation and before the report is submitted to the CCI, a lesser penalty under Section 46 can be issued. Chapter VI of the Act deals with various kinds of penalties, such as contravention of the CCI's order (Section 42); compensation in the case of contravention of CCI's order (Section 42A); penalty for failure to comply with Commission or DG (Section 43); not furnishing information (Section 43A); false statement or omission to furnish material information (Section 45); offences in relation to furnishing of information etc. Each one – barring Section 46, this Court notices, deals with the consequence of orders made by the Commission, either substantive or during the course of the proceeding. In one sense, these are ensuring the enforcement of the CCI's authority to conduct its proceedings. The only provision, i.e. Section 46, which deals with lesser penalty occurs in this Chapter. Now this aspect assumes significance under Regulation 48 as amended, the imposition of common penalty under Chapter 6 is to be preceded by a Show Cause Notice and reasonable opportunity of hearing. The petitioners had strongly argued that the imposition of these penalties – which are in one sense lower in the scale, require a Show Cause Notice, whereas the determination of penalty under Section 27(b) is not necessarily preceded by separate Show Cause Notice.

192. A recent decision-albeit in the context of a case that concerned imposition of a penalty for not complying with the CCI's orders (under Section 43A) underscored the point that such penalties are not conditioned upon existence of a mental condition or

mens rea; they are civil in nature. Therefore, in *Competition Commission of India v Thomas Cook (India) Ltd. and Ors*. 2018 (6) SCC 549 it was held that:

> *"There was no requirement of mens rea Under Section 43A or intentional breach as an essential element for levy of penalty. Section 43A of the Act does not use the expression "the failure has to be willful or mala fide" for the purpose of imposition of penalty. The breach of the provision is punishable and considering the nature of the breach, it is open to impose the penalty."*

193. The Supreme Court quoted with approval its previous decision in *Hindustan Steel Ltd. v State of Orissa* AIR 1970 SC 253, that held that "breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not."

194. In the present case, what is important is that the petitioners' complaint is *not that they were not given any opportunity; rather it is that they ought to have been given a separate opportunity of hearing.* Ordinarily, the court would have concurred with such an argument. However, a deeper analysis of the nature of the proceeding before the CCI would reveal that the procedure it adopts- and is required to adopt gives sufficient safeguard to parties likely to be affected adversely, both as regards *findings and the sanctions.* The first step, of course, is to decide *whether to issue notice. Excel Crop Care (supra)* and the later decisions have now held conclusively that this step is administrative and does not contemplate any prior notice or hearing to the opposite parties. The next stage is investigation by the DG. At this stage, the parties – whenever needed – receive notice and opportunity; if it is denied, they can seek directions to the DG from the CCI. This stage incudes evidence gathering and wherever necessary, cross-examination on behalf of one or more individuals, before the DG- and later, before the CCI, if the complaint is that cross-examination is not granted. The next stage is the report of the DG, which is shared by the parties, who then make their comments, and are granted full opportunity of hearing. This step is very significant, because when the parties do address the CCI and submit their contentions, they have foreknowledge of all the materials, including adverse materials and comments made in the DG's report. This stage is a "full blown" hearing, when

the parties know and have a fair awareness of the range of options available with the CCI in terms of both *findings and the sanctions* (such as orders enjoining some activity, or requiring positive steps to be taken). This forewarning, as it were, and the statutory cap (of not more than 10 percent) is a broad guideline within which both CCI and the parties before it, operate.

195. Fiscal enactments indicate different approaches. The Customs Act, 1962 (i.e. by Sections 28 and 124), require separate show cause notices. However, it is not necessary that the show cause notices have to be issued after adjudication of duty liability; a composite show cause notice for both is usually issued. Under the Central Excise Act, 1944, a composite show cause notice for duty and penalty is issued(by Sections 11A and other related provisions). In other enactments, such as for instance, Section 13 of the Foreign Exchange Management Act, 1999, any contravention of the Act, rules, regulations or directions (under the Act) attract serious penal consequences. The adjudicating officer can impose penalties equal to three times the amount involved in the contravention; yet the parent statute is silent about the procedure and the nature of hearing. Rule 4 (1) of the Rules requires the Adjudicating Authority to issue a notice to any person believed to have committed any contravention of Section 13 of FEMA, Rule 4 (2) requires the show-cause notice to indicate the nature of contravention alleged to have been committed. Rule 4 (3) provides that if the Adjudicating Authority is of the opinion that an enquiry should be held, it shall issue a notice, fixing a date for the appearance of that person either personally or through his legal practitioner.

196. The pattern or structure of the statute and its object, in every such case, defines the nature of hearing provided for. In some cases, the opportunity of hearing is preceded by a composite one; in other cases, however, of necessity, a show cause notice is to be issued separately. In the Income Tax Act, 1961, for instance, every person or entity who earns taxable income has a duty to file returns; those returns then can be merely "framed" without adjudication (under Section 143(1)) or assessed, after due notice of scrutiny, under Section 143 (2) culminating in an assessment order. Necessarily, therefore, *before the assessment order is made, the Assessing officer (i.e. the primary adjudicating authority) has no occasion to consider and apply his mind, if*

the assessee has under-reported income or claimed an obviously unjustified deduction or tax benefit. It is during the course of assessment that such behaviour, in the form of a claim, is noticed; the assessment order, which is adverse on that point, then becomes the occasion for imposition of penalty. Therefore, at that stage only would the adjudicating authority have the "cause" to issue show cause notice.

197. If these considerations are kept in mind, the fact that certain types of penalties (which are pre-determined quantum for specific violations of the Act) elicit show cause notice as prelude to penalty on the one hand, and absence of any compulsion to issue a *separate show cause notice* preceding a penalty under Section 27 (b) (although a show cause notice and full hearing is provided with opportunity to submit against the report of DG) does not in the opinion of this Court, render that provision arbitrary.

198. The court is cognizant of the fact that there are several adjudications- *quasi* judicial and by judicial tribunals, which envision a "rolled up" hearing which visualizes only one show cause notice- that can culminate in both an adverse finding and a consequential penalty. The most obvious example of this is *Union of India v Tulsiram Patel* 1985 Supp (2) SCR 131. The court then had upheld the Union's contention that the Constitution, by Article 311(2) (after its amendment by the forty second amendment) no longer required a "second show cause notice" as a pre-requisite for imposition of penalty against a delinquent public servant. The court held as follows:

> *"In the case of Suresh Koshy George v the University of Kerala &Ors. (at page 326-7) are pertinent :*
>
> > *"There seems to be an erroneous impression in certain quarters evidently influenced by the provisions in Article 311 of the Constitution particularly as they stood before the amendment of that article that every disciplinary proceeding must consist of two inquiries, one before issuing the show cause notice to be followed by another inquiry thereafter. Such is not the requirement of the principles of natural justice. Law may or may not prescribe such a course."*
>
> *In Associated Cement Companies Ltd v T.C Shrivastava & Ors [1984] 3 S.C.R. 361,369, this Court held that "neither under the ordinary law of the land nor under industrial law a second opportunity to show cause against the proposed punishment is necessary"*

199. Now, coming to the decisions cited by the petitioners. In *S.L. Kapoor (supra)*, the issue was whether the authority was obliged to give opportunity of hearing by issuing a show cause notice, before superseding the municipal committee. The Supreme Court held that the silence of the statute did not preclude the obligation to follow a fair procedure of granting opportunity to the party likely to be affected, by the adverse action; in doing so, it followed its previous rulings in *Mohinder Singh Gill v Chief Election Commissioner* 1978 (2) SCR 272 [that *"(t)he silence of a statute has no exclusionary effect except where it flows from necessary implication."*] and *State of Orissa v Dr. Binapani Dei* AIR 1967 SC 1269 [that an *"administrative order which involves civil consequences.... must be made consistently with the rules of natural justice"*]. Furthermore, the court also is aware that these decisions crystallized into a rule best spelt out by the seminal decision in *Swadeshi Cotton Mills (supra)*, where the court enunciated the guiding principle, (since considered an aphorism, and axiomatic in public law) as follows:

> *"If the statute conferring the power is silent with regard to the giving of pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature and no full review or appeal on merits against that decision is provided courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless viewed pragmatically it would paralyse the administrative process or frustrate the need for utmost promptitude"*

200. This Court is of the opinion that the Supreme Court felt compelled to say what it did, in each of those decisions, and the long line of successive authorities, because the action taken by the executive government or the public agency was not preceded by *fair procedure, that encapsulated any opportunity of hearing.* Here, however, the CCI followed all the steps indicated in the statute; the DG held an inquiry, during which the petitioners were permitted participation; the consequent report and documents were shared with them, or they were given access to the record. After these, each petitioner was given full hearing *which included submissions on potential orders under Section 27.* It is undeniable that the petitioners also furnished written

submissions. The DG's report contains an elaborate analysis of the materials found and inquired into; the CCI's order analyses the report, in the light of the petitioners' submissions. The penalty order is reasoned. Having regard to these circumstances, it cannot be said that the CCI was compelled by the statute to adopt an unfair procedure (i.e. the absence of a second specific hearing before imposition of penalty) exposing Section 27 to the vice of arbitrariness and unconstitutionality.

201. Having concluded that Section 27 is not arbitrary or unreasonable, the court now proceeds to deal with the second submission of the learned counsel, which is that the provision lacks guidelines with respect to the scale of penalty that is to be imposed in any given case and that this very omission renders it vague and clothes CCI with uncanalized power. At the outset, this Court would quote and extract the relevant discussion in the concurring judgment of *N.V. Ramana, J* in *Excel Crop. Care (supra)*, to the following effect:

> *"84. It is well settled that the Competition Act, 2002 is a regulatory legislation enacted to maintain free market so that the Adam Smith's concept of invincible hands operate unhindered in the background.5 Further it is clear from the Statement of objects and reason that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic democracy, and support good governance by restricting rent seeking practices. Therefore an interpretation should be provided which is in consonance with the aforesaid objectives.*
>
> *85. At this point, I would like to emphasize on the usage of the phrase 'as it may deem fit' as occurring Under Section 27 of the Act. At the outset this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided Under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by Rule of law and not by arbitrary, vague or fanciful considerations. Here we may deal with two judgments which may be helpful in deciding the concerned issue. In Dilip N. Shroff v. Joint Commissioner of Income Tax (2007) 6 SCC 329, this Court while dealing with the imposition of the penalty has observed that-*

The legal history of Section 271(1)(c) of the Act traced from the 1922 Act prima facie shows that the Explanations were applicable to both the parts. However, each case must be considered on its own facts. The role of the Explanation having regard to the principle of statutory interpretation must be borne in mind before interpreting the aforementioned provisions. Clause (c) of Sub-section (1) of Section 271 categorically states that the penalty would be leviable if the Assessee conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing of inaccurate particulars alone, the Assessee does not ipso facto become liable for penalty. Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings as has been noticed in some of the decisions of this Court, inheres on the face of the statutory provisions. Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo Committee, only to harass the Assessee. The approach of the Assessing Officer in this behalf must be fair and objective.

(Emphasis supplied)

Moreover in the case of Hindustan Steel Ltd. v. State of Orissa AIR 1970 SC 253 this Court made following observations-

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the Authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the Authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."
(Emphasis supplied)

86. It should be noted that any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further it is well established by this Court that the principle

of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued. In Coimbatore District Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Assn. (2007) 4 SCC 699 this Court has explained the concept of 'proportionality' in the following manner-

'proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of the decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise-the elaboration of a Rule of permissible priorities. De Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ('necessity teat') requires infringement of human rights to the least restrictive alternative'

In consonance of established jurisprudence, the principle of proportionality needs to be imbibed into any penalty imposed Under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Therefore the fine Under Section 27(b) of the Act should be determined on the basis of the relevant turnover. In light of the above discussion a two step calculation has to be followed while imposing the penalty Under Section 27 of the Act.

STEP 1: DETERMINATION of RELEVANT TURNOVER.

87. At this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on available information. However the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter.

STEP 2: DETERMINATION of APPROPRIATE PERCENTAGE of PENALTY BASED ON AGGRAVATING AND MITIGATING CIRCUMSTANCES.

88. After such initial determination of relevant turnover, commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as

a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc. These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty.

89. At the cost of repetition it should be noted that starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter the tribunal should calculate appropriate percentage of penalty based on facts and circumstances of the case taking into consideration various factors while determining the quantum. But such penalty should not be more than the overall cap of 10% of the entity's relevant turnover. Such interpretation of Section 27 (b) of the Act, wherein the discretion of the commission is guided by principles established by law would sub-serve the intention of the enactment.."

202. In the opinion of this Court, the enunciation of the above principles as the guiding norm which CCI has to follow, in each case, when it determines deviant behaviour that invite adverse findings and appropriate sanctions, are a sufficient answer to the charge of unconstitutionality levelled against Section 27. It is a recognized and sound principle of constitutional interpretation that courts will, while considering the *vires* or validity of a law, lean in favour of its constitutionality, if it is so capable of construction, rather than to hold it void. In *Namit Sharma v Union of India* (2013) 1 SCC 745therefore, it was held that:

"(the) most significant canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The courts would accept an interpretation which would be in favour of the constitutionality, than an approach which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this Court in its various pronouncements."

203. Long ago in *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, the Supreme Court held that:

> *"It is well settled that if certain provisions of law, construed in one way, would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction."*

204. Again, later in *Rt. Rev. Msgr. Mark Netto v State of Kerala* (1979) 1 SCC 23 held that the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving strained construction or narrowing down its scope. In *Bharat Petroleum Corporation Ltd. v Maddula Ratnavalli and Ors* in 2007 (6) SCC 81 it was held as follows:

> *"Therefore, there is a presumption in favour of constitutionality of a legislation or statutory rule unless ex facie it violates the fundamental rights guaranteed under Part III of the Constitution. If the provisions of a law or the rule is construed in such a way as would make it consistent with the Constitution and Another interpretation would render the provision or the rule unconstitutional, the Court would lean in favour of the former construction."*

205. Following the salutary principle of constitutional interpretation, this Court is of the opinion that the soundness of discretion and the method adopted by the CCI having regard to the objectives of the Act and regulations framed under it should be the paramount guiding factors, apart from the principle of proportionality which *Excel Crop Care (supra)* talked about. Given that the Supreme Court has indicated the path and course that guides CCI, and the relevant considerations, this Court is of the opinion that the objection to the unconstitutionality of Section 27 (b) cannot survive.

206. The last aspect on the issue of Section 27 is that the common refrain of learned counsel (for the petitioners) was that the CCI misapplied the "relevant market" principle which should have been considered. Tata Motors, particularly complained that the CCI's impugned order was inconsistent, and, therefore, arbitrary, inasmuch as it faltered in *the application of that principle*- in its (i.e. Tata Motors') case, despite outlining the relevant market as the domestic market, the turnover (based on which penalty was imposed) was expanded to include the global turnover. The objection of Mercedes Benz (articulated by its senior counsel Mr. Neeraj Kishan Kaul) was that

the manufacturer sold an entire *system* that left no room for a separate spare parts market and, consequently, the finding of anti-competitive behaviour was unjustified and illegal. A plain reading of the order impugned would show that the CCI has considered Benz's submissions, and given several reasons why it proceeded to record adverse findings and impose penalties. In the view that, this Court is ultimately taking, which is to address itself only with the constitutionality and *vires* of the statute, it is held that a further discussion on the merits of the order- *vis-à-vis*- each aggrieved petitioner would not be essential. The court prefers to leave these submissions open for decision on merits, by the Appellate Tribunal.

207. In *S.N. Mukherjee v. Union of India* (1990) 4 SCC 594, adverting to the practice adopted and insistence placed by the courts in United States, which is to emphasize the importance of recording of reasons for decisions by the administrative authorities and tribunals, it said *"administrative process will best be vindicated by clarity in its exercise"*. The exercise of power of review- appellate or public law review, is to be in consonance with settled principles, which means that those affected are informed of considerations that impelled the action. The Supreme Court stated as follows:

> *"the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.*
> *xxx xxxxxxxxx*
>
> *12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment...*

> *13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders..."*

208. Several subsequent authorities have reiterated the necessity of furnishing reasons in support of conclusions. Therefore, this Court concludes that to decide whether to, and to what extent impose penalty are in the domain of the CCI's discretion, which it is bound to exercise, keeping in mind the factors (deemed not exhaustive) in *Excel Crop Care (supra)* and also general objects and purposes of the Act. The challenge to Section 27(b) and Regulation 48, therefore, fails. It goes without saying that the exercise of such power can be interfered by COMPAT on appeal, on its merits. All these are inbuilt safeguards which if transgressed by the CCI in any given case, are capable of correction within the framework of the Act.

Conclusions and Directions

209. This Court notes in conclusion, that the *Competition Act* is an attempt by Parliament to improve – in the light of experience gained from a modern liberalized economy and corresponding state retreat in key areas of economic activities, the prevalent laws governing concentration of market power. The MRTP Act, 1969 was its first attempt (in a closed economy) to control monopolies and restrictive practices. In the light of experience gained and the felt necessities of the changed times – and having seen the experience gained by other nations, in the course of their legislation with competition, the Act was introduced, with due deliberation. Recent decisions have emphasized the importance of the CCI in imbuing the market place with the

culture of competition, and even underlined that sectoral regulators' decisions or regulations (within the frame works of their parent legislations) cannot foreclose enquiry and consequential action by the CCI in its overarching concerns with respect to market domination and anti-competitive behaviour of erring entities. In *Competition Commission of India v Bharat Sanchar Nigam Ltd* 2018 SCC OnLine SC 2678 this was emphasized and underlined in the following manner:

> *"102. Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of the CCI stands totally ousted cannot be accepted. Insofar as the nuanced exercise from the stand point of Competition Act is concerned, the CCI is the experienced body in conducting competition analysis. Further, the CCI is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. This specific and important role assigned to the CCI cannot be completely wished away and the 'comity' between the sectoral regulator (i.e TRAI) and the market regulator (i.e the CCI) is to be maintained.*
>
> *103. The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well.*
>
> *104. We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted. In nutshell, that leads to the*

conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by the CCI to investigate an alleged cartel does not impinge upon TRAI's jurisdiction to regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to 'regulatory capture' and, therefore, the CCI is competent to exercise its jurisdiction from the stand point of the Competition Act. However, having taken note of the skillful exercise which the TRAI is supposed to carry out, such a comment vis-a-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February, 2007, a sectoral regulator, may not have an overall view of the economy as a whole, which the CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out."

210. Parliamentary effort to innovate and legislate new market regulations, gained in the light of previous experience and teaching gained from the experience in other countries, led it to enact the *Competition Act*. The *raison d'etre* of such laws is its objective of promoting competition, - and eliminating disparities that would ensue in the event of market dominance by a few, resulting in concentration of resources of the nation (which Article 39 of the Constitution of India, enjoins the State to avoid). Speaking of the Sherman Anti-Trust Act, in *Essential Communications Sys, Inc. v AmTel & Tel Co* 610 F 2d 1114, 1117 (3d Cir 1979) the third Federal Circuit Appellate Court held:

"The Sherman Act, embodying as it does a preference for competition, has been since its enactment almost an economic constitution for our complex national economy. A fair approach in the accommodation between the seemingly disparate goals of regulation and competition should be to assume that competition, and thus antitrust law, does operate unless clearly displaced"

211. The need to experiment and bring in new legislation to face the challenges of the changing times and the legislature duty to do so- as well as the correct approach that courts should adopt was outlined as follows in *New State Ice Co. v. Liebman,* 285 U.S. 262 (1932), where Justice Brandeis stated as follows:

"…There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Resonance can be found in almost identical views echoed by the Supreme court in India, in *R.K. Garg v. Union of India,* (1981) 4 SCC 675 where it was held that:

"The Court must always remember that ―legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry‖; ―that exact wisdom and nice adaption of remedy are not always possible‖ and that ―judgment is largely a prophecy based on meagre and uninterpreted experience‖. Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Roig Refining Company [94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation

which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

212. Similar views were expressed in *Director General of Foreign Trade v Kanak Exports*, (2016) 2 SCC 226, and *Swiss Ribbons (supra).* In the former (*Kanak Exports*) the court stated that:

"in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula. In Balco Employees' Union v. Union of India [Balco Employees' Union v. Union of India, (2002) 2 SCC 333], the Supreme Court held that laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature.."

213. In view of the findings of this Court, in the previous parts of this judgment, the following conclusions are recorded and directions issued:

(i) Section 22(3) of the *Competition Act* (except the proviso thereto) is declared unconstitutional and void;

(ii) Section 53E (prior to the amendment in 2017) is declared unconstitutional and void: however, this is subject to the final decision of the Supreme Court in the writ petitions challenging the Finance Act, 2017;

(iii) All other provisions of the *Competition Act* are held to be valid subject to the following orders:

(a) The CCI shall frame guidelines with respect to the directions contained in para 179 of this judgment, i.e. to ensure that one who hears decides is embodied in letter and spirit in all cases where final hearings are undertaken and concluded. In other words, once final hearings in any complaint or batch of complaints begin, the membership should not vary- it should preferably be heard by a substantial number of 7 or at least, 5 members.

(b) The Central Government shall take expeditious steps to fill all existing vacancies in the CCI, within 6 months;

(c) The CCI shall ensure that at all times, during the final hearing, the judicial member (in line with the declaration of law in *Utility Users Welfare Association, (supra)* is present and participates in the hearing;

(d) The parties should in all cases, at the final hearing stage, address arguments, taking into consideration the factors indicated in *Excel Crop Care (supra)* and any other relevant factors; they may also indicate in their written submissions, or separate note, of submissions, to the CCI, why penalty should not be awarded, and if awarded, what should be the mitigating factors and the quantum- without prejudice to their other submissions.

(iv) Since the petitioners had not availed the remedy of appeal (and had approached this Court) it is open to such of them who wish to do so, to approach the Appellate Tribunal, within 6 weeks; in such eventuality, the Appellate Tribunal shall entertain their appeals and decide them on their merits in accordance with law, unhindered by the question of limitation.

214. The writ petitions are partly allowed in the above terms. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

APRIL 10, 2019