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

Judgment Reserved on:18.04.2018

% ***Judgment Pronounced on:12.09.2018***

\+ **LPA 160/2018 & CM APPL. Nos. 11741-44/2018**

CADILA HEALTHCARE LIMITED AND ANR ..... Appellants

Through: Mr. Krishnan Venugopal, Sr. Adv. with Mr.Rahul Goel and Ms. Anu Monga, Mr. Neeraj Lalwani, Mr. Rishabh Arora and Mr. Nitish Sharma Advocates.

versus

COMPETITION COMMISSION OF INDIA AND ORS …...Respondents

Through: Mr. Samar Bansal, Ms. Shreya Singh, Mr.Manan Shishodia and Ms.Aakansha Kaul, Advocates for R-1/CCI.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K.CHAWLA

S.RAVINDRA BHAT, J.

1. The present appeal is directed against a judgment and order dated 09.03.2018 of a learned Single Judge of this court. The

impugned judgment upheld the orders dated 16.01.2018 and 17.01.2018 passed by the first Respondent i.e. Competition Commission of India (hereinafter "CCI"). The CCI's orders were passed on the two review/recall applications and application for cross examination filed by the first Appellant (hereafter "Cadila"). The applications filed by Cadila sought recall of the CCI's order dated 17.11.2015 under Section 26(1) of the Competition Act, 2002 ("the Act" hereafter). Those directions regard were that *"in the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in such contravention".*

2. Cadila's review/recall application was preferred on 8th September 2017. Two subsequent reminder applications were also filed by Cadila on 08.11.2017 and 29.11.2017. By the CCI's order of 12.12.2017, Cadila was directed to urge on the merits of the review/recall application at the time of the final hearing on 16.01.2018. The opposite parties directed to file their responses to the DG report by 05.01.2018. Hearing was deferred from 12.12.2017 to 16.01.2018 and 17.01.2018 in terms of the CCI's order dated 21.11.2017. Cadila filed its common reply to the investigation report submitted by the respondent Director General ("DG" hereafter), on 08.01.2018 before the CCI. It specifically requested that its application for Review/Recall be heard separately and urged CCI to pass a separate order in this regard since - in case the same were allowed–it may not have to undergo the proceedings under the Competition Act.

3. The CCI delivered its orders on 16.01.2018 and 17.01.2018, rejecting Cadila's review/recall application, Cadila urges that these orders were dispatched on or after 09.02.2018 and received on (13)14.02.2018. The impugned judgment upheld CCI's orders dated 16-17.01.2018.

Necessary Facts

4. Three information petitions/complaints were preferred by - a) M/s Alis Medical Agency ("AMA"), b) M/s Stockwell Pharma, Surat ("SP") and c) M/s Apna Dawa Bazar, Vadodara ("ADB") before the CCI. Those three entities alleged that they were denied supplies of medicines, when they approached certain pharmaceutical companies, or their clearing and forwarding agents, on the alleged directions of the Federation of Gujarat State Chemist and Druggists Association ("the federation" hereafter) in the State of Gujarat. One Dayabhai Patel was a partner in both ADB and Reliance Medical Agency ("RMA"). It was alleged that Dayabhai Patel had filed another case -in the CCI- on a similar issue through another firm Reliance Agency ("RA" hereafter). One Nayan Raval, the Authorized Signatory of the third respondent RMA was also a partner in ADB and RA.

5. Cadila alleged that RMA prepared a pay order bearing No.371845 dated 09.07.2015 for ₹50,000/- in favour of CCI for filing the information. By letter dated 09.07.2015 RMA approached Cadila through its C&F Agent i.e. the second petitioner, seeking supply of certain pharmaceutical products. On 03.08.2015, the second information petition dated 27.07.2015 was filed by RMA (Case No.

68/2015 before the CCI) against the Chemist & Druggist Association, Vadodara and certain pharmaceutical companies including Cadila, alleging limiting and control supply of drugs in Vadodara by requiring "No Objection Certificate" for appointment of stockists. It was alleged that Dayabhai Patel a partner in Apna Dawa Bazar, is also partner in RMA.

6. On 26.08.2015, CCI took cognizance of the information, by an order and called upon RMA to explain its case on 30.09.2015. It is alleged that none of the writ petitioners were informed about this or called for hearing. Cadila alleged that it received balance payment of ₹3,25,000/- (for the order dated 09.07.2015) on 24.09.2015. Cadila stated that it fulfilled the order by supplying the drugs needed to RMA between 26-29.09.2015. On 30.09.2015, RMA appeared before the CCI. The CCI passed an order dated 17.11.2015 under Section 26 (1) of the Act directing the DG to investigate the role of certain opposite parties for the alleged contravention (of the Act). Consequently, the DG issued notice to Cadila under Section 36 (2) read with Section 41 (2) of the Act with direction to furnish certain information on or before 29.01.2016. Cadila, after seeking some extension, submitted a partial reply to the DG's notice on 05.02.2016 providing all the information and documents (except one, which was submitted on 11.02.2016). A further notice was issued by DG on 25.04.2016. Cadila filed a response to this notice as well.

7. Cadila alleges that that it had placed on record the facts relating to RMA and the order dated 09.07.2015. It also averred that even after the order dated 09.07.2015, the RMA used to place orders on

regular basis with it and goods were duly supplied. It was also alleged that RMA submitted three CDs containing certain material. Cadila argues that these CDs were supplied in earlier cases and therefore could not be relied upon. The DG issued summons on 05.05.2016 under Section 36(2) read with Section 41(2) of the Act.

8. On 05.07.2016 on the request of the DG, the Federation was made an opposite party in Case no. 68/2015 by the CCI. The DG filed an investigation report with the CCI on 01.05.2017. On 20.06.2017 CCI considered the DG's report and passed an order forwarding their electronic copies to RMA; it also forwarded electronic copies of the report to Cadila's CMD and other functionaries of DG as well. On 22.06.2017, CCI forwarded its order of 20.06.2017 and directed Cadila to submit its reply to the DG's report by 20.07.2017. The letter also stated that the case would be listed for final hearing on the DG's report on 08.08.2017. Cadila urges that after receiving the DG's report, it became aware that it was an opposite party in that case. It therefore, appointed legal counsel for conducting the inspection and reviewing documents forming the basis of the said case. On 20.07.2017, Cadila sought a request for extension of time for review of documents and filing appropriate reply to the DG report along with photocopy of the authorization letter in favour of his counsel. On 24.07.2017, the first inspection application was rejected. The second inspection application was filed by Cadila on 27.07.2017.

9. Cadila was granted inspection of the records which it conducted on 31.07.2017. It (Cadila) filed another, a third inspection application in view of the voluminous record and time constraint. On 02.08.2017

an application for obtaining certified copies of certain documents filed with CCI. On 04.08.2017 inspection was granted to Cadila, which conducted the inspection of certain files pursuant to the permission granted by the CCI. On 08.08.2017 first hearing was held before the CCI.

10. Cadila argued that it was awaiting receipt of certain copies of the documents from the CCI and on the basis of which proposed to file an appropriate application/submissions before the respondent CCI. On 11.08.2017 Cadila received certified true copies of the documents. In these circumstances, on 08.09.2017 it filed the application seeking review/recall of the order under Section 26(1) order. On 12.12.2017 the hearing of the matter was rescheduled by the CCI to 16-17.01.2018. On 08.01.2018, Cadila moved an application before CCI under Section 36 (2) read with Section 41 (2) of the Act and the CCI General Regulations, 2009 seeking cross examination of Nayan Raval Dayabhai Patel (both partners of RMA) and Jashvant P Patel, President of the Federation. On 08.01.2018 Cadila filed a common reply to the investigation report submitted by the DG to the CCI complying with this direction. On 16.01.2018 Cadila appeared before CCI and made oral submissions with respect to its review/recall application and the application seeking cross examination.

11. Under cover of letter dated 08.02.2018, Cadila received CCI's orders dated 16-17.01.2018 rejecting its applications for review/recall and rejection of the application seeking cross examination. Cadila approached this court, under Article 226 of the Constitution. Its writ petition alleged that without a separate order under Section 26 (1) of

the Act, authorizing investigation against it, the DG could not have proceeded against it on the strength of a previous order which was not based on any material or allegation with respect to complicity of Cadila; consequently the investigation and report against it was a nullity.

12. Cadila's position was that since the issue went into the root of its jurisdiction, CCI was bound to review its order, in the light of this court's ruling in *Google Inc v Competition Commission of India* 2015 (150) DRJ 192. Since it virtually abdicated its duty to review the material collected by DG, and review its order, the CCI's order had to be interfered with. It was also argued that the CCI further erred inasmuch as it ignored the submission that RMA and its partners' complaints were premised on blatant falsehoods; besides, having benefitted from the supply of the contracted pharmaceuticals, they had no *locus* to complain that Cadila was indulging in any anti-competitive practice. As such the information and complaints were *mala fides.* Any proceeding, based on false premises and allegations, could be closed or terminated at any time and the CCI, in refusing to do so, fell into grave error.

13. The third ground argued by Cadila was that the CCI could not have invoked Section 48 against its officers, at the preliminary stage. It was alleged that the initiation and continuance of proceedings under Section 48 against its officers and executives was inconsistent with the intent of the statue and binding orders regarding the same laid down by the Competition Appellate Tribunal ("COMPAT"). The

investigation and proceeding against officers and employees of an enterprise and the fixing of their liability despite the inconclusiveness of the enterprise's liability was contrary to the letter and spirit of Section 48 of the Competition Act. It was urged that in the present case, no affirmative finding against Cadila existed. Absent such finding no proceeding could be initiated against Cadila's officers, partners and executives. In terms of the settled rules of interpretation, a provision enacting an offence or imposing a penalty is to be strictly construed. It was argued that the COMPAT in numerous cases unequivocally held that in the absence of a determination by CCI about the contravention of the Act by the company proceedings against officers or executives of such a company cannot be initiated. All the grounds urged by Cadila were rejected by the learned single judge, who dismissed its writ petition. Cadila has therefore appealed to this court.

Contention of parties

14. Cadila's learned senior counsel Mr. Krishnan Venugopal argued that the order by CCI regarding *prima facie* satisfaction under Section 26(1) is unsustainable and not in accordance with the provisions of the Competition Act and the various decisions of the Supreme Court and this Court. The exercise of excessive jurisdiction by the DG vitiates the entire proceedings. Given that CCI rejected the application for 'review/ recall', those issues have to be adjudicated by this Court (and not the CCI or the Appellate Court). Drawing heavily from observations of the Supreme Court in *Excel Crop Care Ltd v Competition Commission of India* 2017 (8) SCC 47, it was argued that

there is sufficient basis in that decision to say that whereas an initial order covering a few issues relating to anti-competitive practices of a particular period against one party can lead to valid investigation into similar, later actions against the same authority, there is no legal sanction for investigation into acts or omissions of another party, by the DG, in the absence of express authorization regarding its or their role, by the CCI, in a separate and subsequent *prima facie* order under Section 26 (1). Learned senior counsel highlighted that the danger of permitting CCI and the DG to proceed without such express sanction is that it would amount to an open warrant, to carry out roving inquiries against unrelated parties, based on entirely untruthful and baseless allegations. He highlighted that the initial *prima facie* order is premised on assessment of a certain preliminary standard of proof regarding the materials discernable at that stage; however the same yardstick would not be applied if the DG is authorized to carry out investigation into the conduct of other parties. Learned counsel relied on *Grasim Industries Ltd v Competition Commission of India* 206 (214) DLT 42, where it was held that without an order by the CCI into the matter with respect to a particular party, it is not competent for the DG to investigate into allegations. Counsel further argued that permitting the DG to proceed further in the absence of any material, which is overseen by the CCI would be to permit to it a roving inquiry, which can be interdicted by the courts in judicial review.

15. It is argued that questions of jurisdiction or those issues that go to the root of jurisdiction and exercise of power where CCI acts beyond the provisions of the Competition Act cannot be decided by

the CCI at the time of final arguments or later by the appellate tribunal. It is submitted that the same has to be looked into by this Court. It is argued that CCI is required under the law to form a *prima facie* opinion on each allegation in the information. The CCI cannot abdicate that function and pass an open-ended order under Section 26(1) without forming any opinion on the allegations as contained in the information. It is argued that the manner in which the order under Section 26(1) is phrased by the CCI, i.e. by not including pharmaceutical companies as proper opposite parties, the commission tried to circumvent the *Google* order (as arguably parties may not have any right for review/ recall).

16. It is contended that basic unsustainability and formation of the order under Section 26(1) of the Competition Act can only be argued before this Court and not before CCI (at the time of final hearing) or Appellate Court (even at a later stage). The DG's notice dated 19.01.2016 (received on 27.01.2016) – to supply information is vitiated. It is also clarified that CCI, by its order had not formed a *prima facie* opinion (and consequently not passed a *prima facie* order under 26(1) of the Competition Act) against Cadila. Thus, DG's action in proceeding to investigate and go beyond the order under Section 26(1) of the Competition Act, if accepted by the CCI (as a routine/correct practice), would be foreclosed before CCI during the final arguments.

17. Emphasizing that the impugned orders of the CCI amount to negating this court's judgment in *Google* which authorized a substantive right to seek 'review/ recall', counsel submitted that unless

it is interfered with, Cadila would be seriously prejudiced. It is submitted that the said judgment confers valuable rights on a party arrayed as subject to investigation and proceedings under the Act and entitles it to approach the CCI to take a "second look" and recall its order under Section 26 (1) if needed, in the following circumstances:

a) where treating the allegations in the reference/information/ complaint to be correct, still no case of contravention of Section 3(1) or Section 4(1) of the Act would be made out or

b) where the said allegations are absurd and inherently improbable or

c) where there is an express legal bar to the institution and continuance of the investigation or

d) where the information/reference/complaint is manifestly attended with *mala fide* and has been made/filed with ulterior motive or the like.

It is submitted that the aggrieved party can approach this court for 'review/recall' of order under Section 26(1) of the Competition Act, if any of the said parameters are met. In the present case more than two parameters are established; but rejected by the CCI. Learned counsel relied on the judgment in *T.K. Musaliar v Venkatachalam* AIR 1956 SC 246. Underlining that the DG initiated investigations into its conduct, Cadila argues that the order violates the mandate of the Competition Act and Sections 41 (2) and 36 (2). In such event, the essential jurisdiction of the body is without authority of law, which renders fatal its entire proceeding: counsel cited *Coal India v Ananta Saha* 2011 (5) SCC 142; *V.D. Roy v State of Kerala* 2000 (8) SCC 590 and of the South African Supreme Court, reported as *Woodlands*

Dairy v Milkwood Dairy [2010] ZASCA 104, to say that proceeding without the primary jurisdictional facts, strikes at the root of a competition commission's authority, which is liable to be quashed. Reliance is also placed on *Kothamasu Kanakarathnamma v State of Andhra Pradesh* AIR 1965 SC 304. Further, reliance is placed on *Rohtas Industries v SD Agarwal* 1969 (1) SCC 325 and *Barium Chemicals v Company Law Board* AIR 1967 SC 295, to urge that the purpose underlying exercise of jurisdiction in any proceeding, should be to further statutory objectives and not to result in abuse of law. In the present case, since CCI's jurisdiction was invoked in a *mala fide* manner, the order made by the commission was liable to be reviewed; CCI's refusal to do so, vitiated the entire proceeding

18. It is submitted that the Competition Appellate Tribunal (COMPAT) has consistently taken a view that if the fraud/*malafide* was brought to the notice of the CCI prior to passing of order under Section 26(1), then it would not have even passed the said prima facie order. Further, the COMPAT held that political rivalry/ business fights cannot be overlooked in competition law cases. The COMPAT also held that in the cases relating to chemist and druggists' associations and pharma companies (for allegations relating to non-supply of medicines), there cannot be a violation of Section 3(1) of the Competition Act.

19. It is submitted that Nayan Raval and Dayabhai Patel are or were one-time partners in RA, ADC and RMA. It was submitted that the informant failed to disclose the said facts to the CCI and that they have filed information (with same allegations) in Case Nos.97/2013

and 72/2014 with the CCI earlier. It is clear that these individuals (Nayan Raval and Dahyabhai Patel) are using different entities to indulge in frivolous, vexatious litigation against the same set of parties.

20. Learned senior counsel argued that the CCI wholly disregarded that these individuals are abusing the process of law and using the form of the partnership firm to play around with its jurisdiction without any regard to truth and fair play. In this context, it is urged that suppression of material facts amounts to fraud on the CCI. Elaborating on this aspect, it was argued that RMA's *mala fides* was amplified by the fact that it misled the CCI. It obtained a demand draft for filing information with the CCI on the same date when it placed an order for medicines with Cadila. RMA did not disclose to CCI that it made balance payment on 24.09.2015 through RTGS and that Cadila had already supplied the drugs (between 26-29.09.2015). Counsel relied on decisions of COMPACT in *Lupin Limited & Others v. Competition Commission of India & Ors* (COMPAT), (Appeal No. 40 of 2016, decided on 7th December, 2016) and *Schott Glass India Pvt. Ltd. v. Competition Commission of India &Anr.* (COMPAT), (A.No. 91 of 2012, dated 02.04.2014) and urged that complaints or information provided by business rivalry or fraud can vitiate the proceedings before CCI.

21. It is submitted that the order under Section 26(1), as regards Cadila was induced by fraud. It is a settled principle laid down by the Supreme Court that suppression of material facts/documents amounts to fraud. Therefore, urged senior counsel, if the initial action is not in

consonance with law, subsequent proceedings would not sanctify it. Thus, once the basis of a proceeding is gone (as in this case), all consequential acts, actions, orders would fail, automatically. Therefore, all the consequential actions arising from the information vis-à-vis Cadila including the DG's report, are vitiated by fraud. It is submitted that in terms of the *Google* judgment, this Court should exercise its power to recall/review the order under Section 26(1) of the Competition Act- insofar as it extends to Cadila.

22. Mr. Venugopal urged that there is a settled principle in competition law that for applicability of Section 3(1) of the Competition Act the alleged 'agreement' should be between competitors (existing or potential) or between enterprises upstream or downstream in any production chain. In the present case, Federation of Gujarat State Chemists and Druggists Association and Petitioners are not engaged in identical or similar trade of goods or services, which is an essential condition for applicability of Section 3(3) of the Competition Act. Furthermore, associations/Federation and Cadila is also not placed at different stages of the production chain in different markets, which is an essential condition for applicability of Section 3(4) of the Competition Act. Therefore, even if the alleged agreement between Association/ Federation and Cadila is assumed to exist (which it does not), the same would neither fall within Section 3(3) or Section 3(4) of the Competition Act (and not constitute a contravention of the Competition Act).

23. It was next argued by learned senior counsel that it is clear that the individuals (Nayan Raval and Dayabhai Patel) were using different

entities to indulge in frivolous, vexatious litigation against the same set of parties (pharmaceutical companies and associations of chemists and druggists in Gujarat). The present case satisfies all the ingredients of *res judicata* as revealed by the following:

a) Matters in issue in the case at hand must have been directly and substantially in issue in the former case; Case No.97/2013 and Case No.68/2015 substantially involve the issue of alleged anti-competitive practice of mandatory NOC for appointment of stockiest being undertaken by certain association of chemists and druggists in Gujarat.

b) As to the parties in the present case and the former case must be the same, or claiming under some common party, it is argued that Case No.97/2013 and Case No.68/2015 were filed by Nayan Raval (under different partnership firms). Case No.72/2014 was filed by Dahyabhai Patel – partner of Nayan Raval in Apna Dawa Bazar. The main opposite parties in all the cases are Chemists and Druggists Association of Baroda and its two office bearers.

c) Court deciding former case must be competent to try the case in which substantially similar issue has been subsequently raised. It is emphasized that here all cases were filed before CCI. The CCI proceeded with exercising its jurisdiction and passing *prima facie* order under Section 26(1) of the Competition Act.

d) It is lastly argued that the former case, i.e. Case No.97/2013, was heard and finally decided by CCI through its order dated 4 January 2018.

Therefore, urged counsel, in accordance with the above principles, the proceedings in the present case would lead to CCI

dealing with successive information (by essentially the same informant) filed for the same conduct against the same enterprise by a separate order.

24. Senior counsel argued that the initiation and continuance of the proceedings under Section 48 against Cadila's officers and executives are inconsistent with the intent of the statute and binding orders regarding the same laid down by the COMPAT. This approach followed by CCI whereby the officers and executives of an enterprise are investigated and their liabilities fixed. Despite the liability of the enterprise itself being undecided is contrary to the letter and spirit of Section 48 of the Competition Act to proceed against officers and employees of Cadila. In the present case, no affirmative finding against Cadila exists at the present stage. Unless such a finding is rendered, no proceeding can be initiated against its officers, partners and executives. Urging that in terms of settled rules of interpretation, a provision enacting an offence or imposing a penalty is to be strictly construed. COMPAT in numerous cases has unequivocally held that in the absence of a determination by the CCI that the company has committed contravention of any of the provisions of the Competition Act or any rule, regulation etc., proceedings against officers or executives of such a company cannot be initiated. It is stated that the COMPAT's conclusion is also supported by the fact that Section 48(1) as well as Section 48(2) of the Competition Act uses the term 'contravention' and not 'alleged contravention' which makes it clear that Section 48 can be only invoked after it is proved that a contravention has been committed by a company.

25. Counsel submitted that CCI also arbitrarily declined Cadila's plea for opportunity of cross-examination of certain witnesses (Mr. Nayan Raval, Mr.Dayabhai Patel and Mr.Jasvant Patel) who gave oral testimony against it. The CCI's reasoning is inconsistent with the recognized purpose of cross-examination and its importance as acknowledged by the Supreme Court, this court and the COMPAT (whose directions are binding on CCI). In this context, it is highlighted that it is a settled principle that any subordinate court is required to follow the law as laid-down by the superior court, and not following the law as settled by the superior court amounts to judicial impropriety. The same has also been decided by Supreme Court in the *Competition Commission of India v. Steel Authority of India Ltd.* 2010 (10) SCC 744.

26. Mr. Samar Bansal, counsel for CCI argues that the impugned judgment is sound and does not call for interference. Opposing Cadila's pleas that CCI should have *first* formed a *prima facie* opinion against it under Section 26(1) as a precursor for directing the DG to investigate the parties including it and that CCI could not have abdicated that said power to the DG and lastly, as far as the matters which goes to the root of CCI's jurisdiction and acts beyond the provisions of the Competition Act need to be decided by this Court are concerned, counsel stated that such submissions are contrary to the judgment of the Supreme Court in *Excel Crop Care Limited v. Competition Commission of India & Anr.* (2017) 8 SCC 47. It was argued that the Supreme Court dealt with an identical argument and rejected it. It was stated that the court referred to the judgment of

COMPAT (Appellate Tribunal), which was in appeal before the Supreme Court. The Supreme Court, Mr.Bansal submitted, observed that if the arguments of the appellants there (Excel Cropcare), were accepted, it would render the entire purpose of investigation nugatory. It was argued that CCI, by issuing a general direction to the DG to investigate the conduct of such other parties, who may have indulged in the said contravention, had authorized the DG to carry out investigation against all of them, including Cadila as well.

27. Counsel urged that while carrying out the investigation, if the facts are revealed and bring to light information about concerns and organizations or individuals who enter into agreements or arrangements, prohibited by Section 3 of the Act, the DG acts within his power to include them in the report that he may furnish to the CCI.

28. CCI's counsel submitted that reliance placed on the judgment in *Google Inc. (supra),* by Cadila is incorrect as the *ratio* of that judgment is inapplicable to the facts of this case. It was emphasized that – in that case, the appellant i.e. Google Inc. had approached this Court during the investigation and not after a report was submitted by the DG. According to him, it was under those circumstances, this Court had held that CCI had the jurisdiction to review/recall without entering into any factual controversy. According to him, the Court should not interfere with the CCI's order dated 17.11.2015, or the subsequent orders and relegate Cadila to CCI, to enable it to argue that the report submitted by the DG both on facts/law was defective or illegal.

29. Mr. Bansal states that Cadila submitted to the jurisdiction of the DG, pointing out that on 17.11.2015 CCI made the *prima facie* order under Section 26(1); on 19.01.2016 the DG notice was issued to Cadila under Section 36(2) read with Section 41(2) of the Competition Act. The second notice was issued to Cadila by the DG on 25 April 2016. It was submitted that on 05.5.2016, DG issued summons under Section 36(2) read with Section 41(2) of the Competition Act for personal appearance to (1) Mr.Suryakant Dwivedi, Dy.GM-Distribution of Zydus Cadila (2) Mr. Dilesh Gajjar, Manager (Warehouse), Rimi. It was stated that on 26.05.2016, Dilesh Gajjar, (employee of Rimi) deposed before the DG. On 6.6.2016 Mr.Suryakant Dwivedi (Manager OP-30/Cadila) was deposed by the DG. Mr.Bansal submitted that on 08.08.2017, first hearing took place before the CCI. Cadila was granted time to file reply to DG's report (by 08.09.2017). On the next date, i.e. 08.09.2017 Cadila filed its application for review/recall of order under section 26(1). The CCI under these circumstances, by its order of 12.12.2017, directed that the review/recall application shall be taken up at the time of final arguments. On 08.01.2018 Cadila filed its reply to the DG's report along with application for cross examination. Submissions were made on 16.01.2018 on the review/recall application as well as application for cross examination. It is emphasized that at no time, did Cadila challenge DG's jurisdiction to carry on investigation on the basis of the CCI's order.

30. CCI further argues, through its counsel, that the plea with respect to *mala fides* of the informant Cadila's argument that there

was no violation of Section 3(1) of the Act, on *res judicata*; and that arguments under Section 48 of the Competition Act could be made before the CCI as it had not rendered any findings on any of the factual submissions can made before it while arguing both the applications. The CCI has granted liberty to Cadila to argue these before it during arguments. Similarly, he stated, even Cadila's plea regarding denial of cross examination is not tenable in the facts of this case. It is argued that Cadila never requested for cross examination of the witnesses till 08.01.2018. Consequently, CCI had no occasion to grant the request. Further, CCI's counsel highlighted that those individuals whose cross examination was sought by Cadila are instances whose affidavits were not relied upon by the DG during investigation to form an opinion against the Cadila in his report. Mr. Bansal submitted that Cadila can yet argue the relevance of cross examination and also the effect of denial of cross examination before the Commission. In sum, CCI's submission is that Cadila's right to agitate all the grounds except on Section 26(1) are available before the Commission and this court should desist from deciding these issues to interdict the CCI's proceedings. The CCI is exercising its jurisdiction under a defined parameters in terms of the provisions of the Competition Act.

<u>Points of Controversy</u>

1) Whether the DG's investigation in the absence of a specific order under Section 26(1) by CCI having formed a *prima facie* opinion, is vitiated;

2) Is the impugned judgment correct in upholding as sound CCI's finding rejecting the recall application, (based on grounds of *fraud, res judicata* and/or no cause of action).
3) Whether there was denial of principles of natural justice in the rejection of Cadila's request for cross examination;
4) Whether DG could have issued notice to Cadila's officials under Section 48
5)

Analysis and Findings

31. The relevant provisions of the Competition Act and Regulations framed there under read as follows:

> *"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.

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36. Power of Commission to regulate its own procedure-

(1) The Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have powers to regulate its own procedure including the places at which they shall have their sittings, duration of oral hearings when granted, and times of its inquiry.

(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 of1908), 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 affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872(1 of 1872),requisitioning any public record or document or copy of such record or document from any office;

(f) dismissing an application in default or deciding it ex parte;

(g) any other matter which may be prescribed.

(3) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure,1973 (2 of 1974).

(4) 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 or proceeding before it.

(5) The Commission may direct any person--

(a) to produce before the Director General or the Registrar or an officer authorised by it, such books, accounts 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 Registrar or any officer authorised 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.

(6) If the Commission is of the opinion that any agreement referred to in section 3 or abuse of dominant position referred to in section 4 or the combination referred to in section 5has caused or is likely to cause an appreciable adverse effect on competition in the relevant market in India and it is necessary to protect, without further delay, the interests of consumers and other market participants in India, it may conduct an inquiry or adjudicate upon any matter under this Act after giving a reasonable oral hearing to the parties concerned."

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Section 38 - Rectification of orders

(1) With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act.

(2) Subject to the other provisions of this Act, the Commission may make--

(a) an amendment under sub-section (1) of its own motion;

(b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.

Explanation.-- For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

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Section 41 - Director-General to investigate contraventions

(1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission under sub-section (2) of section 36.

(3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

Explanation.-- For the purposes of this section,

(a) the words "the Central Government" under section 240 of the Companies Act, 1956(1 of 1956) shall be construed as "the Commission";

(b) the word "Magistrate" under section 240A of the Companies Act, 1956(1 of 1956) shall be construed as "the Chief Metropolitan Magistrate, Delhi"

The powers of the CCI and DG, which are co-extensive, with respect to matters that are the subject matter of investigation, are spelt out in Regulation 41 of the Competition Commission of India (General) Regulations, 2009 ("the 2009 regulations"), which reads as follows:

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."

32. The court accepts that jurisdictional issues can be the subject matter of judicial review. The dispute here, however, is whether CCI – and later, the single judge – erred in the appreciation of any fact or provision of law, with respect to the exercise of jurisdiction in proceeding with the inquiry, through the DG, in the overall context of the case, where the earlier general complaint did not specifically pinpoint any behaviour on Cadila's part.

33. A plain reading of Section 26(1) shows that at the opinion formation stage regarding existence of a *prima facie* case needing investigation, CCI should consider the contents of *inter alia,* information supplied under Section 19(1)(a) and the documents, if any, received with the reference or information. This is a *sine qua non* for a direction to the DG to investigate into the matter. Consequently while exercising power under Section 26(1), CCI cannot adjudicate upon the merits and de-merits of the allegations in the information. If

after examining the contents of the reference or information, the Commission finds that the material produced along with it is not sufficient for forming an opinion about the existence or otherwise of a *prima facie* case or it wants some clarification on any particular aspect of the matter/issue, it seeks a preliminary conference and invites the complainant/information or other person as is considered necessary for the preliminary conference (Regulation 17 of the 2009 regulations). Thereafter, CCI can pass an order under Section 26(1) briefly stating the reasons for forming an opinion regarding existence of a prima facie case warranting DG's investigation.

34. In this case, the complaints were Case No.97/2103, Case No. 68/2015, Case No.68/2014, Case No.71/2014 and Case No.72/2014. The first order under Section 26 (1) was issued on 28.02.2014 in Case No.97/13 (by RA). This resulted in an order holding the respondents guilty of abuse of dominant power, by order dated 04.01.2018. The complainant in this case was Nayan Raval – as ex-partner of RA. A common *prima facie* order was made for Case Nos.66/14, 71/14 and 72/2014, on 29 December, 2014 (the complainants here were RMA, ADB, Stockwell Pharma and AMS). Nayan Raval signed on behalf of RMA, Dayabhai Patel signed for ADB; Nayan Raval made a statement in the course of proceedings; Stockwell Pharma's complaint was signed by Pankaj Shethna and Yogesh Patel signed the complaint for AMA. Interestingly by order (in RMA's complaint, i.e. Case No. 68/2015) the CCI made the impugned order on 30.11.2015, which *inter alia,* is as follows:

"14. Considering the similarity of facts and allegations, the Commission is of the view that the present case will, regard to OP 1, OP 2 and OP 3 may be clubbed with the above mentioned 3 cases i.e. Case No, 65. 71 and 72 of 2014 in terms of the proviso to section 26(1) of the Act read with Regulation 27(1) of the Competition Commission of India (General) Regulation 2009.

15. The DG is accordingly directed to investigate the role of OP 1 OP 2 and OP 3 of the alleged contravention of the provisions of the Act, During the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in the said contravention. In case of contravention, DG shall also investigate the role of the persons who at the time of such contravention were in-charge of and responsible for the conduct of business of the contravening entity."

35. It is essential now to view the objectives underlining competition law in India; these were spelt out in the following manner in *Competition Commission of India vs. Steel Authority of India Ltd. & Ors*. 2010 (10) SCC 744 (hereafter *"SAIL"*):

"The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. 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. In exercise of the powers vested in it under Section 64, the Commission has framed Regulations called The Competition Commission of India (General) Regulations, 2009 (for short, the 'Regulations'). The Act and the Regulations framed there under clearly indicate

the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out."

The Supreme Court then ruled that the order directing investigation or inquiry was not a quasi judicial one, but an administrative one:

"28. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53A of the Act. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is

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

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

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

The Supreme Court, however, stated that though not adjudicatory, the order under Section 26 (1) must show application of mind:

> *"....In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different Sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned."*

36. In *Grasim Industries* (supra) a single judge had held that investigation by the DG without an authorization in respect of a party to be incompetent, observing as follows:

> *"The scheme of the Act thus, does not permit investigation by Director General into any information which was not considered by the Commission, while forming opinion under sub-section (1) of Section 26 of the Act. The formation of opinion by the Commission and direction to cause an investigation to be made by the Director General being a pre-requisite condition for initiation of investigation, the Director General would have no power to undertake investigation in respect of the complaint which the Commission did not consider while forming an opinion and directing investigation by the Director General. If the Director General investigates an information which the Commission did not consider in the first instance, while forming opinion with respect to existence of a prima facie case, such an act on his part shall be ultra vires his power under the Act and, therefore, clearly illegal."*

37. The next decision pertinent to this appeal is the one cited by both parties, i.e. *Excel Crop Care Ltd.* (supra).

> *"35. The CCI had entrusted the task to DG after it received representation/complaint from the FCI vide its communication dated February 04, 2011. Argument of the Appellants is that since this communication did not mention about the 2011 tender of the FCI, which was in fact even floated after the aforesaid communication, there could not be any investigation in respect of this tender. It is more so when there was no specific direction in the CCI's order dated February 24, 2011 passed Under Section 26(1) of the Act and, therefore, the 2011 tender could not be the subject matter of inquiry when it was not referred to in the communication of the FCI or*

order of the CCI. The COMPAT has rejected this contention holding that Section 26(1) is wide enough to cover the investigation by the DG, with the following discussion:

> *"28. As per the Sub-section (1) of Section 26, there can be no doubt that the DG has the power to investigate only on the basis of the order passed by the Commission Under Section 26(1). Our attention was also invited to Sub-section (3) of Section 26 under which the Director-General, on receipt of direction under Sub-section (1) is to submit a report of its findings within such period as may be specified by the Commission. The argument of the parties is that if on the relevant date when the Commission passed the order, even the tender notice was not floated, then there was no question of Direction General going into the investigation of that tender. It must be noted at this juncture that Under Section 18, the Commission has the duty to eliminate practices having adverse effect on competition and to promote and sustain competition. It is also required to protect the interests of the consumers. There can be no dispute about the proposition that the Director General on his own cannot act and unlike the Commission, the Director General has no suo-moto power to investigate. That is clear from the language of Section 41 also, 28 which suggests that when directed by the Commission, the Director General is to assist the Commission in investigating into any contravention of the provisions of the Act. Our attention was also invited to the Regulations and more particularly to Regulation 20, which pertains to the investigation by the Director General. Sub-Regulation (4) of Section 20 was pressed into service by all the learned Counsel, which is in the following term:*

The report of the Director-General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation:

(proviso not necessary)

From this, the learned Counsel argued that the Director General could have seen into the tender floated on 08.05.2009 only, and no other tender as the information did not contain any allegation about the tender floated in 2011. Therefore, the investigation made into the tender floated in 2011 was outside the jurisdiction of the Director General. This argument was more particularly pressed into service, as the Director General as well as the Competition Commission of India have found that all the Appellants had entered into an agreement to boycott the tender floated in 2011 and thereby had rigged the bids.

29. We have absolutely no quarrel with the proposition that the Director General must investigate according to the directions given by the CCI under Section 26(1). There is also no quarrel with the proposition that the Director General shall record his findings on each of the allegations made 29 in the information. However, it does not mean that if the information is made by the FCI on the basis of tender notice dated 08.05.2009, the investigation shall be limited only to that tender. Everything would depend upon the language of the order passed by the CCI on the basis of information and the directions issued therein. If the language of the order of Section 26(1) is considered, it is broad enough. At this juncture, we

must refer to the letter written by Chairman and Managing Director of FCI, providing information to the CCI. The language of the letter is clear enough to show that the complaint was not in respect of a particular event or a particular tender. It was generally complained that Appellants had engaged themselves in carteling. The learned Counsel Shri Virmani as well as Shri Balaji Subramanian are undoubtedly correct in putting forth the argument that this information did not pertain to a particular tender, but it was generally complained that the Appellants had engaged in the anticompetitive behaviour. When we consider the language of the order passed by the CCI under Section 26(1) dated 23.04.2012 the things becomes all the more clear to us. The language of that order is clearly broad enough to hold, that the Director General was empowered and duty bound to look into all the facts till the investigation was completed. If in the course of investigation, it came to the light that the parties had boycotted the tender in 2011 with pre-concerted agreement, there was no question of the DG not going into it. We must view this on the background that when the information was led, the Commission had material only to form a prima facie view. The said prima-facie view could not restrict the Director General, if he was duty bound to carry out a comprehensive investigation in keeping with the direction by CCI. In fact the DG has also taken into 30 account the tenders by some other corporations floated in 2010 and 2011 and we have already held that the DG did nothing wrong in that. In our opinion, therefore, the argument fails and must be rejected."

We entirely agree with the aforesaid view taken by the COMPAT.

36. If the contention of the Appellants is accepted, it would render the entire purpose of investigation nugatory. The entire purpose of such an investigation is to cover all necessary facts and evidence in order to see as to whether there are any anti-competitive practices adopted by the persons complained against. 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."

38. Cadila's argument, that in *Excel Crop Care* the issue was inclusion of more than one instance or incident within the ambit of investigation (given that the complaint was in respect of one tender only) is distinguishable, is in this court's opinion, insubstantial and needs to be rejected. Its reliance on *Grasim Industries,* is no longer apt. At the stage when the CCI takes cognizance of information, based on a complaint, and requires investigation, it does not necessarily have

complete information or facts relating to the pattern of behaviour that infects the marketplace. Its only window is the information given to it. Based on it, the DG is asked 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 might unfold. At this 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. Or else, the *Excel Crop Care* would not have 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 trigger for assumption of jurisdiction of the CCI is receipt of complaint or information, when the *"Commission is of the opinion that there exists a prima facie case"* exists (per Section 26 (1)). The succeeding order is administrative (per *SAIL*); however that order should disclose application of mind and should be reasoned (per *SAIL*). Upto this stage, with that enunciation of law, no doubt arguably Cadila could

have said that absent a specific order as regards its role, by CCI, the DG could not have inquired into its conduct. However, with *Excel Crop Care* 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; Cadila, in the opinion of this court, is precluded from stating that a specific order authorizing transactions by it, was a necessary condition for DG's inquiry into its conduct. 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 it CCI can call upon parties to react is when it receives a report from DG stating 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 Cadila's argument that a specific order by CCI applying its mind into the role played by it was essential before the DG could have proceeded with the inquiry, is rejected.

39. The next question relating to a facet of the same issue is whether given that an order requiring production of materials or co-operate in the inquiry is of such a nature that some form of fair procedure in the nature of hearing is necessary. Cadila's reliance on *Rohtas Industries* and *Barium Chemicals* is, in the opinion of this court, irrelevant given the facts of this case. Granted, administrative orders should be reasoned; however, where they trigger *investigative processes* that are not *conclusive,* having regard to the clear enunciation in *SAIL,* that notice is inessential, accepting the argument, that inquiry would harm the market or commercial reputation of a concern, would be glossing over the law in *SAIL.* Moreover, the *Rohtas Industries* related to the affairs of a company, which implicated its internal management. Allowing inquiry, even an innocuous one, without application of mind, is a different proposition altogether from acting on the information of someone who alleges either direct or indirect or tacit dominance in the market place in the course of one's business. The latter is regulatory of the marketplace rather than the core management of the concern; it is akin to adjudicating a tax or commercial dispute, or a regulatory dispute. As stated by Justice Brennan, natural justice in such instances should not *"unlock the gate which shuts the court out of review on the merits."* (in this case, preclude or chill the exercise of jurisdiction by the DG

into a potential abuse of dominant position of a commercial entity). Therefore, this court finds no merit in the argument that the procedure adopted by the DG in going ahead with the inquiry and investigating into the market behaviour of Cadila in anyway affects it so prejudicially as to tarnish its reputation. The CCI has not as yet examined the investigation report in the light of Cadila's contentions; all rights available to it, to argue on the merits are open.

Point No 2: Rejection of the recall application

40. Cadila's grievances, articulated during the hearing of this appeal, was that the single judge fell into error in upholding CCI's argument that the application for recall in terms of *Google Inc* could not be entertained and more importantly that its application disclosed fraud on the part of the informants, as well as the fact that the issue was hit by the doctrine of *res judicata.*

41. The *Google* decision was in the context of *refusal* by the CCI to entertain an application for recall of the earlier Section 26 (1) order on the ground of lack of power. The court held that such power exists: drawing analogy from the inherent power of the court under Section 482 of the Code of Criminal Procedure, 1973, which does not permit a review to a criminal court, but only a power to rectify an obvious mistake (Section 362). *Google* was considerably influenced by decisions which primarily ruled that judicial review- under Article 226 was available despite finality of an order, and despite bar to a remedy in the civil court. The court also took note of deletion of a provision of the Code of Civil Procedure which had enabled the adducing of

documents after evidence is recorded relying on *K.K. Velusamy Vs. N. Palanisamy* (2011) 11 SCC 275. It was held also that a palpably illegal order can be set aside by the authority which passes it, by citing *Vinod Kumar v State of Haryana* 2013 (16) SCC 293. Finally, *Google* went on to state:

> *"19. However having said that, we are not to be understood as conveying that in every case in which CCI has ordered investigation without hearing the person/enterprise complained/referred against, such person/enterprise would have a right to apply for review/recall of that order. Such a power though found to exist has to be sparingly exercised and ensuring that the reasons which prevailed with the Supreme Court in SAIL (supra) for negating a right of hearing to a person are not subverted.*
>
> *20. Such a power has to be exercised on the well recognized parameters of the power of review/recall and without lengthy arguments and without the investigation already ordered being stalled indefinitely. In fact, it is up to the CCI to also upon being so called upon to recall/review its order under Section 26(1) of the Act to decide whether to, pending the said decision, stall the investigation or not, as observed hereinabove also. The jurisdiction of review/recall would be exercised only if without entering into any factual controversy, CCI finds no merit in the complaint/reference on which investigation had been ordered. The application for review/recall of the order under Section 26(1) of the Act is not to become the Section 26(8) stage of the Act.*
>
> *21. We therefore answer the question framed hereinabove for adjudication in affirmative and hold that respondent No. 1 CCI has the power to recall/review the order under Section 26(1) of the Act but within the*

parameters and subject to the restrictions discussed above."

This court has misgivings about the correctness of the *Google* decision, for the reason that the *substantive* review power which existed with the CCI (Section 37) earlier, was repealed. This repeal was Parliamentary expression that such power was not admissible. A cardinal rule of interpretation is that the power of review is expressly granted. In *Patel Narshi Thakershi & Ors v Shri Pradyuman Singhji Arun Singhji* AIR 1970 SC 1273 the Supreme Court held that: *"It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to our notice from which it could be gathered that the Government had power to review its own order."Honda Siel Power Products Ltd. Vs. Commissioner of Income Tax, Delhi (2007) 12 SCC 596* likewise, is an authority for the proposition that where a specific power to rectify exists, the tribunal has no authority to review a previous order. It was observed that *"the purpose behind enactment of Section 254 (2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal"*. The power under Section 254 is to rectify (akin to Section 38 in the Competition Act).

42. The distinction between a tribunal (which has powers circumscribed by statute) and a court (which has inherent powers) is

well known. Where a specific procedural provision (which enabled the court to entertain and accept documents after the trial commenced) was deleted; the Supreme Court held that such legislative interdict did not affect the inherent powers. Sometimes, the court has adverted to other provisions of the Code of Civil Procedure being manifestations of the inherent power (Ref. *Budhia Swain Vs. Gopinath Deb* (1999) 4 SCC 396). *Vinod Kumar* (supra) cited in *Google* was a case where the original power was exercised plainly and manifestly contrary to the rules (an adverse confidential report of which review was sought after over 9 years, was entertained by an officer incompetent to do so; the Government set it at naught). That was a case of *nullity* of the original order. Similarly, the cases cited in *Google* (*R.R.Verma v Union of India* 1980 (3) SCC 402 and *S. Nagaraj v State of Karnataka* 1993 (Supp 4) SCC 595) cannot be read divorced from their context. In *RR Verma* the court had stated

> *"We do not think that the principle that the power to review must be conferred by statute either specifically or by necessary implication is applicable to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would indeed lead to untoward and startling results."*

The court was then concerned with Rule 3 of the All India Services (Conditions of Service Residuary matters) Rules, which empowered the Government to by *"order, dispense with or relax the requirements of that rule or regulation, as the case may be, to such extent and subject to such exceptions and conditions, as it may consider necessary for dealing with the case in a just and equitable*

manner." This meant necessarily that the authority was conferred with wide discretion to relieve the rigors of extant rules, but not to exercise the power whimsically:

> *"Very often it is found that an all too strict application of a rule works undue hardship on a civil servant, resulting in injustice and inequity,' causing disappointment and frustration to the civil servant and finally leading to the defeat of the very object aimed at by the rules namely efficiency and integrity of civil servants. Hence it is that the Central Government is vested with a reserve power Under Rule 3 to deal with unforeseen and unpredictable situations, and to relieve the civil servants from the infliction of undue hardship and to do justice and equity. It does not mean that the Central Government is free to do what they like, regardless of right or wrong; nor does it mean that the Courts are powerless to correct them."*

Likewise, *S. Nagaraj* was the Supreme Court's broad interpretation of a *Constitutional power* to render substantive justice under Article 137 of the Constitution of India (which nowhere restricts the power, such as for instance in Section 114, CPC).

43. It is pertinent to note that in *Adalat Prasad v Rooplal Jindal* 2004 (7) SCC 338, the Supreme Court had occasion to revisit the correctness of its previous decision, which had held that a Magistrate can recall an order issuing process, in a complaint case initiated for an offence alleged under Section 138 of the Negotiable Instruments Act, 1881, despite absence of a specific power of review. Despite the consequence of a wrong order adversely dragging a party to criminal proceedings, the court ruled that there was no remedy of recall by the same court, i.e. the magistrate. The Court held:

"14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

15 It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because

the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code.

16. Therefore, in our opinion the observation of this Court in the case of Mathew (supra) that for recalling an order of issuance of process erroneously, no specific provision of law is required would run counter to the Scheme of the Code which has not provided for review and prohibits interference at inter-locutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew's case (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

44. In the *Google* decision, the court had relied on several other decisions which dealt with *pure administrative power,* or power which was statutory for which no specific power was conferred, to recall (or review). In the latter category, the Supreme Court had consistently ruled that Section 21 of the General Clauses Act 1897 applied. That provision specifically states that where a statute does not enable the recall of an order or notification, or bye law (note that all are *legislative or quasi legislative statutory powers*) the power to recall those exists, provided it is exercised in the same manner as in the case of the exercise of original power. This power is quasi legislative; for instance it was held in *Kamla Prasad Khetan v Union of India* [1957] SCR 1052, this Court considered the scope of Section 21 of the General Clause Act. At page 1068, the Court observed thus:

"*The power to issue an order under any Central Act includes a power to amend the order; but this power*

is subject to a very important qualification and the qualification is contained in the words `exercisable in the like manner and subject to the like sanction and conditions (if any)'.................................The true scope and effect of the expression `subject to the like conditions (if any)' occurring in Section 21 of the General Clauses Act has been explained."

45. The decisions relied on in *Google* in the context of exercise of power under Article 226 (of judicial review by the High Courts) or under Section 482 (inherent power of the High Court) in the opinion of this court again are inapt, because they talk of the power of *High Courts and not of the same tribunal or forum which is divested of the power of substantive review or recall of its orders.*

46. This court is of the opinion that though there are serious concerns which should caution exercise of power by the CCI in terms of the *Google Inc,* it cannot be termed as *per incurium.* It would be sufficient to remember that these serious limitations exist with respect to exercise of a substantive power of recall, which can be justifiably used in rare circumstances where the *fraud* is egregious and does not involve a detailed hearing or where the mistake is of the kind covered by Section 38. The power of judicial review exists where the authority or tribunal acts in excess of its power (illegality) or transgresses procedural regulations, is unfair or tainted with *mala fides.* Therefore this court holds that the impugned order which held that *Google* has no application to the facts of this case because in *Google* the DG had not filed any report; the investigation was ongoing when the petitioner applied for recall and when this court was approached. Here, the recall application was filed after the DG's report to CCI. The finding in the

impugned judgment therefore is unexceptionable; it was held by the Single Judge that the -

> *"conclusion of this Court in Google (supra) has to be read/understood to mean a recall/review application can be filed during investigation and not after the submission of the report by the DG. This I say so once report is submitted, then an action/procedure under Section 26(5) or 26(8) gets triggered, taking the case out of the realm of 26(1) or 26(2) of the Act, [which was the position in Google (supra)]. The only remedy for the parties is to argue the report before the Commission and not on the order u/s. 26(1) as was sought to be done in the case in hand. The same is impermissible in law, inasmuch as procedure as contemplated/provided must be allowed to be gone through."*

47. The next question is whether CCI erred in holding that the question of investigating into its conduct, was as a result of fraud or misrepresentation by any party. The conduct of some complainants, in approaching the CCI with complaint, without disclosing that the alleged abusive behaviour of Cadila or its distributor, i.e. not supplying the formulation, was in fact false, amounts to playing a fraud on that tribunal, necessitating recall of the orders of DG which were premised on a general *prima facie* order. The conclusions of the CCI, which rejected the recall application (after noticing its previous order, which had directed the DG to inquire into conduct of the opposite parties as well as other parties) pertinently, is as follows:

> *"11. As a matter of fact, the DO, during its investigation has found evidence against the Applicants and many other pharma companies and then C&F agents. Further two pharma companies, which were not even OPs in any of the 4 clubbed cases, namely Hetero Healthcare Ltd*

and Divine Savior Private Ltd, have also been found to be indulging in the impugned anti-competitive conduct by the DG. In respect of the Applicants, the DG has found evidence which establishes their involvement in the impugned anti-competitive conduct. The Applicants have been served with a copy of the investigation report detailing the evidence collected by the DG against them and now, they ought to argue the matter on merits rebutting the evidence collected against them rather than filing belated applications seeking review/recall of the prima facie Order.

12. Further the argument of the Applicants that the Informant has committed a fraud by placing an order for supply of medicines upon the applicants on the same date and getting a demand draft prepared for filing information before the Commission, though sounds attractive, does not necessarily indicate mala fide on the part of the Informant. Further, the fact of the Informant not disclosing supply of drugs/medicines by the Applicants to it in the preliminary conference held at the Commission on 30.09.2015 cannot be relied upon to attribute mala fide on the part of the Informant. Though the Applicants have alleged that the Informant received supplies on 29.09.2015 the Informant's counsel contended that the invoice vide which supplies were made is dated 30.09.2015. In the Commission's opinion, all these are questions of merits and the Applicants are at liberty to argue on these before the Commission while rebutting the evidence collected by the DG against them during the investigation. The Commission, before arriving at a final decision in the matter will consider their submissions, including the alleged misrepresentation by the Informant.

13. In view of the foregoing discussion, the Commission rejects review/recall application of the Applicants and directs them to argue the case on merits of the investigation report of the DG. TO ensure a fair

> *opportunity hearing on their oral arguments will be fixed on a later date to allow them sufficient time to object to the findings of the DG and discharge the burden of proof with regard to their involvement in the impugned conduct."*

This court is of opinion that the CCI's order is irreproachable, particularly so in view of the opinion expressed by it that some material was discerned against the applicants. As to the stage (of the application for recall, by relying on *Google*), this court is of opinion that the CCI's view here too is sound. Though not identical, analogy can be drawn to *the stage at which the High Court exercises power under Section 482 Cr. PC.* If, for instance, the charge sheet disclosing *prima facie* materials reasonably disclosing the complicity of any accused is filed in court, the inherent power to quash proceedings is rarely, if ever resorted to. *Google* had relied on *Bhajan Lal v State of Haryana* 1992 (Supp 1) SCC 335 where the court held seven exceptional features which enabled exercise of jurisdiction under Section 482 Cr.P.C. to quash criminal proceedings; the third situation reads as follows:

> *"(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused."*

Unless this threshold is reached, even *Google* recognizes that the power of recall is unavailable. In the present case, the DG's report apparently discloses some *prima facie* material; the CCI is therefore proceeding with the next stage of investigation. Cadila's arguments,

therefore cannot be accepted. As held in *State of West Bengal and Ors. Vs. Kamal Sengupta and Anr.,* (2008) 8 SCC 612:

> *"The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record... To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law."*

48. This court notices that in the present case, Cadila filed a 110 page, 216 paragraph recall application which not only dealt with complicated questions of law, but called for analysis of detailed facts. Therefore, the rejection on the merits of Cadila's recall application is not erroneous.

49. The last point on this issue is the question of *res judicata.* Here, the court notices that *Grasim Industries* was a case where the court had ruled that even though there might be an infirmity in the CCI's approach regarding the initiation of proceedings, the material gathered by DG can be treated as information. Therefore, that in a given case, a decision is rendered may not be conclusive of the *matter in entirety;* complaints and grievances regarding abuse of dominance have an inherently anti-competitive effect, which pervade the marketplace and tend to stifle competition or create barriers to a free trade in goods and services. Conclusions of one or two specific complaints may not

always be determinative of an entity's behaviour in the market place; they tend to cover a larger canvas, influencing the outcomes in terms of price, access to articles goods and services, within the commercial stream and their deleterious effects are felt by the general public. Settlement or disposal of individual or some cases might not be determinative of the *matter* which pertains to abuse of dominance, for the reason that it affects the wider public, just as a crime does. It is like saying that a builder or other service provider who indulges in widespread malpractice that amounts to cheating investors or flat buyers, which is exposed by one complaint, that results in a first information report (FIR) and consequent investigation, that unearths that several other consumers are like preys can be quashed on the ground that the errant service provider settles with the complainant/informant. In such event, the High Court would never exercise its discretion to quash the proceeding emanating from the FIR. Therefore, the CCI or an expert body should *ordinarily* not be crippled or hamstrung in their efforts by application of technical rules of procedure.

Point No.3

50. The CCI rejected Cadila's application for permission to cross examine three witnesses who had deposed before the DG. This application was made on 08.01.2018. The relevant discussion in its impugned order, is as follows:

> *"The learned senior counsel for Cadila Healthcare Ltd. contended that though the requested cross-examination-,*

they wish to bring out the ill-motives and political rivalry between the Informant and some factions of the CDAB/Federation and also to reveal that the allegations made, against CDAB has no substance at all. The Commission does not find such reasons satisfactory enough to allow Cadila Healthcare Ltd. an opportunity of cross-examination. The Commission notes that the statements/Affidavits of the witnesses whose cross-examination has been sought by Cadila Healthcare Ltd, have not been relied upon by the DG to conclude a finding against Cadila Healthcare Ltd. The learned senior counsel for Cadila Healthcare Ltd, was not able to explain the reasons why its request, in the absence of any such incriminating statement by any of the witnesses mentioned in its application, is necessary or expedient to be allowed. The Commission thus, rejects the cross-examination requests made by Cadila Healthcare Ltd."

This court notices that the CCI had earlier, in the order, noted that a party can reasonably request for cross examination of individuals whose testimony can adversely affect it and that it has to consider the applications made in such cases, by exercise of discretion.

51. Cadila's argument that its request was turned down without adequate reasons, in this court's opinion is justified. Regulation 41(5) of the 2009 regulations provides as follows:

"(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."

This court is of the opinion that the discretion, which is undoubtedly vested with the CCI to permit or refuse cross

examination of a witness, is to be exercised judiciously. The reason for denial of the request for cross examination is that the justification given by Cadila is not "satisfactory" and that the testimony of witnesses who have deposed and whose cross examination is sought, are not relied upon in the DG's report. This court is of the opinion that such reasons are not germane; mere "dissatisfaction" does not imply judicious exercise of discretion. As regards the reliance by the DG in his report is concerned, the grounds of cross examination are necessarily wider; it is avowedly to establish whether the witnesses were credible and whether any part of their statements could be relied on; furthermore they can be cross examined on *relevant facts,* which are not necessarily confined to what they depose about. Therefore, it is held that CCI erred in refusing to grant cross examination (to Cadila) of the three witnesses who had deposed before the DG.

Point No.4

52. Cadila's argument on this aspect is that without first recording the complicity or otherwise of a company, its directors or employees/officials cannot be issued notice for contravention of the Act. In other words, according to Cadila, the CCI has to first record that the company is guilty of an abusive act, after which it can proceed against its director, etc. The relevant provision is as follows:

> *"**Contravention by Companies***
>
> ***48. (1)** Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company,*

every person who, at the time the contravention was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

***(2)** Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.*

***Explanation**.—For the purposes of this section,—*
a) "company" means a body corporate and includes a firm or other association of individuals; and
b) "director", in relation to a firm, means a partner in the firm."

53. The question sought to be agitated was urged before another single judge in *Pran Mehra vs. Competition Commission of India and Another* (Writ Petitions No. 6258/ 2014, 6259/ 2014 and 6669/ 2014) when the court held as follows:

*"**6**.... I am in agreement with the submissions of Mr. Chandhiok that there cannot be two separate*

proceedings in respect of the company (i.e. VeriFone) and the key-persons as the scheme of the Act, to my mind, does not contemplate such a procedure. The procedure suggested by Mr.Ramji Srinivasan is both inefficacious and inexpedient. As in every such matter, including the proceedings under Section 138of the Negotiable Instruments Act, 1881 (in short N.I. Act), a procedure of the kind suggested is not contemplated. The judgment of the Supreme Court in the case Aneeta Hada dealt with proceedings under Section 138 of the N.I. Act. The judgment does not deal with issue at hand, which is whether adjudication in two parts, as contended by Mr. Ramji Srinivasan, is permissible. The judgment, in my opinion is distinguishable.

***7.** It is no doubt true that the petitioners can only be held liable if, the CCI, were to come to a conclusion that they were the key-persons, who were in-charge and responsible for the conduct of the business of the company. In the course of the proceedings qua a company, it would be open to the key-persons to contend that the contravention, if any, was not committed by them, and that, they had in any event employed due diligence to prevent the contravention. These arguments can easily be advanced by key- persons without prejudice to the main issue, as to whether or not the company had contravened, in the first place, the provisions of the Act, as alleged by the D.G.I., in a given case."*

The CCI has, by its separate order, in *Ministry of Agriculture v M/s Mahyco Monsanto Biotech Ltd* (Ref. Case No.02/2015, order dated 26/07/2016) followed the above decision and had further cited *Shailendra Swarup v. The Director, Enforcement Directorate* (2011) 162 Comp. Cas. 346 (Del.) which held that FERA proceedings can be held simultaneously, *Sushila Devi vs. Securities and Exchange Board of India* (2008) 1 Comp. L.J. 155 Del., where the petitioner being the

officer in-charge of and responsible for the conduct of the business of the company was summoned as an accused for violation of Sections 24 (1) of the Securities and Exchange Board of India Act, 1992 along with the company. The CCI also noticed that the law on this aspect was finally settled in *Aneeta Hada vs. M/s Godfather Travels & Tours Private Limited* (2008) 13 SCC 70.

54. *Aneeta Hada* set at rest the controversy whether in one proceeding, against the company, its director ("person in-charge") can also be prosecuted or proceeded against on the principle of vicarious liability. Before *Aneeta Hada,* there existed a dichotomy of opinions – on the one hand, in *State of Madras vs. C.V. Parekh and Another* (1970) 3 SCC 491 held that without prosecuting the company, the director could not be prosecuted. *Sheoratan Agarwal and Another vs. State of Madhya Pradesh* (1984) 4 SCC 352(on the other hand), explained the decision in *C.V. Parekh (supra)* by a two judge bench of the Court which held that the company alone or the person in-charge of and responsible for the conduct of business of the company alone, may be prosecuted for the acts of the company as there is no statutory requirement that such person cannot be prosecuted unless the company is also arraigned as an accused with him. In *Aneeta Hada* (supra) it was held, *inter alia,* as follows:

> *"**58.** Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company*

> *can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."*

This court is of opinion that the correct interpretation of law was given in *Pran Mehra* the reasoning of which is hereby confirmed, as is the reasoning in *Ministry of Agriculture v M/s Mahyco Monsanto Biotech Ltd,* which proceeds on a correct appreciation of the law. Accordingly Cadila's grievance with respect to issuance of notice to its directors by citing Section 48 is without substance; it is hereby rejected. The impugned judgment cannot be faulted.

55. In view of the above reasoning, it is held that the procedure adopted by the DG, who investigated the complaint as a matter, without the CCI recording its *prima facie* opinion against the appellant/Cadila cannot be termed an illegality. Likewise, the rejection of the recall application (by the CCI) does not call for interference. On the third point, i.e. the issue of cross examination, this appeal has to succeed; however on the last issue, i.e. notice and proceedings in a composite manner against the directors and Cadila, cannot be termed an illegality or irregularity; it was in accordance with law.

56. In view of the discussion, the appeal succeeds in part and is allowed to the extent that CCI shall afford opportunity to cross examine the three individuals named by Cadila in its application

(dated 08.01.2018) by issuing a notice to all concerned. On all other aspects the appeal, i.e. as to rejection of the recall application and the other points discussed above, has to fail and is dismissed. The appeal is dismissed, but subject to the above directions.

Dasti under signatures of Court Master to counsel for the parties.

HIGH COURT OF DELHI

S. RAVINDRA BHAT
(JUDGE)

A.K.CHAWLA
(JUDGE)

SEPTEMBER 12, 2018

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