REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7779 OF 2010
[D.No.12247 OF 2010]

Competition Commission of India ...Appellant

Versus

Steel Authority of India Ltd. & Anr. ...Respondents

J U D G M E N T

SWATANTER KUMAR, J.

The application for leave to appeal is allowed. Civil appeal is admitted.

The decision of the Government of India to liberalize its economy with the intention of removing controls persuaded the Indian Parliament to enact laws providing for checks and balances in the free economy. The laws were required to be enacted, primarily, for the objective of taking measures to avoid anti-competitive agreements and abuse of dominance as well as to regulate mergers and takeovers which result in distortion of the market. The earlier Monopolies and Restrictive Trade Practices Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of international economic developments relating to competition law. Most countries in

the world have enacted competition laws to protect their free market economies- an economic system in which the allocation of resources is determined solely by supply and demand. The rationale of free market economy is that the competitive offers of different suppliers allow the buyers to make the best purchase. The motivation of each participant in a free market economy is to maximize self-interest but the result is favourable to society. As Adam Smith observed: “there is an invisible hand at work to take care of this”.

As far as American law is concerned, it is said that the Sherman Act, 1890, is the first codification of recognized common law principles of competition law. With the progress of time, even there the competition law has attained new dimensions with the enactment of subsequent laws, like the Clayton Act, 1914, the Federal Trade Commission Act, 1914 and the Robinson-Patman Act, 1936. The United Kingdom, on the other hand, introduced the considerably less stringent Restrictive Practices Act, 1956, but later on more elaborate legislations like the Competition Act, 1998 and the Enterprise Act, 2002 were introduced. Australia introduced its current Trade Practices Act in 1974.

The overall intention of competition law policy has not changed markedly over the past century. Its intent is to limit the role of market power that might result from substantial concentration in a particular industry. The major concern with monopoly and similar kinds of concentration is not

that being big is necessarily undesirable. However, because of the control exerted by a monopoly over price, there are economic efficiency losses to society and product quality and diversity may also be affected. Thus, there is a need to protect competition. The primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other. The model of perfect competition is the 'economic model' that usually comes to an economist's mind when thinking about the competitive markets.

As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of

competition law.

In India, a High Level Committee on Competition Policy and Law was constituted to examine its various aspects and make suggestions keeping in view the competition policy of India. This Committee made recommendations and submitted its report on 22nd of May, 2002. After completion of the consultation process, the Competition Act, 2002 (for short, the 'Act') as Act 12 of 2003, dated 12th December, 2003, was enacted. As per the statement of objects and reasons, this enactment is India's response to the opening up of its economy, removing controls and resorting to liberalization. The natural corollary of this is that the Indian market should be geared to face competition from within the country and outside. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body namely, the 'Competition Commission of India' (for short, the 'Commission') which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act

was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

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 thereunder 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 present Act is quite contemporary to the laws presently in force in the United States of America as well as in the United Kingdom. In other words, the provisions of the present Act and Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom have somewhat similar legislative intent and scheme of enforcement. However, the provisions of these Acts are not quite *pari materia* to the Indian legislation. In United Kingdom, the Office of Fair Trading is primarily regulatory and adjudicatory functions are performed by the Competition Commission and the Competition Appellate Tribunal. The U.S. Department of Justice Antitrust Division in United States, deals with all jurisdictions in the field. The competition laws and their enforcement in those two countries is progressive, applied rigorously and more effectively. The deterrence objective in these anti-trust legislations is clear from the provisions relating to criminal sanctions for individual violations, high upper limit for imposition of fines on corporate entities as well as extradition of individuals found guilty of formation of cartels. This is so, despite the fact that there are much larger violations of the provisions in India in comparison to the other two countries, where at the very threshold, greater numbers of cases invite the attention of the regulatory/adjudicatory bodies. Primarily, there are three main elements which are intended to be controlled by implementation of the provisions

of the Act, which have been specifically dealt with under Sections 3, 4 and 6 read with Sections 19 and 26 to 29 of the Act. They are anti-competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition. Thus, while dealing with respective contentions raised in the present appeal and determining the impact of the findings recorded by the Tribunal, it is necessary for us to keep these objects and background in mind.

Jindal Steel & Powers Ltd. (for short the 'informant') invoked the provisions of Section 19 read with Section 26(1) of the Act by providing information to the Commission alleging that M/s. Steel Authority of India Ltd. (for short 'SAIL') had, *inter alia*, entered into an exclusive supply agreement with Indian Railways for supply of rails. The SAIL, thus, was alleged to have abused its dominant position in the market and deprived others of fair competition and therefore, acted contrary to Section 3(4) (Anti-competitive Agreements) and Section 4(1) (Abuse of dominant position) of the Act. This information was registered by the Commission and was considered in its meeting held on 27th October, 2008 on which date the matter was deferred at the request of the informant for furnishing additional information. During the course of hearing, it was also brought to the notice of the Commission that a petition being Writ Petition (C) No.8531 of 2009, filed by the informant against the Ministry

of Railways, was also pending in the High Court of Delhi at New Delhi. Vide order dated 10th November, 2009 the Commission directed the informant to file an affidavit with respect to the information furnished by it. The Commission also directed SAIL to submit its comments in respect of the information received by the Commission within two weeks from the date of the said meeting and the matter was adjourned till 8th December, 2009. On 19th November, 2009 a notice was issued to SAIL enclosing all information submitted by the informant. When the matter was taken up for consideration by the Commission on 8th December, 2009, the Commission took on record the affidavit filed by the informant on 30th November, 2009 in terms of the earlier order of the Commission, but SAIL requested extension of six weeks time to file its comments. Finding no justification in the request of the SAIL, the Commission, vide its order dated 8th December, 2009, declined the prayer for extension of time. In this order, it also formed the opinion that *prima facie* case existed against SAIL, and resultantly, directed the Director General, appointed under Section 16(1) of the Act, to make investigation into the matter in terms of Section 26(1) of the Act. It also granted liberty to SAIL to file its views and comments before the Director General during the course of investigation. Despite these orders, SAIL filed an interim reply before the Commission along with an application that it may be heard before any interim order is passed by the Commission in the proceedings. On 22nd December, 2009 the Commission only reiterated

its earlier directions made to the Director General for investigation and granted liberty to SAIL to file its reply before the Director General. The correctness of the directions contained in the order dated 8th December, 2009 was challenged by SAIL before the Competition Appellate Tribunal (for short, the 'Tribunal'). The Commission filed an application on 28th January, 2010 before the Tribunal seeking impleadment in the appeal filed by SAIL. It also filed an application for vacation of interim orders which had been issued by the Tribunal on 11th January, 2010, staying further proceedings before the Director General in furtherance of the directions of the Commission dated 8th December, 2009. It will be useful to refer to the order passed by the Commission on 8th December, 2009 at this stage itself which reads as under:

"The meeting was held under the chairmanship of Sh. H.C. Gupta, Member.

2. The case was earlier considered by the Commission in its meetings held on 4.11.2009 and 10.11.2009. In the meeting of the Commission held on 10.11.2009, Mr. Suman Kr. Dey, VP and Head Legal and Mrs. Pallavi Shroff, Advocate (along with their fellow advocates) appeared before the Commission on behalf of the informant and made detailed admissions. As per decision taken during the meeting held on 10.11.2009, informant/his counsel was directed to file an affidavit regarding the current status of the writ petition filed in the Delhi high Court, particular indicating its admission or otherwise and as to whether any other order has been passed by the Hon'ble High Court, in the matter so far. SAIL was also requested to furnish their views/comments in the matter within 2 weeks time.

3. In the meeting of the Commission held on 08.12.2009, the Commission took on record the affidavit filed by the informant on 30.11.2009 regarding the current status of the writ petition filed in the Delhi High Court and certified copies of all the orders passed by the Hon'ble High Court, in the matter, till date. However, SAIL did not file its

reply within the stipulated time and requested to allow extension of time from 3.12.2009 for a further period of six weeks. The Commission considered the above request of SAIL. However, the Commission did not allow any further extension.

4. The case was discussed in detail. After considering the details filed by the informant with the information and the entire relevant material/record available in this context as well as detailed submission made by the advocates of the informant before the Commission on 10.11.2009. Commission is of the opinion that there exists a prima facie case. Therefore, the Commission decided that the case be referred to Director General for investigation in the matter.

5. Secretary was accordingly directed to refer the case to DG for investigation and submission of the report within 45 days of the receipt of orders of the Commission. SAIL informed that they may furnish their views/comments in the matter to the DG."

As already noticed, the legality of this order was questioned before the Tribunal by SAIL on one hand, while, on the other hand the Commission had pressed its application for impleadment. In the application for impleadment it was averred by the Commission that it is a necessary and proper party for adjudication of the matter before the Tribunal and therefore, it should be impleaded as a party and be heard in accordance with law. Emphasis was also placed on Section 18 of the Act to contend that powers, functions and duties of the Commission were such that it would always be appropriate for the Commission to be impleaded as a party in appeals filed before the Tribunal. It was also averred in the application that intervention of the Commission at the appellate proceedings would not prejudice anybody. The very maintainability of the appeal before the Tribunal was also questioned by

the Commission on the ground that the order under appeal before the Tribunal was a direction *simpliciter* to conduct investigation and thus was not an order appealable within the meaning of Section 53A of the Act. The Tribunal in its order dated 15th February, 2010*, inter alia,* but significantly held as under:

a) The application of the Commission for impleadment was dismissed, as in the opinion of the Tribunal the Commission was neither a necessary nor a proper party in the appellate proceedings before the Tribunal. Resultantly, the application for vacation of stay also came to be dismissed.

b) It was held that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Thus, the Commission is directed to give reasons while passing any order, direction or taking any decision.

c) The appeal against the order dated 8th December, 2009 was held to be maintainable in terms of Section 53A of the Act. While setting aside the said order of the Commission and recording a finding that there was violation of principles of natural justice, the Tribunal granted further time to SAIL to file reply by 22nd February, 2010 in addition to the reply already filed by SAIL.

This order of the Tribunal dated 15th February, 2010 is impugned in the present appeal.

The informant, i.e. the person who wishes to complain to the Commission constituted under section 7 of the Act, would make such information available in writing to the Commission. Of course, such information could also be received from the Central Government, State Government, Statutory authority or on its own knowledge as provided under Section 19(1)(a) of the Act. When such information is received, the Commission is expected to satisfy itself and express its opinion that a *prima facie* case exists, from the record produced before it and then to pass a direction to the Director General to cause an investigation to be made into the matter. This direction, normally, could be issued by the Commission with or without assistance from other quarters including experts of eminence. The provisions of Section 19 do not suggest that any notice is required to be given to the informant, affected party or any other person at that stage. Such parties cannot claim the right to notice or hearing but it is always open to the Commission to call any 'such person', for rendering assistance or produce such records, as the Commission may consider appropriate.

The Commission, wherever, is of the opinion that no *prima facie* case exists justifying issuance of a direction under Section 26(1) of the Act, can close the case and send a copy of that order to the Central

Government, State Government, Statutory Authority or the parties concerned in terms of Section 26(2) of the Act. It may be noticed that this course of action can be adopted by the Commission in cases of receipt of reference from sources other than of its own knowledge and without calling for the report from Director General.

In terms of Section 26(3), the Director General is supposed to take up the investigation and submit the report in accordance with law and within the time stated by the Commission in the directive issued under Section 26(1). After the report is submitted, there is a requirement and in fact specific duty on the Commission to issue notice to the affected parties to reply with regard to the details of the information and the report submitted by the Director General and thereafter permit the parties to submit objections and suggestions to such documents. After consideration of objections and suggestions, if the Commission agrees with the recommendations of the Director General that there is no offence disclosed, it shall close the matter forthwith, communicating the said order to the person/authority as specified in terms of Section 26(6) of the Act. If there is contravention of any of the provisions of the Act and in the opinion of the Commission, further inquiry is needed, then it shall conduct such further inquiry into the matter itself or direct the Director General to do so in accordance with the provisions of the Act.

In terms of Section 26(7), the Commission is vested with the power to

refer the matter to the Director General for further investigation, or even conduct further inquiry itself, if it so chooses. The Commission, depending upon the nature of the contravention, shall, after inquiry, adopt the course specified under Sections 27 and 28 of the Act in the case of abuse of dominant position and the procedure under Sections 29 to 31 of the Act in the case of combinations. The Commission is vested with powers of wide magnitude and serious repercussions as is evident from the provisions of Sections 27(d), 28 and 31(3) of the Act. The Commission is empowered to direct modification of agreements insofar as they are in contravention of Section 3, division of an enterprise enjoying dominant position, modification of combinations wherever it deems necessary and to ensure that there is no abuse or contravention of the statutory provisions. We may notice that the provisions relating to combinations have been duly notified vide Notifications dated 12th October 2007 and 15th May, 2009 respectively. However, in the facts of the present case, these provisions do not fall for consideration of the Court.

For conducting inquiry and passing orders, as contemplated under the provisions of the Act, the Commission is entitled to evolve its own procedure under Section 36(1) of the Act. However, the Commission is also vested with the powers of a Civil Court in terms of Section 36(2) of the Act, though for a limited purpose. After completing the inquiry in

accordance with law, the Commission is required to pass such orders as it may deem appropriate in the facts and circumstances of a given case in terms of Sections 26 to 31 of the Act.

Having referred to the background leading to the enactment of competition law in India and the procedure that the Commission is expected to follow while deciding the matters before it and facts of the case, now it will be appropriate for this Court to refer to the submissions made in light of the facts of this case. According to the Commission (the appellant herein), the directions passed in the order dated 8th December, 2009 under Section 26(1) of the Act are not appealable and further there is no requirement in law to afford an opportunity of hearing to the parties at the stage of formulating an opinion as to the existence of a *prima facie* case. It is also the contention of the Commission that in an appeal before the Tribunal it is the necessary party and that the Commission is not expected to state reasons for forming an opinion at the *prima facie* stage.

On the contrary, according to SAIL (the respondent herein), the principles of natural justice have been violated by the Commission while declining to grant extension of time to file its reply and that the direction in referring the matter to Director General was passed in undue haste.

The informant placed reliance upon Regulation 30(2) of the

Regulations which empowers the Commission to pass such orders as it may deem fit on the basis of the facts available, where a party refuses to assist or otherwise does not provide necessary information within the stipulated time. Further, according to the informant there was no valid reason submitted by the SAIL which would justify grant of extension and as such the order passed by the Commission on merits was not liable to be interfered.

We may also notice that learned counsel appearing for the parties had addressed the Court on certain allied issues which may not have strictly arisen from the memorandum of appeal, but the questions raised were of public importance and are bound to arise before the Commission, as well as the Tribunal in all matters in which the proceedings are initiated before the Commission. Thus, we had permitted the parties to argue those allied issues and, therefore, we would proceed to record the reasons while dealing with such arguments as well.

In order to examine the merit or otherwise of the contentions raised by the respective parties, it will be appropriate for us to formulate the following points for determination:--

1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a *prima facie* opinion would be appealable in

terms of Section 53A(1) of the Act?

2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the *prima facie* case?

3) Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

4) At what stage and in what manner the Commission can exercise powers vested in it under Section 33 of the Act to pass temporary restraint orders?

5) Whether it is obligatory for the Commission to record reasons for formation of a *prima facie* opinion in terms of Section 26(1) of the Act?

6) What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the

procedural intricacies do not hamper in achieving the object of the Act, i.e., free market and competition.

We would prefer to state our answers to the points of law argued before us at the very threshold. Upon pervasive analysis of the submissions made before us by the learned counsel appearing for the parties, we would provide our conclusions on the points noticed supra as follows:

1) In terms of Section 53A(1)(a) of the Act appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53A(1)(a). The orders, which have not been specifically made appealable, cannot be treated appealable by implication. For example taking a *prima facie* view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53A.

2) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a *prima facie* case exists for

issuance of a direction to the Director General to cause an investigation to be made into the matter.

However, the Commission, being a statutory body exercising, *inter alia*, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive.

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

3) The Commission, in cases where the inquiry has been initiated by the Commission *suo moto,* shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the Competition Tribunal. The presence of the Commission before the Tribunal would help in complete adjudication

and effective and expeditious disposal of matters. Being an expert body, its views would be of appropriate assistance to the Tribunal. Thus, the Commission in the proceedings before the Tribunal would be a necessary or a proper party, as the case may be.

4) During an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order *inter alia* should : (a) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) It is necessary to issue order of restraint and (c) from the record before the Commission, it is apparent that there is

every likelihood of the party to the *lis*, suffering irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect on competition in the market.

The power under Section 33 of the Act to pass temporary restraint order can only be exercised by the Commission when it has formed *prima facie* opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations.

5) In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a *prima facie* view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties.

Submissions made and findings in relation to Point No.1

If we examine the relevant provisions of the Act, the legislature, in its wisdom, has used different expressions in regard to exercise of

jurisdiction by the Commission. The Commission may issue directions, pass orders or take decisions, as required, under the various provisions of the Act. The object of the Act is demonstrated by the prohibitions contained in Sections 3 and 4 of the Act. Where prohibition under Section 3 relates to anti-competition agreements there Section 4 relates to the abuse of dominant position. The regulations and control in relation to combinations is dealt with in Section 6 of the Act. The power of the Commission to make inquiry into such agreements and the dominant position of an entrepreneur, is set into motion by providing information to the Commission in accordance with the provisions of Section 19 of the Act and such inquiry is to be conducted by the Commission as per the procedure evolved by the legislature under Section 26 of the Act. In other words, the provisions of Sections 19 and 26 are of great relevance and the discussion on the controversies involved in the present case would revolve on the interpretation given by the Court to these provisions.

Thus, we may reproduce provisions of Section 19 and 26 which read as under:

"19. Inquiry into certain agreements and dominant position of enterprise.--(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry

barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(/) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—

(a) physical characteristics or end-use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers;

(f) classification of industrial products.

26. Procedure for inquiry 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 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 subsection (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 and 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 investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by 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."

The Tribunal has been vested with the power to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission in exercise of its powers under the provisions mentioned in Section 53A of the Act. The appeals preferred before the Tribunal under Section 53A of the Act are to be heard and dealt with by the Tribunal as per the procedure spelt out under Section 53B of the Act. It will be useful to refer to both these provisions at this stage itself, which read as under:--

"53A. Establishment of Tribunal. - (1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal, –

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44,

section 45 or section 46 of this Act;

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under subsection(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

(2) The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify.

53B. Appeal to Appellate Tribunal. - (1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal."

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.

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. At this stage the case of Automec Srl v. Commission of the European Communities [(1990) ECR II-00367] can be noted, where the Court of First Instance held as under :--

"42. As the Court of Justice has consistently held, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 173. More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (judgment in Case 60/81 IBM v. Commission [1981] ECR 2639, at p. 2651, paragraph 8 et seq.). It follows that the fact that the contested act is a preparatory measure constitutes one of the barriers to the admissibility of an action for annulment which the Court may consider of its own motion, as the Court of Justice acknowledged in its judgment in Case 346/87 Bossi v. Commission [1989] ECR 303, especially at p.332 et seq."

The provisions of Sections 26 and 53A of the Act clearly depict the

legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Once the legislature has opted to specifically state the order, direction and decision, which would be appealable by using clear and unambiguous language, then the normal result would be that all other directions, orders etc. are not only intended to be excluded but, in fact, have been excluded from the operation of that provision. The presumption is in favour of the legislation. The legislature is deemed to be aware of all the laws in existence and the consequences of the laws enacted by it. When other orders have been excluded from the scope of appellate jurisdiction, it will not be permissible to include such directions or orders by implication or with reference to other provisions which hardly have any bearing on the matter in issue and thus make non-appealable orders appealable. The provisions of Section 53A(1)(a) use the expression 'any direction issued or decision made or order passed by the Commission'. There is no occasion for the Court to read and interpret the word 'or' in any different form as that would completely defeat the intention of the legislature. The contention raised before us is that the word 'or' is normally disjunctive and 'and' is normally conjunctive, but at the same time they can be read *vice versa*. The respondent argued that the expression 'any direction issued' should be read disjunctive and that gives a complete right to a party to prefer an appeal under Section 53A, against a direction for investigation, as that itself is an appealable right

independent of any decision or order which may be made or passed by the Commission.

It is a settled principle of law that the words 'or' and 'and' may be read as *vice versa* but not normally. "You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'….. " [Green v. Premier Glynrhonwy Slate Co. (1928) 1 KB 561 p. 568)]. As pointed out by Lord Halsbury, the reading of 'or' as 'and' is not to be resorted to, "unless some other part of the same statute or the clear intention of it requires that to be done." [Mersey Docks and Harbour Board v. Henderson Bros. (1888) 13 AC 595 at 603)]. The Court adopted with approval Lord Halsbury's principle and in fact went further by cautioning against substitution of conjunctions in the case of Municipal Corporation of Delhi vs. Tek Chand Bhatia [(1980) 1 SCC 158], where the Court held as under:--

"11. ……As Lord Halsbury L.C. observed in *Mersey Docks & Harbour Board v. Henderson* [LR (1888) 13 AC 603], the reading of "or" as "and" is not to be resorted to "unless some other part of the same statute or the clear intention of it requires that to be done". The substitution of conjunctions, however, has been sometimes made without sufficient reasons, and it has been doubted whether some of the cases of turning "or" into "and" and vice versa have not gone to the extreme limit of interpretation."

To us, the language of the Section is clear and the statute does not demand that we should substitute 'or' or read this word interchangeably

for achieving the object of the Act. On the contrary, the objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected of the Court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature.

We may usefully refer to similar interpretation given by this Court in the case of Super Cassettes Industries Ltd. vs. State of U.P. [(2009)10 SCC 531], wherein the Court was dealing with cancellation of a notice issued under Section 9(2) of the U.P. Imposition of Ceiling of Land Holdings Act, 1960, requiring submission of a statement by the tenure holder for determination of surplus land in accordance with law. Sub-section (1) of Section 13 of the said Act read as under:--

"13. Appeals—(1) Any party aggrieved by an order under sub-section (2) of Section 11 or Section 12, may, within thirty days of the date of the order, prefer an appeal to the Commissioner within whose jurisdiction the land or any part thereof is situate."

The State of UP through its Collector had preferred an appeal under Section 13 of the Act against an order passed by the authority cancelling the notice which had been issued under Section 9(2) of the Act. The contention raised was that the said order amounted to an order being

passed under Section 11(2) of the Act. An order passed under Section 11(2) of the Act in furtherance of the statement prepared by the tenure holder was final and conclusive and could not be called in question in any court of law. The Court while interpreting the provisions of Section 13(1) held that it is only the specific order passed under Section 11(2) and Section 12 of the Act which could be appealed against and while applying its rule held as under:--

"23. It is well known that right of appeal is not a natural or inherent right. It cannot be assumed to exist unless expressly provided for by statute. Being a creature of statute, remedy of appeal must be legitimately traceable to the statutory provisions…….

xxx xxx xxx xxx

31. Section 13 provides a right of appeal to a party aggrieved by an order under Sub-section (2) of Section 11 or Section 12 and no other. In other words, any order passed by the Prescribed Authority other than the order under-Section (2) of Section 11 or Section 12 is not appealable. From any reckoning, the order dated December 17, 2003 is neither an order under Sub-section (2) of Section 11 nor an order under Section 12. Act 1960 does not make the order of the Prescribed Authority canceling the notice issued under Section 9(2) amenable to appeal. Such order does not fall within the ambit of Section 13."

We find that the view taken by the Court in this case squarely applies to the case in hand as well. Right to appeal is a creation of statute and it does require application of rule of plain construction. Such provision should neither be construed too strictly nor too liberally, if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the

appropriate forum.

In the case of Maria Cristina De Souza Sadder vs. Amria Zurana Pereira Pinto [(1979) 1 SCC 92], this Court held as under:

"5 …It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the *lis* is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof."

The principle of 'appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure' is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being creation of a statute, legislature has to decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law. Reference may be made to M. Ramnarain Private Limited v. State Trading Corporation of India Limited, [(1983) 3 SCC 75] and Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad [(1999) 4 SCC 468]. Right of appeal is neither a natural nor inherent right vested in a party. It is substantive statutory right regulated by the statute creating it. The cases of Kondiba Dagadu Kadam v*s.* Savitribai Sopan Gujar [(1999) 3 SCC 722] and Kashmir Singh

vs. Harnam Singh [2008 AIR SC 1749] may be referred to on this point. Thus, it is evident that the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be provided by the law in force. In absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party.

A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is *jus dicere*, not *jus dare*. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

This Court in the case of Shiv Shakti Co-op. Housing Society, Nagpur vs. Swaraj Developers [(2003) 6 SCC 659], while referring to the principles for interpretation of statutory provisions, held as under:

"19. It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. *(See Institute of Chartered Accountants of India v. Price Waterhouse.)* The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner Courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. *(See State of Gujarat v. Dilipbhai Nathjibhai Patel)*. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [*See Stock v. Frank Jones (Tipton) Ltd.*] Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of a doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (*Per Lord Loreburn, L.C. in Vickers Sons and Maxim Ltd. v. Evans*, quoted in Jumma Masjid v. Kodimaniandra Deviah."

The Law Commission of India, in its 183rd Report, while dealing with the need for providing principles of interpretation of statute as regards the extrinsic aids of interpretation in General Clauses Act, 1897, expressed the view that a statute is a will of legislature conveyed in the form of text. Noticing that the process of interpretation is as old as language, it says that the rules of interpretation were evolved at a very early stage of Hindu civilization and culture and the same were given by *'Jaimini'*, the author of *Mimamsat Sutras;* originally meant for *shrutis,* they were employed for the interpretation of *Smritis* as well. While referring to the said historical background, the Law Commission said:

"It is well settled principle of law that as the statute is an edict of the Legislature, the conventional way of interpreting or construing a statute is to seek the intention of legislature. The intention of legislature assimilates two aspects; one aspect carries the concept of 'meaning', i.e., what the word means and another aspect conveys the concept of 'purpose' and 'object' or the 'reason' or 'spirit' pervading through the statute. The process of construction, therefore, combines both the literal and purposive approaches. However, necessity of interpretation would arise only where the language of a statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute. If the language is clear and unambiguous, no need of interpretation would arise. In this regard, a Constitution Bench of five Judges of the Supreme Court in R.S. Nayak v. A.R. Antulay, AIR 1984 SC 684 has held:

"...If the words of the Statute are clear and unambiguous, it is the plainest duty of the Court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self defeating."

Recently, again Supreme Court in Grasim Industries Ltd. v. Collector of Customs, Bombay, (2002) 4 SCC 297 has followed the same principle and observed:

"Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for Court to take upon itself the task of amending or altering the statutory provisions."

Thus, the Court can safely apply rule of plain construction and legislative intent in light of the object sought to be achieved by the enactment. While interpreting the provisions of the Act, it is not necessary for the Court to implant, or to exclude the words, or over emphasize language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication.

We are unable to persuade ourselves to agree with the reasoning given and view taken by the Tribunal in this regard, in the impugned order. Even though the Tribunal referred to the dictum of the Court in the case of Tek Chand Bhatia (supra), it still concluded that the use of the words 'any' and 'or' were the expressions of wide magnitude and that 'any' being an adjective qualifies the nouns under the relevant provisions, i.e. directions, decisions and orders, all were appealable without exception.

The expression 'any', in fact, qualifies each of the three expressions 'direction issued or decision made or order passed'. It cannot be said that it signifies any one of them and, particularly, only 'direction issued'. All these words have been used by the legislature consciously and with a purpose. It has provided for complete mechanism ensuring their implementation under the provisions of the Act, for example, under Section 26(1) the Commission is expected to make a decision by formation of a *prima facie* opinion and issue a direction to cause an investigation to be made by the Director General and after receiving the report has to take a final view in terms of Section 26(6) and even otherwise, it has the discretion to form an opinion and even close a case under Section 26(2). Having enacted these provisions, the legislature in its wisdom, made only the order under Section 26(2) and 26(6) appealable under Section 53A of the Act. Thus, it specifically excludes the opinion/decision of the authority under Section 26(1) and even an

order passed under Section 26(7) directing further inquiry, from being appealable before the Tribunal. Therefore, it would neither be permissible nor advisable to make these provisions appealable against the legislative mandate.

The existence of such excluding provisions, in fact, exists in different statutes. Reference can even be made to the provisions of Section 100A of the Code of Civil Procedure, where an order, which even may be a judgment, under the provisions of the Letters Patent of different High Courts and are appealable within that law, are now excluded from the scope of the appealable orders. In other words, instead of enlarging the scope of appealable orders under that provision, the Courts have applied the rule of plain construction and held that no appeal would lie in conflict with the provisions of Section 100A of the Code of Civil Procedure.

Expressum facit cessare tacitum – Express mention of one thing implies the exclusion of other. (Expression precludes implication). This doctrine has been applied by this Court in various cases to enunciate the principle that expression precludes implication. [Union of India vs. Tulsiram Patel, AIR 1985 SC 1416]. It is always safer to apply plain and primary rule of construction. The first and primary rule of construction is that intention of the legislature is to be found in the words used by the legislature itself. The true or legal meaning of an enactment is derived

by construing the meaning of the word in the light of the discernible purpose or object which comprehends the mischief and its remedy to which an enactment is directed. [State of Himachal Pradesh vs. Kailash Chand Mahajan (AIR 1992 SC 1277) and Padma Sundara Rao v. State of T.N. (AIR 2002 SC 1334)].

It is always important for the Court to keep in mind the purpose which lies behind the statute while interpreting the statutory provisions. This was stated by this Court in Padma Sundara Rao's case (supra) as under:--

"11. … The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage,218 FR 547). The view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama (AIR 1990 SC 981)."

Applying these principles to the provisions of Section 53A(1)(a), we are of the considered view that the appropriate interpretation of this provision would be that no other direction, decision or order of the Commission is appealable except those expressly stated in Section 53A(1)(a). The maxim *est boni judicis ampliare justiciam, non-jurisdictionem* finds application here. Right to appeal, being a statutory right, is controlled strictly by the provision and the procedure prescribing such a right. To read into the language of Section 53A that every

direction, order or decision of the Commission would be appealable will amount to unreasonable expansion of the provision, when the language of Section 53A is clear and unambiguous. Section 53B(1) itself is an indicator of the restricted scope of appeals that shall be maintainable before the Tribunal; it provides that the aggrieved party has a right of appeal against 'any direction, decision or order referred to in Section 53A(1)(a).' If the legislature intended to enlarge the scope and make orders, other than those, specified in Section 53A(1)(a), then the language of Section 53B(1) ought to have been quite distinct from the one used by the legislature.

One of the parties before the Commission would, in any case, be aggrieved by an order where the Commission grants or declines to grant extension of time. Thus, every such order passed by the Commission would have to be treated as appealable as per the contention raised by the respondent before us as well as the view taken by the Tribunal. In our view, such orders cannot be held to be appealable within the meaning and language of Section 53A of the Act and also on the principle that they are not orders which determine the rights of the parties. No appeal can lie against such an order. Still the parties are not remediless as, when they prefer an appeal against the final order, they can always take up grounds to challenge the interim orders/directions passed by the Commission in the memorandum of

appeal. Such an approach would be in consonance with the procedural law prescribed in Order XLIII Rule 1A and even other provisions of Code of Civil Procedure.

The above approach will subserve the purpose of the Act in the following manner :

First, expeditious disposal of matters before the Commission and the Tribunal is an apparent legislative intent from the bare reading of the provisions of the Act and more particularly the Regulations framed thereunder. Second, if every direction or recording of an opinion are made appealable then certainly it would amount to abuse of the process of appeal. Besides this, burdening the Tribunal with appeals against non-appealable orders would defeat the object of the Act, as a prolonged litigation may harm the interest of free and fair market and economy. Finally, we see no ambiguity in the language of the provision, but even if, for the sake of argument, we assume that the provision is capable of two interpretations then we must accept the one which will fall in line with the legislative intent rather than the one which defeat the object of the Act.

For these reasons, we have no hesitation in holding that no appeal will lie from any decision, order or direction of the Commission which is not made specifically appealable under Section 53A(1)(a) of the Act. Thus,

the appeal preferred by SAIL ought to have been dismissed by the Tribunal as not maintainable.

Submissions made and findings in relation to Point Nos.2 & 5

The issue of notice and hearing are squarely covered under the ambit of the principles of natural justice. Thus, it will not be inappropriate to discuss these issues commonly under the same head. The principle of *audi alteram partem,* as commonly understood, means 'hear the other side or hear both sides before a decision is arrived at'. It is founded on the rule that no one should be condemned or deprived of his right even in quasi judicial proceedings unless he has been granted liberty of being heard.

In cases of Cooper v. Wands Worth Board of Works [(1863), 14 C.B. (N.S.) 180] and Errington v. Minister of Health, [(1935) 1 KB 249], the Courts in the United Kingdom had enunciated this principle in the early times. This principle was adopted under various legal systems including India and was applied with some limitations even to the field of administrative law. However, with the development of law, this doctrine was expanded in its application and the Courts specifically included in its purview, the right to notice and requirement of reasoned orders, upon due application of mind in addition to the right of hearing. These principles have now been consistently followed in judicial dictum of

Courts in India and are largely understood as integral part of principles of natural justice. In other words, it is expected of a tribunal or any quasi judicial body to ensure compliance of these principles before any order adverse to the interest of the party can be passed. However, the exclusion of the principles of natural justice is also an equally known concept and the legislature has the competence to enact laws which specifically exclude the application of principles of natural justice in larger public interest and for valid reasons. Generally, we can classify compliance or otherwise, of these principles mainly under three categories. First, where application of principles of natural justice is excluded by specific legislation; second, where the law contemplates strict compliance to the provisions of principles of natural justice and default in compliance thereto can result in vitiating not only the orders but even the proceedings taken against the delinquent; and third, where the law requires compliance to these principles of natural justice, but an irresistible conclusion is drawn by the competent court or forum that no prejudice has been caused to the delinquent and the non-compliance is with regard to an action of directory nature. The cases may fall in any of these categories and therefore, the Court has to examine the facts of each case in light of the Act or the Rules and Regulations in force in relation to such a case. It is not only difficult but also not advisable to spell out any straight jacket formula which can be applied universally to all cases without variation.

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

At the very outset, we must make it clear that we are considering the application of these principles only in light of the provisions of Section 26(1) and the finding recorded by the Tribunal in this regard. The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into the motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a *prima facie* case for issuance of direction to the Director General to conduct an investigation. This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received by it. Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or any other person is required to be issued at this stage. In contra-distinction to this, when the Commission receives the report from the Director General and if it has not already

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

Some of the Regulations also throw light as to when and how notice is required to be served upon the parties including the affected party. Regulation 14(7) states the powers and functions, which are vested with the Secretary of the Commission to ensure timely and efficient disposal of the matter and for achieving the objectives of the Act. Under

Regulation 14(7)(f) the Secretary of the Commission is required to serve notice of the date of ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a *prima facie* case and to convey the directions of the Commission for investigation, or to issue notice of an inquiry after receipt and consideration of the report of the Director General. In other words, this provision talks of issuing a notice for holding an ordinary meeting of the Commission. This notice is intended to be issued only to the members of the Commission who constitute 'preliminary conference' as they alone have to decide about the existence of a *prima facie* case. Then, it has to convey the direction of the Commission to the Director General. After the receipt of the report of the Director General, it has to issue notice to the parties concerned.

Regulation 17(2) empowers the Commission to invite the information provider and ***such other person***, as is necessary, for the preliminary conference to aid in formation of a *prima facie* opinion, but this power to invite cannot be equated with requirement of statutory notice or hearing. Regulation 17(2), read in conjunction with other provisions of the Act and the Regulations, clearly demonstrates that this provision contemplates to invite the parties for collecting such information, as the Commission may feel necessary, for formation of an opinion by the preliminary conference. Thereafter, an inquiry commences in terms of Regulation

18(2) when the Commission directs the Director General to make the investigation, as desired.

Regulation 21(8) also indicates that there is an obligation upon the Commission to consider the objections or suggestions from the Central Government or the State Government or the Statutory Authority or the parties concerned and then Secretary is required to give a notice to fix the meeting of the Commission, if it is of the opinion that further inquiry is called for. In that provision notice is contemplated not only to the respective Governments but even to the parties concerned.

The notices are to be served in terms of Regulation 22 which specifies the mode of service of summons upon the concerned persons and the manner in which such service should be effected. The expression '***such other person',*** obviously, would include all persons, such as experts, as stated in Regulation 52 of the Regulations. There is no scope for the Court to arrive at the conclusion that such other person would exclude anybody including the informant or the affected parties, summoning of which or notice to whom, is considered to be appropriate by the Commission.

With some significance, we may also notice the provision of Regulation 33(4) of the Regulations, which requires that on being satisfied that the reference is complete, the Secretary shall place it

during an ordinary meeting of the Commission and seek necessary instructions regarding the parties to whom the notice of the meeting has to be issued. This provision read with Sections 26(1) and 26(5) shows that the Commission is expected to apply its mind as to whom the notice should be sent before the Secretary of the Commission can send notice to the parties concerned. In other words, issuance of notice is not an automatic or obvious consequence, but it is only upon application of mind by the authorities concerned that notice is expected to be issued.

Regulation 48, which deals with the procedure for imposition of penalty, requires under Sub-Regulation (2) that show cause notice is to be issued to any person or enterprise or a party to the proceedings, as the case may be, under Sub-Regulation (1), giving him not less than 15 days time to explain the conduct and even grant an oral hearing, then alone to pass an appropriate order imposing penalty or otherwise.

Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than

25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

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.

It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that non-compliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on

larger public interest and is for compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of compliance to the principles of natural justice in light of the above noticed principles. In the case of Tulsiram Patel (supra), this Court took the view that *audi alteram partem* rule can be excluded where a right to a prior notice and an opportunity of being heard, before an order is passed, would obstruct the taking of prompt action or where the nature of the action to be taken, its object and purpose as well as the scheme of the relevant statutory provisions warrant its exclusion. This was followed with approval and also greatly expanded in the case of Delhi Transport Corporation vs. Delhi Transport Corporation Mazdoor Congress [(1991) Supp1 SCC 600], wherein the Court held that rule of *audi alteram partem* can be excluded, where having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions, fairness in action does not demand its application and even warrants its exclusion. In the case of Union of India v. W.N. Chadha [(1993) Supp 4 SCC 260], wherein the Court was primarily concerned with Section 166(9) of the Criminal Procedure Code and the application of principles of natural justice in the domain of administrative law and while deciding whether a person was entitled to the right of hearing, held as under:-

"88. The principle of law that could be deduced from the above decisions is that it is no doubt true that the fact that a decision, whether a prima facie case has or has not been made out, is not by itself determinative of the exclusion of hearing, but the consideration that the decision was purely an administrative one and a full-fledged inquiry follows is a relevant — and indeed a significant — factor in deciding whether at that stage there ought to be hearing which the statute did not expressly grant.

89. Applying the above principle, it may be held that when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full inquiry in case of filing a report under Section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of *audi alteram partem* superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether *audi alteram partem* is implicit, but whether the occasion for its attraction exists at all."

The exclusion of principles of natural justice by specific legislative provision is not unknown to law. Such exclusion would either be specifically provided or would have to be imperatively inferred from the language of the provision. There may be cases where post decisional hearing is contemplated. Still there may be cases where 'due process' is specified by offering a full hearing before the final order is made. Of course, such legislation may be struck down as offending due process if no safeguard is provided against arbitrary action. It is an equally settled principle that in cases of urgency, a post-decisional hearing would satisfy the principles of natural justice. Reference can be made to the cases of Maneka Gandhi v. Union of India [(1978) 1 SCC 48] and State of Punjab v. Gurdayal [AIR 1980 SC 319]. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an

enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass *ex parte ad interim* injunction orders immediately in terms of Section 33 of the Act, while granting post decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice.

It is true that in administrative action, which entails civil consequences for a person, the principles of natural justice should be adhered to. In the case of Raj Restaurant and Anr. v. Municipal Corporation of Delhi, [(1982) 3 SCC 338], the Supreme Court held as under:

"5. Where, in order to carry on business a licence is required, obviously refusal to give licence or cancellation or revocation of licence would be visited with both civil and pecuniary consequences and as the business cannot be carried on without the licence it would also affect the livelihood of the person. In such a situation before either refusing to renew the licence or cancelling or revoking the same, the minimum principle of natural justice of notice and opportunity to represent one's case is a must. It is not disputed that no such opportunity was given before taking the decision not to renew the licence though it is admitted that the for the reasons herein before set out the licence was not renewed such a decision in violation of the principle of natural justice would b void. Now, it is true that no specific order is made setting out the reason for refusal to renew the licence. But the action taken of sealing the premises for carrying on the business without a licence clearly implies that there was refusal to renew the licence and the reasons are now disclosed. And the action disclosing the decision being in violation of the principle of natural justice, deserves to be quashed."

Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. Reference can be made to the judgment of this Court in the case of Canara Bank vs. Debasis Das [(2003) 4 SCC 557]. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself. 'Natural justice' is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well defined principles enunciated by the Courts. Every quasi judicial order would require the concerned authority to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness.

Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of

the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami vs. Union of India [(1992) 4 SCC 605] explained the expression 'inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but *sui generis.* Referring to the investigation under criminal jurisprudence as well as scope of inquiry under service jurisprudence, the Court held as under:

"61. The problem could be broached through a different perspective as well. In normal parlance, in a criminal case, investigation connotes discovery and collection of evidence before charge-sheet is filed and based thereon definite charges are framed. Inquiry by a Magistrate is stopped when the trial begins. The trial is a culminating process to convict or acquit an accused. In Service Jurisprudence, departmental inquiry against a delinquent employee, bears similar insignia to impose penalty. At the investigation stage the accused or the charged officer has no say in the matter nor is he entitled to any opportunity. The disciplinary authority or inquiry officer, if appointed, on finding that the evidence discloses prima facie ground to proceed against the delinquent officer, the inquiry would be conducted. The criminal court frames charges after supplying the record of investigation relied on. Equally, the disciplinary authority/inquiry officer would frame definite charge or charges and would communicate the same together with a statement of the facts in support thereof sought to be relied on and would call upon the delinquent officer to submit his explanation or written statement of defence etc. At the trial/inquiry the person is entitled to reasonable opportunity to defend himself……."

The exceptions to the doctrine of *audi alteram partem* are not unknown either to civil or criminal jurisprudence in our country where under the

Code of Civil Procedure *ex-parte* injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries. Reference in this regard can be made to the case of Azienda Colori Nazionali - ACNA S.P.A. v Commission of the European Communities, [(1972) ECR 0933], where the argument was raised that the Commission had infringed the administrative procedure laid down in Regulation No. 17/62 of the European Council Regulation. In that case the Commission of the European Communities sent the notice of the objections to the applicant at the time of informing the applicant about the decision to initiate procedure to establish infringement of rules on competition. The European Court of Justice while holding that sending notification of the above mentioned decision simultaneously with the notice of objections cannot affect the rights of the defence, stated as under:-

"10. Neither the provisions in force nor the general principles of law require notice of the Decision to initiate the procedure to establish an infringement to be given prior to notification of the objections adopted against the interested parties in the context of such proceedings.

11. It is the notice of objections alone and not the Decision to commence

proceedings which is the measure stating the final attitude of the Commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced."

The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of *audi alteram partem* is not called for. Formation of a *prima facie* opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other

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

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

The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in

any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more *res integra* and has been settled by a recent judgment of this Court in the case of Assistant Commissioner, C.T.D.W.C. v. M/s Shukla & Brothers [JT 2010 (4) SC 35], wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies. The Court examined various judgments of this Court in relation to its application to administrative law and held as under:

"10. The Supreme Court in the case of S.N. Mukherjee v. Union of India [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the Courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:-

"the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

xxx xxx xxx xxx

12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential

feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment…

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

In this very judgment, the Court while referring to other decisions of the Court held that it is essential that administrative authorities and tribunals should accord fair and proper hearing to the affected persons and record explicit reasons in support of the order made by them. Even in cases of supersession, it was held in Gurdial Singh Fijji v. State of Punjab [(1979) 2 SCC 368] that reasons for supersession should be essentially provided in the order of the authority. Reasons are the links between the materials on which certain conclusions are based and the actual

conclusions. By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and therefore, proper reasoning is foundation of a just and fair decision. Reference can be made to Alexander Machinery (Dudley) Ltd. v. Crabtree [1974 ICR 120] in this regard.

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

formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as 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.

Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act.

Submissions made and findings in relation to Point No.3

The concept of necessary and proper parties is an accepted norm of civil law and its principles can safely be applied to the proceedings before the Tribunal to a limited extent. Even some provisions of the Act and the Regulations would guide the discussion in this behalf. In terms of Section 7(2) of the Act the Commission is a body corporate having perpetual succession and a common seal with power to sue and be sued in its name. In terms of Section 53A, the Tribunal is constituted to hear and dispose of appeals against any direction issued, decision made or order passed under the provisions stated therein. The Tribunal is also vested with the power of determining the claim of compensation that may arise from the findings recorded by the Commission. As already noticed, the procedure for entertaining the appeals is specified under Section 53B of the Act.

The right to prefer an appeal is available to the Central Government, State Government or a local authority or enterprise or any person aggrieved by any direction, decision or order referred to in clause (a) of Section 53A (ought to be printed as 53A(1)(a)). The appeal is to be filed within the period specified and Section 53B(3) further requires that the Tribunal, after giving the parties to appeal an opportunity of being heard, to pass such orders, as it thinks fit, and send a copy of such order to the Commission and the parties to the appeal. Section 53S contemplates that before the Tribunal a person may either appear 'in person' or

authorize one or more chartered accountants or company secretaries, cost accountants or legal practitioners or any of its officers to present its case before the Tribunal. However, the Commission's right to legal representation in any appeal before the Tribunal has been specifically mentioned under Section 53S(3). It provides that the Commission may authorize one or more of chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers before the Tribunal.

Section 53T grants a right in specific terms to the Commission to prefer an appeal before the Supreme Court within 60 days from the date of communication of the decision or order of the Tribunal to them.

The expression 'any person' appearing in Section 53B has to be construed liberally as the provision first mentions specific government bodies then local authorities and enterprises, which term, in any case, is of generic nature and then lastly mentions 'any person'. Obviously, it is intended that expanded meaning be given to the term 'persons', i.e., persons or bodies who are entitled to appeal. The right of hearing is also available to the parties to appeal. The above stated provisions clearly indicate that the Commission a body corporate, is expected to be party in the proceedings before the Tribunal as it has a legal right of representation. Absence of the Commission before the Tribunal will deprive it of presenting its views in the proceedings. Thus, it may not be

able to effectively exercise its right to appeal in terms of Section 53 of the Act. Furthermore, Regulations 14(4) and 51 support the view that the Commission can be a necessary or a proper party in the proceedings before the Tribunal. The Commission, in terms of Section 19 read with Section 26 of the Act, is entitled to commence proceedings *suo moto* and adopt its own procedure for completion of such proceedings. Thus, the principle of fairness would demand that such party should be heard by the Tribunal before any orders adverse to it are passed in such cases. The Tribunal has taken this view and we have no hesitation in accepting that in cases where proceedings initiated *suo moto* by the Commission, the Commission is a necessary party. However, we are also of the view that in other cases the Commission would be a proper party. It would not only help in expeditious disposal, but the Commission, as an expert body, in any case, is entitled to participate in its proceedings in terms of Regulation 51. Thus, the assistance rendered by the Commission to the Tribunal could be useful in complete and effective adjudication of the issue before it.

Regulations 24 to 26 define powers of the Commission to join or substitute parties in proceedings, permit person or enterprises to take part in proceedings and strike out unnecessary parties. Out of these provisions regulation 25(1) has a distinct feature as it lays down the criteria which should be considered by the Commission while applying its

mind in regard to application of a party for impleadment. The person or enterprise sought to be impleaded should have *substantial interest* in the outcome of the proceedings and/or that it is necessary in the public interest to allow such an application. In other words, substantial interest in proceedings and serving of larger public interest, amongst others, are the criteria which could be considered by the Commission. This principle would obviously stand extended for exercise of jurisdiction by the Tribunal. In our view, the Commission would have substantial interest in the outcome of the proceedings in most of the cases as not only would the judgments of the Tribunal be binding on it, but they would also provide guidelines for determining various matters of larger public interest and affect the economic policy of the country.

In light of the above statutory provisions, let us examine the scheme under the general principles as well. The provisions of Order I Rule 10 of Code of Civil Procedure control the parties to the proceedings and their addition or deletion thereof. Wide discretion is vested in the Court/appropriate forum in regard to impleadment of necessary and proper parties to the proceedings. Of course, such discretion has to be exercised in accordance with provisions of law and the principles enunciated by various judicial pronouncements. The consideration before the Court, while determining such a question, is whether the said party is a necessary or a proper party and its presence before the Court

is essential for complete and effective adjudication of the subject matter, i*nter alia*, it should also be kept in mind that multiplicity of litigation is to be avoided and that the necessary or proper party should not be left out from the proceedings, particularly, before the tribunal or the forum.

These principles were stated by this Court in Udit Narain Singh Malpaharia v. Addl.Member, Board of Revenue, Bihar, [AIR 1963 SC 786], wherein this Court has held as under:--

"7. To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

Another way to examine the matter is that if the proceedings cannot be concluded completely and effectively in absence of a party, that party should be normally impleaded as a party before the Court, of course, subject to other restrictions in law. While non-joinder of necessary parties may prove fatal, the non-joinder of proper parties may not be fatal to the proceedings, but would certainly adversely affect interest of justice and complete adjudication of the proceedings before the appropriate forum.

As a normal rule, the applicant/informant is *dominus litis* and has the right to control the proceedings, but at the same time, such applicant is

required to notify all other parties against whom the applicant wishes to proceed. Even if an applicant fails to join a party the Court has the discretion to direct joining of such party as the question of impleadment has to be decided on the touchstone of Order I Rule 10 which provides that a necessary or proper party may be added. [Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay [(1992) 2 SCC 524].

In the proceedings, which are initiated by the Commission *suo moto*, it shall be *dominus litis* of such proceedings while in other cases, the Commission being a regulatory body would be a proper party discharging inquisitorial, regulatory as well as adjudicatory functions and its presence before the Tribunal, particularly, in light of the above stated provisions, would be proper. The purpose is always to achieve complete, expeditious and effective adjudication. This Court in the case of Brahm Dutt v. Union of India [(2005) 2 SCC 431], while considering the constitutional validity of Section 8 of the Act observed that the Commission is an expert body which had been created in consonance with international practice. The Court observed that it might be appropriate if two bodies are created for performing two kinds of functions, one, advisory and regulatory and other adjudicatory. Though the Tribunal has been constituted by the Competition (Amendment) Act, 2007, the Commission continues to perform both the functions stated by

this Court in that case. Cumulative effect of the above reasoning is that the Commission would be a necessary and/or a proper party in the proceedings before the Tribunal.

Submissions made and findings in relation to Point No.4

Under this issue we have to discuss the ambit and scope of the powers vested in the Commission under Section 33 of the Act. In order to objectively analyze the content of the submissions made before us, it will be appropriate to refer to the provisions of the said Section, which read as under:

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

A bare reading of the above provision shows that the most significant expression used by the legislature in this provision is 'during inquiry'. 'During inquiry', if the Commission is satisfied that an act in contravention of the stated provisions has been committed, continues to be committed or is about to be committed, it may temporarily restrain any party 'without giving notice to such party', where it deems necessary. The first and the foremost question that falls for consideration is, what is 'inquiry'? The word 'inquiry' has not been

defined in the Act, however, Regulation 18(2) explains what is 'inquiry'. 'Inquiry' shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the Director General. Once the Regulations have explained 'inquiry' it will not be permissible to give meaning to this expression contrary to the statutory explanation. Inquiry and investigation are quite distinguishable, as is clear from various provisions of the Act as well as the scheme framed thereunder. The Director General is expected to conduct an investigation ***only*** in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation *suo moto*. Then the Commission has to consider such report as well as consider the objections and submissions made by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested under Section 33 of the Act. That is the stage when jurisdiction of the Commission can be

invoked by a party for passing of an *ex parte* order. Even at that stage, the Commission is required to record a satisfaction that there has been contravention of the provisions mentioned under Section 33 and that such contravention has been committed, continues to be committed or is about to be committed. This satisfaction has to be understood differently from what is required while expressing a *prima facie* view in terms of Section 26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. Prior to any direction, it could be a general examination or enquiry of the information/reference received by the Commission, but after passing the direction the inquiry is more definite in its scope and may be directed against a party. Once such satisfaction is recorded, the Commission is vested with the power and the informant is entitled to claim *ex parte* injunction. The legislature has intentionally used the words not only '*ex parte'* but also 'without notice to such party'. Again for that purpose, it has to apply its mind, whether or not it is necessary to give such a notice. The intent of the rule is to grant *ex parte* injunction, but it is more desirable that upon passing an order, as contemplated under Section 33, it must give a short notice to the other side to appear and to file objections to the continuation or otherwise of such an order. Regulation 31(2) of the Regulations clearly mandates such a procedure. Wherever the Commission has passed interim order, it shall hear the parties

against whom such an order has been made, thereafter, ***as soon as possible***. The expression '***as soon as possible'*** appearing in Regulation 31(2) has some significance and it will be obligatory upon the fora dealing with the matters to ensure compliance to this legislative mandate. Restraint orders may be passed in exercise of its jurisdiction in terms of Section 33 but it must be kept in mind that the *ex parte* restraint orders can have far reaching consequences and, therefore, it will be desirable to pass such order in exceptional circumstances and deal with these matters most expeditiously.

During an inquiry and where the Commission is satisfied that the act has been committed and continues to be committed or is about to be committed, in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders, without giving notice to such party where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, *inter alia,* should : (a) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is

necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the *lis* would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.

The power under Section 33 of the Act, to pass a temporary restraint order, can only be exercised by the Commission when it has formed *prima facie* opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations.

It will be useful to refer to the judgment of this Court in the case of Morgan Stanley Mutual Funds v. Kartick Das [(1994) 4 SCC 225], wherein this Court was concerned with Consumer Protection Act 1986, Companies Act 1956 and Securities and Exchange Board of India (Mutual Fund) Regulations, 1993. As it appears from the contents of the judgment, there is no provision for passing *ex-parte* interim orders under the Consumer Protection Act, 1986 but the Court nevertheless dealt with requirements for the grant of an *ad interim* injunction, keeping in mind the expanding nature of the corporate sector as well as the increase in vexatious litigation. The Court spelt out the following principles:

"36. As a principle, *ex parte* injunction could be granted only under exceptional circumstances. The factors which should weigh with the

court in the grant of *ex parte* injunction are—

(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal or *ex parte* injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant *ex parte* injunction;

(e) the court would expect a party applying for *ex parte* injunction to show utmost good faith in making the application;

(f) even if granted, the *ex parte* injunction would be for a limited period of time.

(g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court."

In the case in hand, the provisions of Section 33 are specific and certain criteria have been specified therein, which need to be satisfied by the Commission, before it passes an *ex parte ad interim* order. These three ingredients we have already spelt out above and at the cost of repetition we may notice that there has to be application of mind of higher degree and definite reasons having nexus to the necessity for passing such an order need be stated. Further, it is required that the case of the informant-applicant should also be stronger than a mere *prima facie* case. Once these ingredients are satisfied and where the Commission deems it necessary, it can pass such an order without giving notice to the other party. The scope of this power is limited and is expected to be

exercised in appropriate circumstances. These provisions can hardly be invoked in each and every case except in a reasoned manner. Wherever, the applicant is able to satisfy the Commission that from the information received and the documents in support thereof, or even from the report submitted by the Director General, a strong case is made out of contravention of the specified provisions relating to anti-competitive agreement or an abuse of dominant position and it is in the interest of free market and trade that injunctive orders are called for, the Commission, in its discretion, may pass such order *ex parte* or even after issuing notice to the other side.

For these reasons, we may conclude that the Commission can pass *ex parte ad interim* restraint orders in terms of Section 33, only after having applied its mind as to the existence of a *prima facie* case and issue direction to the Director General for conducting an investigation in terms of Section 26(1) of the Act. It has the power to pass *ad interim ex parte* injunction orders, but only upon recording its due satisfaction as well as its view that the Commission deemed it necessary not to give a notice to the other side. In all cases where *ad interim ex parte* injunction is issued, the Commission must ensure that it makes the notice returnable within a very short duration so that there is no abuse of the process of law and the very purpose of the Act is not defeated.

Submissions made and findings in relation to Point No.6

In light of the above discussion, the next question that we are required to consider is, whether the Court should issue certain directions while keeping in mind the scheme of the Act, legislative intent and the object sought to be achieved by enforcement of these provisions. We have already noticed that the principal objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalize the Indian Economy to bring it at par with the best of the economies in this era of globalization would be jeopardised if time bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53B(5) and 53T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the

legislative intent to ensure time bound disposal of such matters.

The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the Legislature upon the Commission under Sections 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification. These powers of the Commission, read with provisions mentioned earlier, certainly require issuance of certain directions in order to achieve the object of the Act and to ensure its proper implementation. The power to restructure the agreement can be brought into service and matters dealt with expeditiously, rather than passing of *ad interim* orders in relation to such agreements, which may continue for indefinite periods. To avoid this mischief, it is necessary that wherever the Commission exercises its jurisdiction to pass *ad interim* restraint orders, it must do so by issuing notices for a short date and deal with such applications expeditiously. Order XXXIX, Rules 3 and 3A of the Code of Civil Procedure also have similar provisions. Certain procedural

directions will help in avoiding prejudicial consequences, against any of the parties to the proceedings and the possibility of abuse of jurisdiction by the parties can be eliminated by proper exercise of discretion and for valid reasons. Courts have been issuing directions in appropriate cases and wherever the situation has demanded so. Administration of justice does not depend on individuals, but it has to be a collective effort at all levels of the judicial hierarchy, i.e. the hierarchy of the Courts or the fora before whom the matters are *sub-judice*, so that the persons awaiting justice can receive the same in a most expeditious and effective manner. The approach of the Commission even in its procedural matters, therefore, should be macro level rather than micro level. It must deal with all such references or applications expeditiously in accordance with law and by giving appropriate reasons. Thus, we find it necessary to issue some directions which shall remain in force till appropriate regulations in that regard are framed by the competent authority.

FINDINGS ON MERITS:

Having examined various legal issues arising in the present case, we will now revert back to the facts of the case in hand. It is clear that Jindal Steel, the informant, had made a reference to the Commission. The Commission had initiated proceedings and asked for further information from the informant and thereafter, had even issued notice calling upon SAIL to submit its views and comments. From the record it is clear that

parties had appeared before the Commission. The SAIL had failed to file the reply and prayed for extension of time, which was declined by the Commission in its order dated 8th December, 2009. The Director General was asked to conduct the investigation, but liberty was granted to SAIL to file its views and comments during the pendency of the investigation. Since further time was declined, SAIL preferred an appeal before the Tribunal, which resulted in passing of the order impugned in the present appeal. We are unable to accede to the submission that the Commission is not a necessary or proper party before the Tribunal. On the contrary, the Regulations and even the interest of justice demands that for complete and effective adjudication the Commission be added as a necessary and proper party in the proceedings before the Tribunal. The direction issued by the Commission was set aside by the Tribunal and further time was granted to SAIL to file its further reply in addition to what has been filed on 15th December, 2009 and the Tribunal then directed the Commission to consider all such material and record a fresh decision. We have held that there is no statutory obligation on the Commission to issue notice for grant of hearing to the parties at the stage of forming an opinion under Section 26(1) of the Act unless, upon due application of mind, it finds it necessary to invite parties or experts to render assistance to and produce documents before the Commission at that stage. We are also unable to agree with the view expressed by the Tribunal that the inquiry commences as soon as the aspects highlighted in sub-section (1) to Section 19 are fulfilled and brought to the notice of

the Commission. It is obvious that Regulation 18(2) was not brought to the notice of the Tribunal which resulted in error of law, particularly, when examined in the light of other provisions and scheme of the Act as well. The Commission, vide its order dated 8th December, 2009, had, for reasons stated therein, declined the extension of time to SAIL. This order of the Commission cannot be stated to be without jurisdiction or suffering from any apparent error of law. However, the Tribunal, in exercise of its judicial discretion, had interfered with the said order and granted further time to SAIL unconditionally. We do not propose to interfere in the exercise of the discretion by the Tribunal except to the extent of imposition of cost. We, therefore direct that SAIL should pay cost of Rs. 25,000/- to the informant for seeking extension of time. The cost shall be conditional, whereafter, the additional reply filed by SAIL would be taken on record and the Commission shall apply its mind to form a *prima facie* view in terms of Section 26(1) of the Act, if the report of the Director General has not been received as yet. In the event the report prepared by the Director General during the period 8th December, 2009 to 11th January, 2010 has been received, the Commission shall proceed in accordance with the provisions of the Act and the principles of law enunciated in this judgment giving proper notice to the informant as well as to SAIL and pass appropriate orders.

CONCLUSION AND DIRECTIONS

Having discernibly stated our conclusions/ answers in the earlier part of the judgment, we are of the considered opinion that this is a fit case where this Court should also issue certain directions in the larger interest of justice administration.

The scheme of the Act and the Regulations framed thereunder clearly demonstrate the legislative intent that the investigations and inquiries under the provisions of the Act should be concluded as expeditiously as possible. The various provisions and the Regulations, particularly Regulations 15 and 16, direct conclusion of the investigation/inquiry or proceeding within a "reasonable time". The concept of "reasonable time" thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade. In this backdrop, we are of the considered view that the following directions need to be issued:

A) Regulation 16 prescribes limitation of 15 days for the Commission to hold its first ordinary meeting to consider whether *prima facie* case exists or not and in cases of alleged anti-competitive agreements and/or abuse of dominant position, the opinion on existence of *prima facie* case has to be formed within 60 days. Though the time period for such acts of the Commission has been

specified, still it is expected of the Commission to hold its meetings and record its opinion about existence or otherwise of a *prima facie* case within a period much shorter than the stated period.

B) All proceedings, including investigation and inquiry should be completed by the Commission/Director General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.

C) Wherever during the course of inquiry the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days.

D) The Director General in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can proceed any further in absence of the report by the Director General in terms of Section 26(2) of the Act. The reports by the Director General should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of Section

26(1) of the Act.

E) The Commission as well as the Director General shall maintain complete 'confidentiality' as envisaged under Section 57 of the Act and Regulation 35 of the Regulations. Wherever the 'confidentiality' is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in terms of the provisions of the Act and the Regulations in force.

In our considered view the scheme and essence of the Act and the Regulations are clearly suggestive of speedy and expeditious disposal of the matters. Thus, it will be desirable that the Competent Authority frames Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission. Till such Regulations are framed, the period specified by us *supra* shall remain in force and we expect all the concerned authorities to adhere to the period specified.

Resultantly, this appeal is partially allowed. The order dated 15th February, 2010 passed by the Tribunal is modified to the above extent. The Commission shall proceed with the case in accordance with law and the principles enunciated *supra*.

In the circumstances there will be no order as to costs.

…….....CJI
[S.H. KAPADIA]

…….....J.
[K.S. RADHAKRISHNAN]

….
…….....J.
[SWATANTER KUMAR]

New Delhi
September 9, 2010.