NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

COMPETITION APPEAL (AT) NO.13 OF 2020
&
I.A. NO. 1121/2021

(Arising out of order dated 16.03.2020 passed by Competition Commission of India in Case No.62 of 2016 titled as XYZ v. Association of Man Made Fibre Industry of India, Grasim Industries Ltd & Ors.)

In the matter of:

Grasim Industries Ltd,
Registered Office: Birlagram, Nagda-456331,
District. Ujjain (MP), India. **.....Appellant**

Versus

1. **Competition Commission of India,**
   9th floor, Office Block-I,
   Kidwai Nagar (East),
   Opposite Ring Road,
   New Delhi-110023.

2. **Textile Consumer Foundation,**
   Flat No.10, D Wing, 1st Floor,
   Tapowan Complex, Jai Prakash Nagar,
   PO Khamla, Nagpur 440025. **.....Respondents**

Present:

For Appellant : Mr. C Aryama Sundaram, Sr. Advocates with Nisha Kaur Uberoi, Mr. Sarthak Ranade, Ms. Mehar Singh Dang, Ms. Shivangi Chawla, Mr. Ishan Arora, Advocates.

For Respondents : Mr. Samar Bansal, Mr. Manu Chaturvedi, Mr. Madhav Tripathi, Mr. Vedant Kapur, Advocates for CCI.
Mr. M.M Sharma, Mr. Ankit Singh Rajput, Advocates for R-2.

J U D G M E N T
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

This appeal arises against the order dated 16th March, 2020 passed by the Competition Commission of India in Case No.62 of 2016 inter alia holding

Appellant guilty of contravention of provisions engrafted under Section 4(2)(a)(ii), 4(2)(d) read with Section 4(1) of the Competition Act, with an amount of Rs.*301.61* Crore(s) imposed as penalty. The Appellant has assailed the findings qua abuse of dominant position attributed to Appellant.

2. Another Competition Appeal (AT) No.11 of 2020 has been filed by the Textile Consumers Foundation against the same impugned order on the ground of inadequate penalty imposed on Grasim Industries.

3. It is submitted the following findings and directions have been given against the appellant in the impugned order *viz.*

i) the relevant market is the Market for supply of Viscose Staple Fibre (VSF) to spinners in India in which market the appellant enjoys the dominant position;

ii) the appellant charges unfair and discriminatory price for sale of VSF to its customers in contravention of Section *4(2)(a)(ii)* read with Section *4(1)* of the Act;

iii) the appellant has imposed supplementary obligations in contravention of Section *4(2)(d)*, read with Section *4(1)* of the Act;

iv) the appellant must publish its discount policy which must be transparent and non-discriminatory to all the market participants, and to make it easily and publicly accessible;

v) appellant must not impose any end-use restriction on the buyers, who should be free to trade in VSF or use the same for any purpose including spinning.

4. Based on the aforesaid findings, the Commission has imposed a penalty of Rs.*301.61* crores upon the appellant. It is argued that Commission's direction in *(iv)* and *(v)* are intrusive, unreasonable and seek to impede the appellant's legitimate entitlement to conduct its trade and business in a commercially reasonable manner and further these directions are contrary to the explicit findings contained in the investigation report of the Director General.

Arguments of the Appellant:

5. It is submitted if the Commission was to deviate from the DG's report, the Commission ought to have given an opportunity to the appellant to show cause, as to why such deviation is necessary. The show cause notice should have set out the grounds on which the Commission would seek to deviate from the DG's report.

5.1 In this regard Appellant urges two facts as important:

i) Alleged violation of the Act in relation to the alleged restriction on traders: The DG's report has explicitly observed that the Appellant has no obligation to keep the traders in business and it cannot be faulted for not doing so and did not find any violation against the appellant in relation to the non-supply to traders by the Appellant in the alleged market for supply of VSF; and

ii) Alleged violation of the Act in relation to the pricing discount policy: It is argued that the DG's report did not hold the appellant to be violative of the Act in relation to the alleged non-disclosure of its pricing/discount policy and noted that *not disclosing*

pricing/ discounting policy by appellant does not appear in itself to be in contravention of the Act.

5.2 The Learned counsel for the appellant at this stage, restricted his arguments to the fact that if the Commission was to upset these *two findings of the DG then it ought to have given an opportunity to the appellant to show cause*. It is submitted that hence the said order of the Commission needs to be set aside only on this ground of non-adherence to principles of natural justice.

5.3 The learned counsel for the appellant referred to following paragraphs (page 517 to 519 of appeal paper book) of the investigation report of Director General:-

> *"(viii)* ***Refusing to sell to traders, thus allowing competition in the market***
>
> *From the submissions of OP2 it is observed that it does not sell VSF to traders or intermediaries. However, traders are free to import VSF for onward supply to spinners. There are instances of such trade in the market. Therefore, nothing stops the potential traders from importing VSF and creating a secondary market, thus posing competition to OP2. But they may run the risk of losses, if OP2 reduces prices. The traders stand no chance in price competition with OP2. Secondly, VSF has to be stored in controlled condition thereby increasing the carrying cost. Absence of traders in VSF market is not a creation of OP2 alone. OP2 has no obligation to keep the traders in business and it cannot be faulted for not doing so. Thus, it does not appear to fall in the realm of Section 4 of the Act*
>
> *(xii)* ***Not disclosing pricing and discounting policy****.*
>
> *Not disclosing pricing / discounting policy by OP2 does not appear in itself to be contravention of the Act. It may lead to unfair and discriminatory pricing to customers and this aspect has already been examined.*

5.4 Thereafter, the Ld. Sr. Counsel referred to the following operative para of the impugned judgement:-

"ORDER

124. In view of the above, Commission is of the opinion that OP-2 has abused its dominant position in the relevant market of 'the market for supply of VSF to spinners in India' by charging discriminatory prices to its customers besides imposing supplementary obligations upon them in violation of the provisions of Sections 4(2)(a)(ii), 4(2)(d) read with 4(1) of the Act, as detailed in this order. The Commission directs OP-2 to cease and desist from indulging in such practices which have been found to be in contravention of the provisions of the Act. Accordingly, OP-2 is directed to refrain from adopting unfair/ discriminatory pricing practices and also refrain from seeking the consumption details of VSF from the buyers. OP-2 is directed to put in place a discount policy which is transparent and non-discriminatory to all the market participants, and to make it easily and publically accessible/ available. It is made clear that OP-2 shall not place any end-use restriction on the buyers of VSF and it would be open to them to use the same for spinning or trading or any other purpose, as permissible under law."

5.5 The Ld. Sr. Counsel for the Appellant cited the following decision in his support which are subsequently discussed in details:

(i) *BCCI Vs CCI 2015 SCC OnLine Comp. AT 238;*

(ii) *Interglobe Aviation Ltd (IndiGoAirlines) Vs CCI, Appeal No.07/2016;* and

(iii) *Balrampur Chini Mills Ltd Vs CCI & Ors, Competition Appeal (AT) No.86/2018.*

- In *BCCI Vs CCI 2015 SCC OnLine Comp. AT 238* wherein the COMPAT held as under:-

  "14. A careful reading of Section 26(1) shows that once the Commission forms an opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be

made into the matter. In terms of Regulation 18 read with Regulation 20, the direction of the Commission is required to be communicated by its Secretary to the Director General along with a copy of the information or reference with all other documents or materials or affidavits or statements which have been filed with the information or reference or at the time of preliminary conference. Section 26(3) requires the Director General to submit a report on its findings within the time specified by the Commission. Such findings must cover each of the allegations contained in the information or reference together with evidence or documents or statements or analysis collected during the investigation. Section 26(4) enjoins the Commission to forward the report of the Director General to the parties concerned. If the investigation is caused to be made based on a reference received from the Central Government or the State Government or the statutory authority, then the report is required to be sent to the appropriate Government or the statutory authority. The object of sending report to the appropriate Government or the statutory authority or the parties concerned is to enable them to submit objections or suggestions qua the findings recorded by the Director General. This exercise has to be undertaken by the Commission even if the Director General finds that there is no contravention of Sections 3 or 4 of the Act. The Commission can close the case if, after considering the objections or suggestions, it agrees with the recommendations of the Director General. If the Commission is not satisfied with the report of the Director General and forms an opinion that further investigation is called for then it can direct the Director General to make such investigation or cause further inquiry into the matter through an authorized officer or itself hold enquiry [Section 26(7) read with Regulation 21(4)]. If the report of the Director General discloses contravention of provisions of the Act and the Commission opines that further inquiry is called for then it shall hold inquiry into such contravention. In such an eventuality, the Commission is required to give notice to the Central Government or the State Government or the statutory authority or the parties concerned [Section 26(8) read with Regulation 21 (8)] and invite their objections or suggestions. Not only this, the Secretary of the Commission is obliged to inform the Director General about the dates fixed for the meetings of the Commission, so as to enable him to appear in person or through an officer. If as a result of the inquiry held under Section 26(7) or 26(8) read with the relevant regulations, the Commission comes to the conclusion that contravention of Section 3 or Section 4 of the

Act is established then it can pass appropriate order under Section 27 including an order for imposing penalty.

15. The exercise required to be undertaken by the Commission under Sections 26 (7) or 26(8) read with the relevant regulations and an order passed under Section 27 which visits the concerned person with civil consequences makes the functions of the Commission adjudicatory/quasi judicial. Therefore, before recording an adverse finding against a person and holding him guilty of violating Section 3 or 4 of the Act, the Commission is obliged to comply with various facets of the principles of natural justice. This necessarily implies that while holding an inquiry under Section 26(7) or Section 26(8) the Commission is required to comply with the rule of audi alteram partem and give an effective opportunity of hearing to the person against whom a finding is likely to be recorded on the issue of contravention of Section 3 or Section 4 of the Act not only to controvert the allegation made against him as also the evidence/material proposed to be used in support of such allegation but also produced evidence to show that he/she/it has not violated any provision of the Act. If the Commission wants to rely upon some information/material, which does not form part of the report of the Director General then such information/material must be disclosed to the person concerned and an effective opportunity has to be given to him to controvert the same. The Commission is also required to pass a speaking order to demonstrate application of mind to the relevant factors/considerations and exclusion of irrelevant and extraneous factors/considerations.

16. The ambit and scope of principles of natural justice has been considered by the Courts across the globe. In India, the High Courts and Supreme Court have invoked these principles in innumerable cases and quashed administrative, quasi judicial or even judicial orders the ground of violation thereof.

……..

24. In her affidavit, Secretary of the Commission has made an attempt to show that there is no difference in the finding/conclusion recorded by the Director General and the Commission on the issue of 'relevant market' and the appellant got full opportunity to show that Organization of Private Professional Cricket League/Events in India constituted the 'relevant market', but she has not disputed that in the order passed under Section 26(1), the Commission had clearly

mentioned that its focus was on the underlying economic activities which are ancillary for the organization of sports events. She has also not disputed that the Director General made investigation keeping in view the allegations contained in the information and the points formulated by the Commission and recorded a finding that the 'relevant market' was underlying activities which are ancillary for organization of cricket in Twenty-20 format with respect to the IPL tournament. A careful scrutiny of the record reveals that while directing its Secretary to forward the report of the Director General to the appellant, the Commission had nowhere indicated that it did not agree with the finding recorded by the Director General on the issue of 'relevant market' and the appellant should show as to why Organization of Private Professional Cricket League/Events in India may not be treated as the 'relevant market'. It is, thus, evident that the appellant did not get any opportunity to contest the proposed determination of the 'relevant market' by the Commission. It is also worth mentioning that the appellant was served with copy of the Director General's report in two installments and was called upon to file its objections/suggestions. Therefore, it was natural for the appellant to file reply only with reference to the findings and the conclusions recorded by the Director General. The Commission was expected to hear the appellant in the context of objections/suggestions filed in the context of the findings recorded by the Director General. If the Commission wanted to differ with the Director General on the issue of 'relevant market' then it should have given notice spelling out its intention to do so and give an opportunity of hearing to the appellant, which was admittedly not done. Therefore, there is no escape from the conclusion that the finding recorded by the Commission that Organization of Private Professional Cricket League/Events in India is the 'relevant market' is vitiated due to violation of the rule of audi alteram partem.

.....

27. In the first place, the Secretary of the Commission has virtually admitted that the Commission relied on the so called information available in public domain without disclosing the same to the appellant. In my view the Commission's failure to disclose the information/material proposed to be used by it for arriving at a finding on the issue of abuse of dominance and give an opportunity to the appellant to explain/controvert the same has not only resulted in violation of the principles of natural justice but also occasioned failure of justice.

…….

36. By relying upon the above noted judgments, I hold that the finding recorded by the Commission on the issue of abuse of dominance is legally unsustainable and is liable to be set-aside because the information downloaded from the net and similar other material do not have any evidentiary value and, in any case, the same could not have been relied upon by the Commission without giving an effective opportunity to the appellant to controvert the same."

- Further, in *Interglobe Aviation Ltd (IndiGoAirlines) Vs CCI, Appeal No.07/2016* the COMPAT held as under:-

"32. We may now revert to these appeals. A careful scrutiny of the record shows that after conducting detailed investigation, the Jt. DG recorded findings/conclusions in respect of the seven issues framed by her and held that the allegation of formation of cartel and violation of Section 3(1) read with Section 3(3)(a) has not been proved against the appellants. The Commission considered the report of the Jt. DG in its meeting held on 19.02.2015 and passed the usual order for supply of copies thereof to the parties to enable them to file their replies/objections. That order does not contain any indication that the Commission had disagreed with the findings and conclusions recorded by the Jt. DG and formed a reason-based opinion that the allegation of formation of cartel and violation of Section 3(1) read with Section 3(3)(a) appears to have been proved against the appellants. The letter/notice dated 23.02.2015 issued by the Secretary of the Commission also did not give any hint to the appellants that the Commission had not agreed with the findings and conclusions recorded by the Jt. DG. Even at the stage of oral hearing, the Commission did not give any indication to the appellants that it was not in agreement with the findings/ conclusions recorded by the Jt. DG called upon them to show cause as to why an affirmative finding may not be recorded on the issue of formation of cartel in the matter of levy of FSC and why they should not be held guilty of having acted in contravention of Section 3(1) read with Section 3(3)(a) of the Act. However, in the final order passed on 17.11.2015, the Commission recorded its disagreement with the Jt. DG and held that the appellants are guilty of forming a cartel and acting in contravention of those provisions and imposed penalty under Section 27.

33. From what has been mentioned in the preceding paragraph, it is clear that till the passing of the impugned order, the Commission had, at no stage of the proceedings held after the receipt of investigation report, given any notice to the appellants indicating/incorporating the reasons for its disagreement with the findings/conclusions recorded by the Jt. DG that the appellants had not formed any cartel or acted in contravention of Section 3(1) and Section 3(3)(a) of the Act and no opportunity was given to them to show that the reasons recorded by the Commission for its disagreement with the findings and conclusion recorded by the Jt. DG were untenable and also show that they had neither formed any cartel nor acted in contravention of the provisions of the Act. In other words, the Commission passed the impugned order without giving an action-oriented notice to the appellants and an effective opportunity to controvert what the Commission had perceived as contrary to Section 3(1) read with Section 3(3)(a) of the Act and this amounts to clear violation of the basics of natural justice, which the Commission was duty bound to comply within view of the mandate of Section 36(1) of the Act.

34. We are further of the view that violation of the principles of natural justice by the Commission has caused serious prejudice to the appellants because they have been condemned without being afforded an opportunity to present their cause against the proposed action and burdened with huge financial liability running into crores of rupees. If the Commission had informed the appellants that it proposes to disagree with the findings and conclusions recorded by the Jt. DG and given them an opportunity to file objections against the reasons for disagreement and also given them chance of oral hearing, then the latter may have put forwarded various arguments to persuade/ convince the Commission that the Jt. DG had rightly returned a negative finding on the issue of formation of cartel and that no attempt had been made by them to arbitrarily determine the FSC or revise the same. By omitting to give notice to the appellants incorporating the reasons for its disagreement with the findings and conclusion recorded by the Jt. DG, the Commission deprived the appellants of a valuable opportunity to effectively defend themselves against the proposed action. Therefore, there is no escape from the conclusion that the violation of the principles of natural justice by the Commission has caused serious prejudice to the appellants and the impugned order cannot be sustained by applying the ratio of the judgement of the Constitution Bench in Managing Director,

ECIL Hyderabad and Others Vs. B. Karunakar and Others (supra).

.....

37. In the result, the appeals are allowed, the impugned order is set-aside and the matters are remanded to the Commission with the following directions :

(I) The Commission shall re-consider the report of the Jt. DG and take

appropriate decision under Section 26(8) of the Act. If the Commission disagrees with the findings and conclusions recorded by the Jt. DG, then it shall indicate the reasons for such disagreement and issue notice to the parties incorporating the reasons of disagreement and give them opportunity to file their replies/ objections.

(II) After receiving the replies/ objections of the parties, the Commission

shall hear them and pass appropriate order in accordance with law."

- In *Balrampur Chini Mills Ltd Vs CCI & Ors, Competition Appeal (AT) No.86/2018* in para 69 this Tribunal held as under:

"69. We note that in the present case the non-compliance to the principle of natural justice is not due to some legal, compelling reason or public interest, but solely due to a faulty, and irrational procedure followed by the Competition Commission which has certainly meant prejudice to the appellants as they were imposed penalty on the basis of such a procedure being followed by CCI."

5.6 The Ld. Sr. Counsel for the Appellant submitted that the impugned order needs to be remanded back to the Ld. CCI for allowing opportunity to the Appellant to present its case on the issues on which Ld. CCI has differed from the report of the DG.

Arguments of the Respondent No. 2:

6. It is the submission of the learned counsel for the Respondent that the judgement of BCCI and InterGlobe are not applicable in the facts of this case, as in those cases the facts were entirely different and the 'relevant market' was changed by the Commission as is evident from the judgement itself. Learned counsel for the Respondent submitted that in BCCI case the DG found the relevant market as 'underlying economic activities which are ancillary for organising the IPL Twenty20 cricket tournament being carried out under the aegis of BCCI'. However, the Commission found the relevant market as 'market for organizing of private professional cricket league/events in India'. It is submitted that in the present case there is no difference in the market definition between the DG and the Commission. The Commission has fully endorsed the finding of the DG on the market being that of market for supply of VSF to spinners in India.

6.1 Further in *Inter Globe* case, the Commission had completely reversed the findings in the DG's report in its final order without giving the accused party any indication that they wanted to disagree with the DG's findings. It is argued that the DG had concluded in respect of seven issues that the allegation of formation of cartel and violation of Section3(1) read with Section 3(3) (a) of the Act were not proved against the Opposite parties, the Commission had disagreed with the findings and held that the opposite parties were guilty of forming a cartel and imposed penalty on each.

6.2 It is submitted that any violation of the principle of natural justice which does not cause prejudice to the party need to be ignored. He referred to the judgement of Hon'ble Supreme Court in the case of *State of UP vs.*

Sudhir Kumar Singh and other (2020) SCC Online SC 847 which held as under:-

> "*39. An analysis of the aforesaid judgments thus reveals:*
>
> *(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.*
>
> *(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.*
>
> *(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.*
>
> *(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.*
>
> *(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.*

6.3 It is submitted that if one peruses the impugned order, one would find that the Commission noted the use of discriminatory discount policy by the appellant, as it used to give lesser discounts to big players and there was price

discrimination and also there was contravention of supplementary obligations, hence the Commission rightly held the appellant has contravened Section 4(2)(a)(ii) and 4(2)(d) read with Section 4(1) of the Competition Act.

6.4 It is the submitted that the term "buyer" used in para 124 of the impugned order refers to "spinners" and not third parties such as traders, and does not contradict the finding of the DG that appellant "has no obligation to keep the traders in business".

Arguments of Respondent No. 1:

7. The Ld. Counsel for the Respondent No. 1 argued that there is no variation in the findings of the DG as well as the Commission, there was no need to issue show cause and as such there is no case for violation of principle of natural justice. Reference was made to the following paragraphs of the DG's report, wherein he noted as following:

> *".....*
> *(viii) Refusing to sell to traders, thus not allowing competition in the market.*
> *From the submissions of OP2 it is observed that it does not sell VSF to traders or intermediaries. However, traders are free to import VSF for onward supply to spinners. There are instances of such trade in the market. Therefore, nothing stops the potential traders from importing VSF and creating a secondary market, thus posing competition to OP2. But they may run the risk of losses, if OP2 reduces prices. The traders stand no chance in price competition with OP2. Secondly, VSF has to be stored in controlled condition thereby increasing the carrying cost. Absence of traders in VSF market is not a creation of OP2 alone. OP2 has no obligation to keep the traders in business and it cannot be faulted for not doing so Thus, it does not appear to fall in the realm of Section 4 of the Act*

(ix) Controlling own production, production at customer's end and discriminating if customer found not converting VSF into yarn as per their policies.

(x) Forcing customers to submit monthly production data before required discounts are passed on. A very strict control not only on GIL's production but also upon customer's production. Also, customers are forced to submit details of all products and not VSF alone.

The competition issue in both these allegations is that OP2 requires the spinners to submit proof of production and export before providing the related discounts on sale of VSF. From the submissions of OP2 it is clear that as per its pricing policy discussed at paragraph 6.21, it offers incremental discount to spinners who use more than 35% VSF in blended yarn, It also gives extra discount to spinners if they export the yarn. For the purpose, OP2 requires the spinners to submit documentary proof of production and export. In this context, attention is drawn to tables at paragraph 6.39 where the sales of VSF by OP2 to different categories of buyers is presented as snapshots It may be observed that foreign buyers are not offered the various discounts and consequently not required to provide supporting documents to claim the same. The 'benefit' is reserved for Indian buyers.

Investigation is of the view that seeking production details and proof of export from the spinners amounts to imposing supplementary obligations on sale of VSF which by their nature and according to commercial usage have no connection with the subject of the contract. OP2 is able to impose such conditions on the VSF buyers owing to its monopoly in the VSF market in India. As such, it appears to be violating the provisions of Sec 4(2)(d) r/w Sec 4(1) of the Act, which stipulates that any enterprise or group violates the provision if it makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature of according to commercial usage, have no connection with the subject of such contracts.

……

(xii) Not disclosing pricing and discounting policy.

Not disclosing pricing / discounting policy by OP2 does not appear in itself to be contravention of the Act. It may lead to unfair and discriminatory pricing to customers and this aspect has already been examined."

7.1 The DG has summarized the findings as under:

> *"7. Investigation has found that OP2 has been selling VSF to different customers at different rates. It does not declare the price of VSF in the open but confidentially communicates to each local customer the price available to it. OP2 also provides discount under various heads to its customers. It is found that there is disparity in the provision of discounts to different customers. It is found that many a times, a buyer buying more quantity of VSF has to pay a higher price as compared to another buyer who sources lesser quantity from OP2. Moreover, it is also found that OP2 sells VSF at much higher rate to domestic customers as compared to deemed exporters (those who export yarn) and foreign buyers. Based on a thorough analysis, Investigation has shown that OP2 has indulged in unfair and discriminatory pricing of VSF in the relevant market and therefore violated provisions of Section 4(2)(a)(ii) r/w Section 4(1) of the Act.*
>
> *8. Investigation has found that OP2 or its group is not present at many levels in the downstream market of VSF and therefore it is not possible to state that it has used its dominance in one relevant market to enter or protect another relevant market.*
>
> *9. Investigation has found that OP2 seeks details of production and exports from Indian spinners for sale of VSF. It is observed that these are supplementary obligations on Indian spinners which have no connection with the subject due to their nature and according to commercial usage. It is also found that it is not an industry practice in sale of other fibres like PSF, ASF, Nylon, cotton etc. As such, OP2 is found to be violating provisions of Section 4(2)(d) r/w Section 4(1) of the Act.*
> *10. Investigation has also examined the other allegations made by the Informant. However, no contravention of the Act could be established from available material and evidences.*
> *11. Investigation is therefore of the view that OP2 has contravened provisions of Section 4(2)(a)(ii) and Section 4(2)(d), r/w Section 4(1) of the Act."*

7.2 The Ld. Counsel for Respondent No. 1 referred to the findings given in the impugned order passed by the Ld. CCI, which are as under:

"117. The reasons offered by OP-2 for explaining the observed price differentiation between its customers, as noted in the earlier part of the order are not substantiated. Analysis of the data furnished by OP-2 establishes beyond doubt that, contrary to its claim, OP-2 was charging discriminatory price upon its customers, thereby creating distortions in the downstream value chain and harming the conditions of competition for the domestic spinners. Furthermore, with respect to the pricing and discount policy adopted by OP2, the plethora of discount parameters, frequent changes effected to the pricing and discount policy coupled with non-transparency of the same to its buyers also indicate the unilateral and abusive behaviour of OP-2 in the relevant market. In view of the foregoing discussion, the Commission is of the considered opinion that OP-2, in abuse of its market power in the relevant market, has imposed unfair and discriminatory price in sale of VSF upon its customers who are similarly placed and thereby contravened the provisions of Section 4(2)(a)(ii) of the Act.

122. Further, the Commission is of the opinion that only a seller abusing its dominant position can seek such details to prevent the resale and trading of its products and thereby hinder the emergence of an alternate source of competition in the market. The act of OP-2, with respect to seeking from its customers' details of VSF bought and used for production of VSF yarn in the garb of offering discounts as a condition for sale of VSF can be interpreted as not only preventing the resale of VSF by its customers in India but also preventing the export of VSF by its customers as a competitor to OP-2 in the export market. By seeking the details of production and sale from its customer, OP-2, has been controlling the entire market in its favour.

123. In view of the aforesaid discussion, the Commission is of the considered opinion that OP-2 has imposed supplementary obligations upon the spinners which by their very nature or according to commercial usage, have no connection with the subject of such contracts. Such conduct is prohibited by Section 4(2)(d) of the Act by a dominant undertaking and in the facts of the present case, the Commission has no hesitation in holding that OP-2 has abused its dominant position in the relevant market instead of behaving as a responsible corporate citizen which is expected to comply with the special and differential obligations of a dominant undertaking. Resultantly, the Commission is of the view that OP-2 has also contravened the provisions of Section 4(2)(d) of the Act read with Section 4(1) thereof.

ORDER

> *124. In view of the above, Commission is of the opinion that OP-2 has abused its dominant position in the relevant market of 'the market for supply of VSF to spinners in India' by charging discriminatory prices to its customers besides imposing supplementary obligations upon them in violation of the provisions of Sections 4(2)(a)(ii), 4(2)(d) read with 4(1) of the Act, as detailed in this order. The Commission directs OP-2 to cease and desist from indulging in such practices which have been found to be in contravention of the provisions of the Act. Accordingly, OP-2 is directed to refrain from adopting unfair/ discriminatory pricing practices and also refrain from seeking the consumption details of VSF from the buyers. OP-2 is directed to put in place a discount policy which is transparent and non-discriminatory to all the market participants, and to make it easily and publically accessible/ available. It is made clear that OP-2 shall not place any end-use restriction on the buyers of VSF and it would be open to them to use the same for spinning or trading or any other purpose, as permissible under law."*

Thus, it was argued that if one peruses both the DG's report and CCI order there is no change in the findings and as such it cannot be said that non-issue of show cause notice to Appellant.

Arguments in rejoinder:

8. The Ld. Sr. Counsel explained that the procedure in CCI is that complaint is marked to DG for investigation who after investigation, gives a report in writing along with his recommendations. This report is given to the party complained against and it is asked to respond to recommendations. The CCI considers the matter after receipt of the DG report along with representation of the party complained against. If the DG report is in favour of the party complained against, the party does not respond to it and if it is to be adversely used by the CCI, then opportunity to respond should be given to the party complained against.

8.1 The Ld. Sr. Counsel submitted that the impugned order is a composite, interlinked, non-severable order with common penalty for all violations referred in the order. He specifically mentioned that in para 128, the Commission notes that *"The Commission, after taking into account the totality of the facts and the circumstances of the present case, decides to impose penalty calculated @ 5% of the relevant turnover generated by OP-2 from the relevant market delineated i.e., the market for sale of VSF to spinners in India during the financial years from 2014-15 to 2016-17……."*

8.2 The Ld. Sr. Counsel submitted that findings of the DG in favour of the Appellant were reversed by Ld. CCI without giving notice to the Appellant to present his case, which is gross violation of principles of natural justice.

8.3 The Ld. Sr. Counsel referred to para 117 of the impugned order (Vol-2, at page 351 of the Appeal) wherein the Ld. CCI has given a finding that the Appellant has imposed unfair and discriminatory price in sale of VSF upon its customers who are similarly placed and has thereby contravened the provisions of Section 4(2)(a)(ii) of the Act and has directed that the discount/pricing policy be publicised. He referred to report of the DG wherein in para 12 (Vol-3, at page 519 of the Appeal), the DG has reported as under:

> *"(xii)* ***Not disclosing pricing and discounting policy****.*
>
> *Not disclosing pricing / discounting policy by OP2 does not appear in itself to be contravention of the Act. It may lead to unfair and discriminatory pricing to customers and this aspect has already been examined."*

Thus, while DG has stated that non-disclosure of the pricing/discounting policy does not appear to be in contravention of the Act, the Ld. CCI has held otherwise.

8.4 The Ld. Sr. Counsel referred to para 122 to 124 of the impugned order wherein the Ld. CCI has held that act of Appellant in seeking from its customers details of VSF as a pre-condition for sale of VSF can be interpreted as not only preventing the export of VSF by its customers but thereby exercising control of entire market in its favour. The Ld. CCI further held that the supplementary obligations imposed upon the spinners is a conduct prohibited by Section 4 of the Act. In para 124 of the said impugned order, the Ld. CCI has held that the discount policy should be made non-discriminatory to all the market participants and no condition be placed regarding end-use restriction on the buyers of VSF, including allowing trading of VSF.

8.5 The Ld. Sr. Counsel submitted these findings are also contrary to the report of DG and he referred to para (vii) of the said report wherein the DG has stated that the Appellant is under no obligation to keep the traders in business and it can be said that not doing so does not appear to fall in the realm of violation of Section 4 of the Act.

8.6 The Ld. Sr. Counsel further submitted that it has been held by Competition Appellate Tribunal in the two judgments cited earlier (*BCCI and Interglobe Aviation Ltd.)* that wherever Ld. CCI differs from the findings given in the report of DG, an opportunity has to be given to the opposite party for putting up its case. Though, a copy of the DG's report was given to the

Appellant, it was never informed that Ld. CCI is differing from some of the findings of the DG's report. It was submitted that this requirement, as per the aforesaid judgments, has now been brought in the statute in proviso to Section 26(9) which reads as under:

> ***"SECTION 26: PROCEDURE FOR INQUIRY UNDER SECTION 19.***
>
> *[(9) Upon completion of the investigation or inquiry under sub-section (7) or sub-section (8), as the case may be, the Commission may pass an order closing the matter or pass an order under section 27, 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:*
>
> *Provided that before passing such order, the Commission shall issue a show-cause notice indicating the contraventions alleged to have been committed and such other details as may be specified by regulations and give a reasonable opportunity of being heard to the parties concerned.]"*

This Section is enforced w.e.f. 19.09.2024.

Analysis and findings:

9. We have heard the parties and perused the records. Presently, we are restricting the adjudication to the issue of compliance of principles of natural justice, that is, whether anything decided in the impugned order by the CCI is contrary to the report of the DG and if so, whether any opportunity to rebut was required to be given, and if so, whether the case needs to be remanded back to the CCI for providing such opportunity.

10. The Appellant is the largest producer and seller of Viscose Staple Fibre (VSF). The DG and Commission have delineated the relevant market as "market of Viscose Staple Fibre (VSF)". The allegation against the Appellant was abuse of its dominant position in the relevant market by following

discriminatory pricing policy and imposing unfair conditions upon its customers whereby forcing its customers to disclose sale and production data and were refusing to sell to traders, thus not allowing competition in the market.

11. The DG in its investigation report Case No. 62/2016, in para 7 to 11 (page 522 of appeal paper book) has given a finding that the Appellant is indulging in unfair and discriminatory pricing of VSF in the relevant market and has imposed supplementary obligations on Indian spinners, which are in violation of Section of Section 4(2)(a)(ii) and Section 4(2)(d) read with Section 4(1) of the Competition Act.

12. The Ld. Commission has concurred with the findings of the DG on the above 2 grounds: Since we are not examining the merits of this case at this stage, we are not looking at the merits of these findings and the decision of the Commission on it.

13. The controversy in this case are the two findings of the DG, which according to the Appellant, have been reversed by the Commission without giving an opportunity of rebuttal. The first finding of DG is as under:

> *"(xii)* ***Not disclosing pricing and discounting policy.***
> *Not disclosing pricing / discounting policy by OP2 does not appear in itself to be contravention of the Act. It may lead to unfair and discriminatory pricing to customers and this aspect has already been examined."*

14. Regarding this finding, it is the submission of the Appellant that the order of the Commission which asks the Appellant to make policy easily and publicly accessible/available is a direction against the finding of the DG

wherein DG has held that not disclosing pricing/discounting policy is not a contravention of the Act.

15. The 2nd finding of the DG in the present controversy is given in (viii) as under:

> *"(viii)* ***Refusing to sell to traders, thus not allowing competition in the market.***
>
> *From the submissions of OP2 it is observed that it does not sell VSF to traders or intermediaries. However, traders are free to import VSF for onward supply to spinners. There are instances of such trade in the market. Therefore, nothing stops the potential traders from importing VSF and creating a secondary market, thus posing competition to OP2. But they may run the risk of losses, if OP2 reduces prices. The traders stand no chance in price competition with OP2. Secondly, VSF has to be stored in controlled condition thereby increasing the carrying cost. Absence of traders in VSF market is not a creation of OP2 alone. OP2 has no obligation to keep the traders in business and it cannot be faulted for not doing so. Thus, it does not appear to fall in the realm of Section 4 of the Act."*

16. It is the submission of the Appellant that while the DG has held that the Appellant is under no obligation to keep the traders in business, the Ld. Commission has directed the Appellant not to place any end-use restriction on the buyers of VSF and it will be open to them to use the same for spinning or trading or any other purpose, as permissible under law. It is the submission of the Appellant that this direction is also against the finding given by the DG.

17. The directions of the Commission are contained in para 124 which is as under:

> *"124. In view of the above, Commission is of the opinion that OP-2 has abused its dominant position in the relevant market of 'the market for supply of VSF to spinners in India' by charging discriminatory prices to its customers besides imposing supplementary obligations upon them in violation of the*

provisions of Sections 4(2)(a)(ii), 4(2)(d) read with 4(1) of the Act, as detailed in this order. The Commission directs OP-2 to cease and desist from indulging in such practices which have been found to be in contravention of the provisions of the Act. Accordingly, OP-2 is directed to refrain from adopting unfair/ discriminatory pricing practices and also refrain from seeking the consumption details of VSF from the buyers. OP-2 is directed to put in place a discount policy which is transparent and non-discriminatory to all the market participants, and to make it easily and publically accessible/ available. It is made clear that OP-2 shall not place any end-use restriction on the buyers of VSF and it would be open to them to use the same for spinning or trading or any other purpose, as permissible under law."

18. We have considered the reply of the Commission that the aforesaid two findings are not in variation of the findings of the DG as the DG has stated that the discounting/pricing policy is unfair and discriminatory and as the word "buyer" is used in place of "spinners" of VSF and the directions of the Commission is not regarding traders but only allowing the spinners to trade the surplus. Similar submission has been made by the Respondent No. 1.

19. We have considered the submissions of the Respondents and do not agree with it. The DG has held that the discount/pricing policy is discriminatory but has clearly held that non-disclosure is not in violation of the provisions. The Commission has asked the Appellant to publicise its policy. This direction is contrary to the finding of the DG. Similarly, the explanation of the Commission that the word "buyer" refers only to "spinners" is not borne out by plain reading of the direction, as no such definition is provided. In the common parlance, if a "buyer" is allowed to trade, then he can be assumed to be a "trader". Thus, this direction is also in variance with the findings of the DG.

20. The Competition Appellate Tribunal in the case of *BCCI v. CCI & Anr.* reported in *2015 SCC OnLine Comp AT 238,* has held as under:

> *"24. ……. If the Commission wanted to differ with the Director General on the issue of 'relevant market' then it should have given notice spelling out its intention to do so and give an opportunity of hearing to the appellant, which was admittedly not done. Therefore, there is no escape from the conclusion that the finding recorded by the Commission that Organization of Private Professional Cricket League/Events in India is the 'relevant market' is vitiated due to violation of the rule of audi alteram partem.*
>
> *…….*
>
> *37. The discussion made by the Commission in the context of clause 9.1(c)(i) of the media agreement is also vitiated due to breach of principles of natural justice because the same was neither referred in the order passed under Section 26(1) nor the Director General recorded any finding qua its validity or otherwise and on this count the appellant did not get an opportunity to defend the said clause."*
>
> (Emphasis supplied)

21. The Competition Appellate Tribunal in the case of *Interglobe Aviation Ltd. (IndiGo Airlines) vs. The Secretary, Competition Commission of India* in *Appeal No. 07/2016* wherein Competition Appellate Tribunal has held as under:

> *"32. We may now revert to these appeals. A careful scrutiny of the record shows that after conducting detailed investigation, the Jt. DG recorded findings/ conclusions in respect of the seven issues framed by her and held that the allegation of formation of cartel and violation of Section 3(1) read with Section 3(3)(a) has not been proved against the appellants. The Commission considered the report of the Jt. DG in its meeting held on 19.02.2015 and passed the usual order for supply of copies thereof to the parties to enable them to file their replies/ objections. That order does not contain any indication that the Commission had disagreed with the findings and conclusions recorded by the Jt. DG and formed a reason-based opinion that the allegation of*

formation of cartel and violation of Section 3(1) read with Section 3(3)(a) appears to have been proved against the appellants. The letter/notice dated 23.02.2015 issued by the Secretary of the Commission also did not give any hint to the appellants that the Commission had not agreed with the findings and conclusions recorded by the Jt. DG. Even at the stage of oral hearing, the Commission did not give any indication to the appellants that it was not in agreement with the findings/ conclusions recorded by the Jt. DG called upon them to show cause as to why an affirmative finding may not be recorded on the issue of formation of cartel in the matter of levy of FSC and why they should not be held guilty of having acted in contravention of Section 3(1) read with Section 3(3)(a) of the Act. However, in the final order passed on 17.11.2015, the Commission recorded its disagreement with the Jt. DG and held that the appellants are guilty of forming a cartel andacting in contravention of those provisions and imposed penalty under Section 27.

33. From what has been mentioned in the preceding paragraph, it is clear that till the passing of the impugned order, the Commission had, at no stage of the proceedings held after the receipt of investigation report, given any notice to the appellants indicating/incorporating the reasons for its disagreement with the findings/conclusions recorded by the Jt. DG that the appellants had not formed any cartel or acted in contravention of Section 3(1) and Section 3(3)(a) of the Act and no opportunity was given to them to show that the reasons recorded by the Commission for its disagreement with the findings and conclusion recorded by the Jt. DG were untenable and also show that they had neither formed any cartel nor acted in contravention of the provisions of the Act. In other words, the Commission passed the impugned order without giving an action-oriented notice to the appellants and an effective opportunity to controvert what the Commission had perceived as contrary to Section 3(1) read with Section 3(3)(a) of the Act and this amounts to clear violation of the basics of natural justice, which the Commission was duty bound to comply within view of the mandate of Section 36(1) of the Act.

34. We are further of the view that violation of the principles of natural justice by the Commission has caused serious prejudice to the appellants because they have been condemned without being afforded an opportunity to present their cause against the proposed action and burdened with huge financial liability running into crores of rupees. If the Commission had informed the

appellants that it proposes to disagree with the findings and conclusions recorded by the Jt. DG and given them an opportunity to file objections against the reasons for disagreement and also given them chance of oral hearing, then the latter may have put forwarded various arguments to persuade/ convince the Commission that the Jt. DG had rightly returned a negative finding on the issue of formation of cartel and that no attempt had been made by them to arbitrarily determine the FSC or revise the same. By omitting to give notice to the appellants incorporating the reasons for its disagreement with the findings and conclusion recorded by the Jt. DG, the Commission deprived the appellants of a valuable opportunity to effectively defend themselves against the proposed action. Therefore, there is no escape from the conclusion that the violation of the principles of natural justice by the Commission has caused serious prejudice to the appellants and the impugned order cannot be sustained by applying the ratio of the judgement of the Constitution Bench in Managing Director, ECIL Hyderabad and Others Vs. B. Karunakar and Others (supra)."

(Emphasis supplied)

The aforesaid judgments require the Commission to give opportunity to the opposite party wherever it differs from the findings of the DG.

22. The Ld. Commission has differed from findings of the DG regarding their directions for disclosure of discounting/pricing policy and sale to "buyers" who can trade the VSF. The Commission had omitted to give notice to the Appellant regarding the disagreement and has thereby deprived the Appellant an opportunity to defend itself against the proposed actions. The judicial pronouncements discussed above, in the case of *BCCI* and *Inerglobe Aviation Ltd.* clearly require that in such circumstances, a show cause notice should have been given to the Appellant. We also note that in the new "proviso" to Section 26(9) it has been provided that a show cause notice has to be issued by the Commission indicating the contravention alleged and that reasonable opportunity of being heard is to be accorded to the parties concerned, though

the said provision is enforced w.e.f. 19.09.2024, it only affirms what is stated in the decisions of COMPAT in the case of *BCCI* and *Interglobe Aviation Ltd.*

23. In the conspectus of facts and circumstances of this case, for the reasons discussed above, we set aside the impugned order and remand it back to the Commission with a direction to provide an opportunity to the Appellant wherever the Commission differs with the findings of the DG and to decide the case expeditiously in a time bound manner. We make it clear that we have not commented on the merits of the case and the Ld. Commission should not be influenced by anything contained in this judgement, while deciding this case after due show cause notice to the Appellant. The appeal is disposed of accordingly. No order as to costs. Pending application(s), if any, are also closed.

[Justice Yogesh Khanna]
Member (Judicial)

[Mr. Ajai Das Mehrotra]
Member (Technical)

Place: New Delhi
Dated: 05.05.2026
Ram N.