

COMPETITION APPELLATE TRIBUNAL
NEW DELHI

CORAM

Hon'ble Shri Justice G.S. Singhvi
Chairman

Hon'ble Shri Rajeev Kher
Member

In the matter of:

[Appeals under Section 53-B of the Competition Act, 2002 against order dated 20.06.2012 passed by the Competition Commission of India in Case No. 29/2010]

APPEAL No. 105 of 2012 & I.A. No. 36/2013

Lafarge India Limited,
Crescenzo Bldg., B-Wing,
10th Floor, C-38 & C-39,
G Block, BandraKurla Complex,
Bandra (East),
Mumbai – 400 051.

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.

APPEAL No. 103 of 2012

Cement Manufacturers' Association,
Vishnu Kiran Chambers,
1st Floor, 2142-2147, Gurudwara Road,
Karol Bagh,
New Delhi.

Versus

1. The Secretary,
Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. ACC Ltd.
Cement House,
121 MaharshiKarve Road,
Mumbai – 400 020.
3. Gujarat Ambuja Cements Ltd.,
Maker Chambers III
122 Nariman Point,
Mumbai – 400 021.
4. UltraTech Cement Ltd.,
Ahura Centre, “B” Wing, 2nd Floor,
Mahakli Caves Road,
Andheri (East),
Mumbai – 400 093.
5. Jaiprakash Associates Ltd.,
Sector – 128, NOIDA,
Uttar Pradesh – 201 304
6. The India Cements Ltd.,
“Coromandal Towers”,
93, Santhome High Road,
Karpagam Avenue, Raja Annamalai Puram,
Chennai – 600 028.
7. J.K. Cement Ltd.,
Kamla Tower,
Kanpur – 208 001
Uttar Pradesh
8. Madras Cements Ltd.,
Auras Corporate Centre,
98-A, Dr. Radhakrishnan Road,
Mylapore, Chennai – 600 004.
9. Binani Cement Ltd.
Mercantile Chambers, 2nd Floor,
12, J.N. Heredia Marg,
Ballard Estate,

Mumbai – 400 001.

10. Century Textiles & Industries Limited,
Industry House,
159 Churchgate Reclamation,
Mumbai – 400 020.
11. Lafarge India (P) Ltd.,
Crescenzo Bldg.,
B-Wing, 10th Floor,
C-38 & C-39, G Block, BandraKurla Complex,
Bandra (East),
Mumbai – 400 051.
12. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.

Appeal No. 104/12

Ultra Tech Cement Limited
Regd. Office :Ahura Centre, B-Wing, 2nd Floor,
Mahakali Caves Road, Andheri €,
Mumbai – 400 093.

Versus

1. Competition Commission of India,
7th Floor, The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110 001.
Through its Secretary
2. Builders' Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.
3. Cement Manufacturers Association (CMA),
Vishnu Kiran Chambers,
1st Floor, 2142-2147, Gurudwara Road,
Karol Bagh,
New Delhi – 110 005.

4. Associated Cement Co. Ltd.
Cement House,
121 MaharshiKarve Road,
Mumbai – 400 020.
5. Ambuja Cements Ltd.,
Maker Chambers III
122 Nariman Point,
Mumbai – 400 021.
6. Jaypee Cement,
J.A. Annexe 54,
BasantLok, Vasant Vihar,
New Delhi 110 057.
7. The India Cements Ltd.,
Registered office :Dhun Building,
827, Anna Salai,
Chennai – 600 002.
8. J.K. Cement Ltd.,
Kamla Tower,
Kanpur – 208 001
Uttar Pradesh
9. Century Cement
Head Office : Industry House,
159, Churchgate Reclamation,
Mumbai – 400 020.
10. Madras Cements Ltd.,
Auras Corporate Centre,
98-A, Dr. Radhakrishnan Road,
Mylapore, Chennai – 600 004.
11. Binani Cement Ltd.
Mercantile Chambers, 2nd Floor,
12, J.N. Heredia Marg,
Ballard Estate,
Mumbai – 400 001.
12. Lafarge India (P) Ltd.,
Crescenzo Bldg.,
B-Wing, 10th Floor,
C-38 & C-39, G Block, BandraKurla Complex,
Bandra (East),

Mumbai – 400 051.

Appeal No. 106/12

The India Cements Ltd.,
“Coromandal Towers”,
93, Santhome High Road,
Karpagam Avenue, Raja Annamalai Puram,
Chennai – 600 028.

Versus

1. Competition Commission of India,
7th Floor, The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110 001.
Through its Secretary
2. Builders’ Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.
3. Cement Manufacturers Association (CMA),
Vishnu Kiran Chambers,
1st Floor, 2142-2147, Gurudwara Road,
Karol Bagh,
New Delhi – 110 005.
4. Associated Cement Companies Limited,
Cement House,
121, MaharsihiKarve Road,
Mumbai – 400 020.
5. Ambuja Cements Limited,
Elegant Business Park,
Midc Cross Road “B”,
Off Andheri-kurla Road,
Andheri (E),
Mumbai
6. Ultra Tech Cement Limited,
Regd. Office :Ahura Centre, B-Wing, 2nd Floor,
Mahakali Caves Road, Andheri (E),

- Mumbai – 400 093
7. Jaiprakash Associates Ltd.,
Sector – 128, NOIDA,
Uttar Pradesh – 201 304

 8. J.K. Cement Ltd.,
Kamla Tower,
Kanpur – 208 001
Uttar Pradesh

 9. Century Textiles & Industries Limited,
Century Bhavan,
Dr. Annie Besant Road,
Worli,
Mumbai – 400 030.

 10. Madras Cements Ltd.,
Auras Corporate Centre,
98-A, Dr. Radhakrishnan Road,
Mylapore, Chennai – 600 004.

 11. Binani Cement Ltd.
Mercantile Chambers, 2nd Floor,
12, J.N. Heredia Marg,
Ballard Estate,
Mumbai – 400 001.

 12. Lafarge India (P) Ltd.,
Crescenzo Bldg.,
B-Wing, 10th Floor,
C-38 & C-39, G Block, BandraKurla Complex,
Bandra (East),
Mumbai – 400 051.

Appeal No. 107/12

Jaiprakash Associates Ltd.,
Sector – 128, NOIDA,
Uttar Pradesh – 201 304

Versus

1. Competition Commission of India,
7th Floor, The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110 001.
Through its Secretary
2. Builders' Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.
3. Cement Manufacturers' Association
4. Associated Cement Co. Ltd.
5. Gujarat Ambuja Cement Limited
6. Grasim Cement
7. UltratechCememnt Limited
8. India Cement Limited
9. J.K. Cements
10. Century Textiles & Industries Limited
11. Madras Cements Limited
12. Binani Cement Limited
13. Lafarge India Private Limited

Appeal No. 108/12

Associated Cement Companies Ltd.

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,

Tardeo, Mumbai – 400 034.

3. Cement Manufacturers' Association
4. Gujarat Ambuja Cement Limited
5. Grasim Cement
6. UltratechCememnt Limited
7. Jaypee Cement
8. India Cement Limited
9. J.K. Cements
10. Century Textiles & Industries Limited
11. Madras Cements Limited
12. Binani Cement Limited
13. Lafarge India Private Limited

Appeal No. 109/12

Binani Cement Limited,
Mercantile Chambers,
2nd Floor, 12 J.N.Heredia Marg,
Ballard Estate,
Mumbai – 400 001.

... Appellant

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Builders Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.

... Respondents

Appeal No. 110/12

Ambuja Cement Limited

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Builders Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.
3. Cement Manufacturers' Association
4. Associated Cement Companies Limited
5. Grasim Cement
6. UltraTech Cement Limited
7. Jaypee Cement
8. India Cement Limited
9. J.K. Cements
10. Century Textiles & Industries Limited
11. Madras Cements Limited
12. Binani Cement Limited
13. Lafarge India Private Limited

Appeal No. 111/12

The Ramco Cements Limited,
98A, Dr. Radhakrishnan Road,
Mylapore,
Chennai

Versus

1. Competition Commission of India,

The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi

2. Builders Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.

... Respondents

Appeal No.112/12

J.K. Cement Limited,
Kamla Tower,
Kanpur (UP)

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Builders Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.

... Respondents

Appeal No.113/12

Century Textiles & Industries Limited,
Industry House,
159 Churchgate Reclamation,
Mumbai – 400 020.

Versus

1. The Secretary,
Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Cement Manufacturers Association (CMA),

Vishnu Kiran Chambers,
1st Floor, 2142-2147, Gurudwara Road,
Karol Bagh,
New Delhi – 110 005.

3. ACC Ltd.
Cement House,
121 MaharshiKarve Road,
Mumbai – 400 020.
4. Gujarat Ambuja Cements Ltd.,
Maker Chambers III
122 Nariman Point,
Mumbai – 400 021.
5. UltraTech Cement Ltd.,
Ahura Centre, “B” Wing, 2nd Floor,
Mahakli Caves Road,
Andheri (East),
Mumbai – 400 093.
6. Jaiprakash Associates Ltd.,
Sector – 128, NOIDA,
Uttar Pradesh – 201 304
7. The India Cements Ltd.,
“Coromandal Towers”,
93, Santhome High Road,
Karpagam Avenue, Raja Annamalai Puram,
Chennai – 600 028.
8. J.K. Cement Ltd.,
Kamla Tower,
Kanpur – 208 001
Uttar Pradesh
9. Madras Cements Ltd.,
Auras Corporate Centre,
98-A, Dr. Radhakrishnan Road,
Mylapore, Chennai – 600 004.
10. Binani Cement Ltd.
Mercantile Chambers, 2nd Floor,
12, J.N. Heredia Marg,
Ballard Estate,
Mumbai – 400 001.

11. Lafarge India (P) Ltd.,
Crescenzo Bldg.,
B-Wing, 10th Floor,
C-38 & C-39, G Block, BandraKurla Complex,
Bandra (East),
Mumbai – 400 051.

12. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.

Appeal No. 122/12

Cement Manufacturers Association (CMA),
Vishnu Kiran Chambers,
1st Floor, 2142-2147, Gurudwara Road,
Karol Bagh,
New Delhi – 110 005.

(Through : Shri S.K. Dalmia, Acting Secretary)

Versus

1. The Secretary,
Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi

2. Shree Cement Limited,
Bangur Nagar,
Beawar – 305 901,
Ajmer, Rajasthan

3. ACC Ltd.
Cement House,
121 MaharshiKarve Road,
Mumbai – 400 020.

4. Gujarat Ambuja Cements Ltd.,
Maker Chambers III
122 Nariman Point,
Mumbai – 400 021.

5. UltraTech Cement Ltd.,
Ahura Centre, "B" Wing, 2nd Floor,
Mahakli Caves Road,
Andheri (East),
Mumbai – 400 093.
6. Jaiprakash Associates Ltd.,
Sector – 128, NOIDA,
Uttar Pradesh – 201 304
7. The India Cements Ltd.,
"Coromandal Towers",
93, Santhome High Road,
Karpagam Avenue, Raja Annamalai Puram,
Chennai – 600 028.
8. J.K. Cement Ltd.,
Kamla Tower,
Kanpur – 208 001
Uttar Pradesh
9. Madres Cements Ltd.,
Auras Corporate Centre,
98-A, Dr. Radhakrishnan Road,
Mylapore, Chennai – 600 004.
10. Binani Cement Ltd.
Mercantile Chambers, 2nd Floor,
12, J.N. Heredia Marg,
Ballard Estate,
Mumbai – 400 001.
11. Century Textiles & Industries Ltd.,
Industry House,
159 Churchgate Reclamation,
Mumbai 400 020.
12. Lafarge India (P) Ltd.,
Crescenzo Bldg.,
B-Wing, 10th Floor,
C-38 & C-39, G Block, BandraKurla Complex,
Bandra (East),
Mumbai – 400 051.
13. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,

Tardeo, Mumbai – 400 034.

Appeal No.123/12

The Ramco Cements Limited,
Through its Authorised Representative :
Mr. A.V. Dharmakrishnan,
Chief Executive Officer,
The Ramco Cements Limited,
98A, Dr. Radhakrishnan Road,
Mylapore,
Chennai 600 004.

... Appellant

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi

2. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.

... Respondents

Appeal No. 124/12

Century Textiles & Industries Ltd.,
Industry House,
159 Churchgate Reclamation,
Mumbai – 400 020.

Versus

1. The Secretary,
Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi

2. Shree Cement Limited,
Bangur Nagar,
Beawar – 305 901,
Ajmer, Rajasthan

3. Cement Manufacturers Association (CMA),
Vishnu Kiran Chambers,
1st Floor, 2142-2147 Gurudwara Road,

- Karol Bagh,
New Delhi – 110 005.
4. ACC Ltd.
Cement House,
121 MaharshiKarve Road,
Mumbai – 400 020.
 5. Gujarat Ambuja Cements Ltd.,
Maker Chambers III
122 Nariman Point,
Mumbai – 400 021.
 6. UltraTech Cement Ltd.,
Ahura Centre, “B” Wing, 2nd Floor,
Mahakli Caves Road,
Andheri (East),
Mumbai – 400 093.
 7. Jaiprakash Associates Ltd.,
Sector – 128, NOIDA,
Uttar Pradesh – 201 304
 8. The India Cements Ltd.,
“Coromandal Towers”,
93, Santhome High Road,
Karpagam Avenue, Raja Annamalai Puram,
Chennai – 600 028.
 9. J.K. Cement Ltd.,
Kamla Tower,
Kanpur – 208 001
Uttar Pradesh
 10. Madras Cements Ltd.,
Auras Corporate Centre,
98-A, Dr. Radhakrishnan Road,
Mylapore, Chennai – 600 004.
 11. Binani Cement Ltd.
Mercantile Chambers, 2nd Floor,
12, J.N. Heredia Marg,
Ballard Estate,
Mumbai – 400 001.
 12. Lafarge India (P) Ltd.,

Crescenzo Bldg.,
 B-Wing, 10th Floor,
 C-38 & C-39, G Block, BandraKurla Complex,
 Bandra (East),
 Mumbai – 400 051.

13. Builders Association of India,
 G-1/G-20, Commerce Centre,
 J. Dadajee Road,
 Tardeo, Mumbai – 400 034.

Appeal No. 125/12

Binani Cement Limited
 Mercantile Chambers,
 2nd Floor, 12 J.N. Heredia Marg,
 Ballard Estate,
 Mumbai – 400 001.

... Appellant

Versus

1. Competition Commission of India,
 The Hindustan Times House,
 18-20, Kasturba Gandhi Marg,
 New Delhi
2. Builders Association of India,
 G-1/G-20, Commerce Centre,
 J. Dadajee Road,
 Tardeo, Mumbai – 400 034.

... Respondents

Appeal No. 126/12

Ultra Tech Cement Limited,
 Regd. Office : Ahura Centre, B-Wing, 2nd Floor,
 Mahakali Caves Road, Andheri (E),
 Mumbai – 400 093

... Appellant

Versus

1. Competition Commission of India,
 The Hindustan Times House,

- 18-20, Kasturba Gandhi Marg,
New Delhi
Through its Secretary
2. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.
 3. Shree Cement Limited,
Bangur Nagar,
Beawar – 305 901,
Ajmer, Rajasthan
 4. Cement Manufacturers Association (CMA),
Vishnu Kiran Chambers,
1st Floor, 2142-2147 Gurudwara Road,
Karol Bagh,
New Delhi – 110 005.
 5. J.K. Cement Ltd.,
Kamla Tower,
Kanpur – 208 001
Uttar Pradesh
 6. Binani Cement Ltd.
Mercantile Chambers, 2nd Floor,
12, J.N. Heredia Marg,
Ballard Estate,
Mumbai – 400 001.
 7. Lafarge India (P) Ltd.,
Bakhtawar, 14th Floor,
229, Nariman Point
Mumbai – 400 021
 8. M/s. Jaiprakash Associates Ltd.,
J.A. Annexe 54,
BasantLok, Vasant Vihar,
New Delhi – 110 057.
 9. M/s. India Cements Ltd.,
Registered Office :Dhun Building,
827, Anna Salai,
Chennai – 600 002.

10. M/s. Ambuja Cement Limited,
122, Maker Chambers – III,
Nariman Point,
Mumbai – 400 021.
11. M/s. ACC Ltd.
Cement House,
121 MaharshiKarve Road,
Mumbai – 400 020.
12. M/s. Century Textiles & Industries Ltd.,
Head Office : Industry House,
159 Churchgate Reclamation,
Mumbai 400 020.
13. Madres Cements Ltd.,
Auras Corporate Centre,
98-A, Dr. Radhakrishnan Road,
Mylapore, Chennai – 600 004. Respondents

Appeal No. 127/12

Lafarge India Pvt. Limited,
Crescenzo Bldg., B-Wing,
10th Floor, C-38 & C-39,
G Block, BandraKurla Complex,
Bandra (East),
Mumbai – 400 051. ... Appellant

Versus

Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi ... Respondent

Appeal No. 128/12

J.K. Cement Limited,
Kamla Tower,

Kanpur (UP) – 208 001.

... Appellant

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Builders Association of India,
G-1/G-20, Commerce Centre,
J. Dadajee Road,
Tardeo, Mumbai – 400 034.

... Respondents

Appeal No. 129/12

Jai Prakash Associates Limited,
Sector – 128, NOIDA – 201 304
Uttar Pradesh

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
2. Builders Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.
3. Shree Cement Limited
4. Cement Manufacturers' Association
5. Gujarat Ambuja Cement Limited
6. Grasim Cement
7. UltraTech Cement Limited
8. India Cement Limited
9. J.K. Cements
10. Century Textiles & Industries Limited

11. Madras Cements Limited
12. Binani Cement Limited
13. Lafarge India Private Limited

Appeal No. 132/12

Associated Cement Companies Limited
Cement House,
121 MaharshiKarve Road,
Mumbai – 400 020.

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
 2. Builders Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.
 3. Gujarat AmbujaCememnt Limited
 4. Grasim Cement
 5. UltraTech Cement Limited
 6. Jaypee Cement
 7. India Cement Limited
 8. J.K. Cements
 9. Century Textiles & Industries Limited
 10. Madras Cements Limited
 11. Binani Cement Limited
 12. Lafarge India Private Limited
 13. Shree Cement Limited
- ... Respondents

Appeal No. 133/12

Ambuja Cement Limited (ACL),
Elegant Business Park,
MIDC Cross Road "B",
Off Andheri-Kurla Road,
Andheri(East)
Mumbai – 400 059

Versus

1. Competition Commission of India,
The Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi
 2. Builders Association of India,
D-1/203, Ashirwad Complex,
Green Park Main,
New Delhi – 110 016.
 3. Cement Manufacturers' Association
 4. Associated Cement Companies Limited
 5. Grasim Cement
 6. UltraTech Cement Limited
 7. Jaypee Cement
 8. India Cement Limited
 9. J.K. Cements
 10. Century Textiles & Industries Limited
 11. Madras Cements Limited
 12. Binani Cement Limited
 13. Lafarge India Private Limited
 14. Shree Cement Limited
- ... Respondents

Appeal No.134/12

The India Cements Ltd.,
 “Coromandal Towers”,
 93, Santhome High Road,
 Karpagam Avenue, Raja Annamalai Puram,
 Chennai – 600 028.
 Through its General Manager – Legal
 Mr. V. Jeevagan

Versus

1. Competition Commission of India,
 The Hindustan Times House,
 18-20, Kasturba Gandhi Marg,
 New Delhi
2. Builders Association of India,
 G-1/G-20, Commerce Centre,
 J. Dadajee Road,
 Tardeo, Mumbai – 400 034.

... Respondents

Appearances :

Shri Gopal Subramaniam, Senior Advocate with Shri Abhishek Tripathi, Shri Ankur Kashyap, Shri Samir R. Gandhi, Ms. Hemangini Dadwal, Shri Nikhil Pillai, Shri Inderjeet Sircar, Ms. Anusha Ramesh, Ms. Arshia Dhingra, Shri Rahul Worah and Shri Sambit Nanda, Advocates for the Appellant in Appeal No. 105/2012 (Lafarge India Ltd.)

Shri Ramji Srinivasan, Senior Advocate with Ms. Nisha Kaur Uberoi, Ms. Anisha Chand, Ms. Aishwarya Gopalakrishnan, Ms. Neelambara Sandeepan and Ms. Sarah Sunderam, Advocates for the Appellants in Appeal Nos. 110 and 133 of 2012 (Ambuja Cement Ltd.)

Shri Harman Singh Sandhu and Shri Prateek Bhattacharya, Advocates for the Appellants in Appeal Nos. 108 and 132 of 2012 (Associated Cement Companies Ltd.)

Shri Gourab K. Banerji, Senior Advocate with Shri Sameer Parekh, Mrs. Sonali Basu Parekh, Shri Lalit Chauhan, Shri Abhinay Sharma, Shri Aditya Sharma, Shri Abhishek Vinod Deshmukh, Shri Vyom Shah and Ms. S. Lakshmi Iyer, Advocates for the Appellant in appeal Nos. 104 and 126 of 2012 (Ultra Tech Cement Ltd.)

Shri P.K. Bhalla, Advocate for the Appellants in Appeal Nos. 112 and 128 of 2012 (J.K. Cement Ltd.)

Shri G.R. Bhatia, Ms. Kanika Chaudhary, Ms. Nidhi Singh Prakash and Ms. Tripti Malhotra, Advocates for the Appellants in Appeal Nos. 107 and 129 of 2012 (Jai Prakash Associates Ltd.)

Shri T. Srinivas Murthy, Shri Rahul Balaji and Ms. Shrutilyer, Advocates for the Appellant in Appeal Nos. 111 and 123 of 2012

ShriRaghunathaSethupathy, Advocate for the Appellants in Appeal Nos. 109 and 125 of 2012

Shri Aditya Verma, Ms. Aarti Goyal and Ms. S. Lakshmi, Advocates for the Appellant in Appeal Nos. 106 and 134 of 2012

Shri Pramod B. Aggarwala and Shri Prashant Mehra, Advocates for the Appellants in Appeal Nos. 113 and 124 of 2012 (Century Textile Industries) and in Appeal Nos. 103 and 122 of 2012 (Cement Manufacturers' Association)

Shri SiddheshKotwal, Ms. Bansuri Swaraj, Ms. Shreya Bhatnagar and Shri RaghunathaSethapathy, Advocates for the Appellants in Appeal Nos. 109 and 125 of 2012 (Binani Cements Ltd.)

Shri PallavShishodia, Senior Advocate assisted by Shri VibhavGaggar, Ms. Reena Kumari, Shri Tushar Gupta, Shri SakshamDhingra, Shri SaketBisani and Shri Indresh Kumar, Advocates for the Competition Commission of India with Shri Kamal Sultanpuri, Deputy Director (Law) for the Competition Commission of India

Shri AnkushWalia, Advocate for Builders Association of India.

Per Chairman

ORDER

Whether the Chairperson of the Competition Commission of India (for short, 'the Commission'), who did not hear arguments of the learned counsel representing the appellants could become a party to the final order passed under Section 27 of the Competition Act, 2002 (for short, 'the Act') is one of the questions which arises in these appeals filed against order dated 20.06.2012 passed by the Commission in

Case No.29/2010 whereby the appellants were held guilty of having acted in violation of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act and penalty @ 0.5 times of net profit for 2009-2010 (from 20.05.2009) and 2010-2011 was imposed on ten appellants (manufacturers of cement) and penalty of 10% on total receipts for two years was imposed on the Cement Manufacturer's Association.

2. The record of the case reveals that after about two months of the presentation made by Respondent No. 2- Builders' Association of India (BAI) and the Competition Commission of India (for short 'the Commission') before the Parliamentary Standing Committee in the context of allegation of cartelization by the manufacturers of cement and manipulation of prices by them, BAI filed information dated 26.07.2010 under Section 19(1)(a) of the Act, against the Cement Manufacturer's Association and 11 cement manufacturers with the allegation that they had formed a cartel and did not undertake production as per their installed capacity resulting in exorbitant rise in the price of cement. It was also alleged that the cement manufacturers had deliberately manipulated the price of cement affecting the public at large.

3. After considering the information, the Commission felt prima facie satisfied that the allegations made by BAI requires detailed investigation. Accordingly, an order was passed on 15.09.2010 under Section 26(1) of the Act and the Director General was directed to make investigation into the matter.

4. The Director General entrusted the investigation to the Joint Director General (Jt. DG). The latter issued notices to the appellants and informant under Section 36(2) read with Section 41(2) for furnishing information and documents. The appellants furnished the requisite information and documents from time to time. The Jt. DG issued summons to the representatives of the informant and officers of the cement manufacturers and recorded their statements. He also collected information from other sources for the purpose of conducting investigation.

5. After completing investigation, the Jt.DG submitted report dated 21.12.2011 (3 Volumes). He analysed the allegations contained in the information filed by BAI, documents collected from different sources, statements recorded during investigation and summarized his conclusion in Chapter-8 (Volume-1), paragraphs 8.1 to 8.1 of which read as under :

“8.1 The investigation carried out by this office has revealed that the major cement manufacturers are controlling the cement market in India.

8.2 The top 5 companies are having a market share of more than 50%. Further, the cement industry is geographically scattered, as the production is concentrated to various clusters of limestone mines in Andhra Pradesh, Rajasthan, Madhya Pradesh, Gujarat, etc. Further, the cement being a low value high volume product makes the transportation as one of the important factors of cost.

8.3 The cement is a homogeneous product having low cross elasticity of demand as there is no substitute of cement for the consumers.

8.4 Investigation has also revealed that the market shares of top companies are even higher than the all India shares in a particular region. The region-wise analysis of market share shows that top three or four companies control the market share of more than 50%.

8.5 During the course of investigation, the analysis has been done on the basis of market structure, behavioural

methodology and by collecting evidences from various stakeholders and third parties. References from various studies and international cases have also been made during the course of investigation.

8.6 The investigation has revealed that the top cement manufacturers and CMA are violating the provisions of Section 3(1), 3(3)(a), 3(3)(b) of the Competition Act, 2002. The circumstantial evidences as well as the oral evidences gathered during the course of inquiry have established that the cement manufacturers are indulging in collusive price fixing. The circumstantial evidences clearly indicate the meeting of mind and coordinated activities.

8.7 In Chapter 6 of this report, the price parallelism is proved on the basis of analysis of price data of all the companies. The economic analysis of price data established that the price of all the companies are moving in the same direction in all the states. The analysis shows that the coefficient of correlation of price changes in terms of absolute price data as well as price change data was very high and close to 1 which establishes the strong correlation among the companies.

8.8 The analysis of cost to sales ratio of all the top cement companies shows that the companies are charging super normal profit by eliminating the competition. The data relating to cost of sales and sales realization clearly prove that all the companies are earning very good profit since last 4-5 years. The concerted action of the opposite parties and top cement manufacturers with a motive of profiteering and charging

unreasonable prices has adversely affected the consumers and various sections of business in India.

8.9 The investigation has revealed that the top cement manufacturers are controlling the supply of cement in the market by way of some tacit agreement. The analysis of production data shows that the companies have regulated the capacity utilization in last three years by restricting the output to extract the maximum profit and maintain the higher prices of cement.

8.10 The investigation has also revealed that the decision of reduction or increase in the production of cement is taken by the companies in coordinated manner as there was a positive correlation in production and dispatch of cement of all the top companies.

8.11 The examination of third parties has established that by entering into the agreement, the opposite parties are adversely affecting the competition in the marketing resulting in the loss to consumers.

8.12 During the course of investigation, the conduct and activities of CMA is found to be in violation of the provisions of the Competition Act. The CMA is providing a platform for coordination amongst the cement manufacturers by way of various meetings including High Power Committee meetings. It is found that the companies who have withdrawn from the membership of CMA, like ACC and ACL, are also attending such meetings which are conducted in the guise of some academic/ technical discussions. The collection and

dissemination of prices of cement from 34 centres on weekly basis by way of phone, e-mail, through nominated cement companies allow the opportunity for exchanging the prices of cement by the cement manufacturers. The companies collecting data on a continuous basis from all the important centres, in fact, facilitates the exchange of current prices while gathering the information of market price. Further, the monthly publications of CMA relation to plant-wise, company-wise data of cement production, dispatch and movement also facilitates the exchange of vital information relating to the competing cement manufacturers. The activities of CMA have been found to be anti-competitive, as its various conducts and activities lead to lessening the competition in the cement industry.

8.13 In view of investigation conducted by this office, as discussed in detail in chapters 6 and 7 of this report, the allegations leveled against the opposite parties i.e. the top cement manufacturers, have been found to be substantiated and hence the conduct of opposite parties are anti-competitive and in violation to section 3(1), 3(3)(a), 3(3)(b) of the Competition Act, 2002”

7. Volume-II of the report comprises of documents marked as Annexures 1 to 18, the statements marked as S-1 to S-21, data of costing of different companies and working of margins marked as Annexure ‘C’ and State-wise price data and economic analysis marked as Annexure ‘E’

8. The report of the Jt.DG was considered by the Commission in its ordinary meeting held on 08.06.2011 and a decision was taken to supply copies thereof to the parties to enable them to file their replies/objections. After receiving copies of the

report, most of the appellants filed applications for inspection of documents and supply of copies thereof. The Commission accepted the requests for inspection and also extended the time for filing replies/objections.

9. In the interregnum, ACC Limited and Ambuja Cement Limited filed applications dated 07.07.2011 and 03.08.2011 with the complaint that the copies of the report supplied to them were partly illegible and incomplete in more than one respect. They also claimed that the Jt. DG has disseminated confidential information submitted by various parties in violation of Section 57 of the Act and Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (for short, 'the Regulations') and prayed that the parties be directed to destroy the copies of the report of the Jt. DG so that the confidential information may not be leaked. The Commission considered the applications and passed detailed order on 08.08.2011, paragraphs 10 to 27 of which read as under :

“10. That leaves the Commission to examine the only remaining grievance made by the applicants regarding breach of confidentiality of the information supplied.

11. Before examining the aspect, it may be noted that though grievance have been made by both ACC and ACL regarding breach of confidentiality in the applications under consideration, only ACC made a claim for confidentiality under regulation 35 of the General Regulations. However, we may note that though ACI did make a request for confidentiality in one of its replies submitted to the DG. As this request was not under or in accordance with regulation 35 of the General Regulations, it appears that the DG did not consider the said request. Be that as it may, the

Commission has also taken into account the grievance made by ACL in its applications under consideration in this regard.

12. As noted above, ACC claimed confidential treatment of the information under regulation 35 of the General Regulations before the DG during the course of investigation in RTPE No.52 of 2006 and Case No.29 of 2010. The confidentiality treatment was claimed inter alia on the grounds that certain parts of the response contain commercially sensitive and strictly confidential information and the disclosure thereof could have an adverse impact on the business of the applicant causing irreparable harm and may result in losing its competitive edge vis-à-vis other cement manufacturers. The DG, after examining the information claimed as confidential by ACC, vide its notings in the order sheets of even date i.e. 20.05.2011 in RTPE No.52 of 2006 and Case No.29 of 2010 respectively, decided to grant confidentiality to the stated documents under regulation 35 of the General Regulations. However, as mentioned above, since no application was moved by ACL under and in accordance with regulation 35 of the General Regulations seeking confidentiality of the information, no decision was taken by the DG in this regard.

13. From the averments made in the applications and on examining the entire material on record, it appears that certain information which was decided to be granted confidential treatment by the DG vide notings in the order sheets dated 20.05.2011 was incorporated in the reports of

the DG, as detailed later in this order, which were supplied to the other parties in these cases.

14. At the outset, it needs to be highlighted that the information supplied by enterprises which are granted confidential treatment need to be kept confidential as prescribed by the Act and the regulations framed thereunder. The Act recognizes that information obtained under the Act could be commercially sensitive and its disclosure could result in harm to the enterprise. This is expressly provided in section 57 of the Act which shall be dealt with in the following paras. Besides, the General Regulations framed under the Act govern in greater detail the entire procedure of seeking and granting confidential treatment of the documents.

15. Now we may refer to the provisions of section 57 of the Act which restrict the disclosure of information relating to any enterprise, being information which has been obtained by or on behalf of the Commission for the purpose of the Act. The provisions further provide that such information shall not, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purpose of the Act or any other law for the time being in force. For the sake of ready reference, the provisions of section 57 of the Act are quoted below :

Restriction on disclosure of information

57. No information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the

purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed other than in compliance with or for the purposes of this Act or any other law for the time being in force.

16. It may also be pointed out that regulation 35 of the General Regulations governs the confidentiality treatment to be accorded to the documents claimed by the parties as confidential under regulation 35(2) of the General Regulations, any party may submit a request in writing to the Commission or the DG, as the case may be, that a document or documents, or a part or parts thereof, be treated confidential. Such a request may be made in terms of regulation 35(3) of the General Regulations only if making the document or documents or a part or parts thereof public will result in disclosure of trade secret or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury. Further, under regulation 35(4) of the General Regulations such a request has to be accompanied with the statement setting out cogent reasons for such treatment and to the extent possible the date on which such confidential treatment shall expire.

17. We may also note that under regulation 35(9) of the General Regulations, the Commission or the DG, as the case may be may also consider the following factors while arriving at a decision regarding confidentiality :

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

- (b) the extent to which the information is known to the employees, suppliers, distributors and others involved in the party's business;
- (c) the measures taken by the party to guard the secrecy of the information;
- (d) the ease or difficulty with which the information could be acquired or duplicated by others.

18. In the instant case, ACC has made a grievance regarding breach of the provisions relating to confidentiality in disseminating the reports of the DG to the parties which contain inter alia data on capacity utilization, pricing, costs, dispatch details and margins that had been claimed to be confidential by ACC before the DG.

19. Before delving into the matter, it may be clarified that in the present proceedings the Commission is not sitting in appeal over the decisions made by the DG granting confidentiality treatment to the documents claimed to be confidential by ACC. However, looking at the factual aspects of the present matter, the Commission deems it appropriate, for the limited purpose of disposal of the present applications, to examine the issue of dissemination of information in relation to which confidentiality was decided to be granted.

20. We may note that in the present matters, the information was collected from about 37 cement manufacturers by the DG. From the records it appears that barring ACC and other others parties viz., Jaiprakash

Associated Ltd. (Jaypee) and Lefarge India Pvt. Ltd., no other party has claimed confidentiality under regulation 35 of the General Regulations with regard to any information (including the information which was similar to the information claimed to be confidential by ACC) supplied to the DG in Case No.29 of 2010 and RTPE No.52 of 2006. Further, even the information claimed to be confidential by one of the other two parties viz., Jaypee did not relate to capacity utilization, pricing, costs, dispatch details, margins etc. Thus, it is seen that 35 of the 37 cement manufacturers have not claimed confidentiality in regard to similar data furnished to the DG. These are certain significant facts and peculiar features which need to be taken into account by the Commission while dealing with the present applications.

21. We are of the opinion that the data used and annexed in the report relate to prices of cement, capacity and dispatch of cement etc., are historical in nature and are available in the public domain. The cost data used in the report is also average data having no bearing on the current production/ operation. Further, it is also pertinent to note that the details of cost of individual raw material/ input mentioned in cost audit reports of all the parties have not been mentioned or annexed in the reports of the DG.

22. In view of the above, the Commission is of the considered opinion that the dissemination of the report of the DG containing the information cannot be said to have resulted in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any

information or to be reasonably expected to cause serious injury. In any event, the applicants have failed to place on record or to cite any instance which can cause serious injury.

23. It may be noted that in the matters relating to grant of confidentiality, the Commission exercises concurrent powers along with the DG under regulation 35(2) of the General Regulations and it is trite that while exercising concurrent powers in the event of conflict, the decision made by the higher authorities prevails.

24. However, as mentioned above, it is to be noted that it is not the intent of the Commission in these proceedings to sit in appeal over the decisions of the DG to grant confidentiality to the documents. Nor does the Commission wish to revisit or review the said decisions in exercise of its plenary and supervisory powers conferred upon it under the scheme of the Act and in particular vested in it under regulation 3 of the General Regulations.

25. Since the DG has already decided to grant confidential treatment to the information which was disseminated through the reports of the DG and therefore it is imperative that such information is kept confidential.

26. On considering the totality of the circumstances, we pass the following order(s) :

(i) It is ordered that each of the parties to whom the reports of the DG have been supplied by the Commission in Case No.29 of 2010 and RTPE No.52 of 2006 shall destroy such reports including any

copies thereof that may have been made by the parties. It is further ordered that the parties shall not use, part with, disseminate or otherwise transmit in any manner whatsoever the information in the reports of the DG.

(ii) All the parties to whom the reports of the DG have been supplied by the Commission in Case No.29 of 2010 and RTPE No.52 of 2006 are hereby directed to furnish an undertaking that the directions contained at (i) above have been complied with within 15 days from the receipt of such directions.

(iii) The DG is directed to submit the public version (non-confidential version) of the reports in accordance with the General Regulations in Case No.29 of 2010 and RTPE No.52 of 2006 to the Commission within a period of 7 days from receipt of this order.

(iv) In view of the directions contained at (i) – (iii) above, the parties need not file their respective replies/ objections to the reports of the DG which have been supplied to them in Case No.29 of 2010 and RTEP No.52 of 2006 by 10.08.2011 as ordered by the Commission vide its orders dated 05.07.2011 till further order(s) are issued by the Commission in this regard. However, any party which has already filed/ sent its replies/ objections to the report of the DG in Case No.29 of 2010 and RTPE No.52 of 2006 is directed to await further order(s) of the Commission in this regard. Further, the Secretary is directed to keep all replies/ objections which have already been

filed or which may be filed by any of the parties before the communication of the directions contained in this order, separately in sealed covers till further order(s).

(v) On receipt of the public version (non-confidential version) of the reports in Case No.29 of 2010 and RTPE No.52 of 2006 from the DG, the Secretary is directed to place the same before the Commission forthwith for consideration.

(vi) The Secretary is directed to communicate this order to the DG, ACC and ACL. Further, the Secretary is also directed to issue letters to all the parties in Case No.29 of 2010 and RTPE No.52 of 2006 in terms of the directions contained at (i), (ii) and (iv).

27. Further, the importance of maintaining confidentiality cannot be overemphasized, and the Commission has taken a very serious note of the entire matter resulting in disclosure of information which was decided to be kept confidential. Accordingly, the Commission is also taking appropriate administrative measures in this regard separately.”

10. Similar application made by Ultratech Cement Limited was disposed of by the Commission vide order dated 14.09.2011, paragraphs 8 to 12 of which are reproduced below:

“8. At the outset, it may be noted that in the present matters, the information was collected from about 37 cement manufacturers by the DG. From the records it appears that only three parties Viz., Associated Cement Company Ltd.

(ACC), Jaiprakash Associates Ltd., (Jaypee) and Lafarge India Ltd. (Lafarge), had claimed confidentiality under regulation 35 of the General Regulations with regard to some of the information supplied to the DG. However, the applicant did not make any request for confidential treatment of the information furnished by it during the course of the investigation in these cases much less any application in accordance with the provisions contained in regulation 35 of the General Regulations.

9. The Commission in its order dated 08.08.2011 observed that the DG had granted confidentiality treatment to the information under regulation 35 of the General Regulation with respect to the three parties viz. ACC, Jaypee and Lafarge. Further, the Commission also noted certain significant facts and peculiar features which needed to be taken into account while dealing with the applications seeking confidentiality treatment of the information submitted in the present case. From perusal of records, it appears that the Office of the DG has also treated as confidential the information relating to costing data and cost audit reports in respect of all the parties including the parties who had not claimed confidentiality under Regulation 35 of the General Regulations.

10. The Commission after considering the application, the material on record and the peculiar facts and circumstances of the case, is of the view that on the basis of parity it is appropriate to direct the DG to consider the request of the applicant seeking confidentiality treatment. The DG may

consider the applications dated 12.08.2011 in light of the decision taken on the application by the ACC, Jaypee and Lafarge. If any of the information/ document supplied by the applicant is similar to the information for which ACC or Jaypee or Lafarge has sought and were granted confidentiality by the DG, the same may be considered for confidential treatment by the DG in accordance with the provisions contained in regulation 35 of the General Regulations.

11. In view of the above, the DG is directed to examine the request made by the applicant in its application dated 12.08.2011 within a period of 7 days from the receipt of this order. It is further deemed expedient that the DG be directed to consider whether similar information, if any, filed by the remaining parties in Case No. 29 of 2010 and RTPE No.52 of 2006 may also be treated as confidential in accordance with the provisions contained in regulation 35 of the General Regulations.

12. As the Office of the DG has already submitted the public version (non-confidential version) of the reports pursuant to the directions passed by the Commission vide its order dated 08.08.2011, the same may be returned to the Office of the DG in sealed covers for resubmitting the same with necessary changes, if any, made pursuant to the directions contained in this order.”

11. The orders passed on the applications filed by ACC Ltd., Ambuja Cement Ltd. and Ultratech Cement Ltd. were reviewed by the Commission and

confidentiality granted to pricing data was revoked vide order dated 29.11.2011, paragraphs 4, 5 and 14 to 18 of which are reproduced below :

“4. After the investigation when the matter came up for arguments, it was found by the Commission, that the report of DG about the violation of the provision of the Competition Act was based on comparison of price data of different cement manufacturers and price parallelism apart from other factors based on datas collected by DG from different cement manufacturers regarding pricing, costing and utilization of the installed capacity. The Commission found that different cement manufacturers would not be able to argue the case about price parallelism, other comparative factors relevant for the purpose of deciding cartelization issue unless the data collected by DG was made available to the parties in the matter about the prices in different periods, in different regions. Factors like cost per unit, the capacity utilization and the demand in the market were equally important. The Commission therefore, considered that the confidentiality earlier granted to the parties in respect of pricing data could not be allowed to continue to the parties in respect of pricing data could not be allowed to continue, if the case was to be effectively argued by all the opposite parties about cartelization and other relevant issues. It would be relevant to mention that only ACC and Lafarge requested for the confidentiality of price data.

5. There is no gain saying that Commission is to follow the principles of natural justice and hear all affected parties before arriving at a decision whether there was cartelization

among different Opposite Parties or not. Economic analysis of the cost and pricing data by different parties was necessary. This required that all the parties must be allowed to see the pricing data of different parties' to plead their cases about their non-involvement in the cartel, if any. Since only two parties namely Lafarge Ltd. and ACC had claimed confidentiality for price data, the Commission before considering the data regarding pricing as non-confidential, thought it proper to hear the two opposite parties and thus a notice was issued to both the parties for arguing why the price data be not treated as non-confidential.

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14. It is an undisputed fact that in order to arrive at a conclusion whether there was a cartel or not pricing of the cement done by different opposite parties in different geographical region, a comparison of prices and an economic analysis of entire data was necessary, DG has authority and power to collect all such data from the opposite parties, during investigation, as was necessary for the purpose of investigation. A party cannot refuse to part with the data and if it does so DG has the judicial power equivalent to that of a Civil Judge to obtain the data and orders can also be obtained from Metropolitan Magistrate for forcible collection of data. These provisions made in the Act and Regulations make it clear that legislature gave importance to the investigation of DG into cartelization and other issues and provided all necessary tools to the Competition Commission for collecting data, so as to enquire into the allegation about different players in the

industry concerning violation of provision of section 3 & 4 of the Competition Act. The data collected by DG even otherwise is not for public consumption and remains confidential vis-a-vis public and can be used by DG & CCI only for the purpose of the Act. No official of the Competition Commission can reveal the data of any enterprise to public even if no confidentiality is granted to the party. Confidentiality is granted for keeping data even away from the eyes of the opposite parties. This confidentiality is permitted by the Commission where Commission considers that the data pertain to certain trade secrets and revealing of the data to opposite party was not necessary for the purpose of the Act.

15. The present enquiry is being done by the commission into issue of cartelization in industry for the purpose of increasing prices, non-utilization of capacities and thereby killing competition and keeping high profit margins. Cartelization, if proved, invites heavy penalties on the parties involved. It is mandatory for the Commission to give an opportunity to all the parties facing allegation of cartelization to discredit the allegation and argue that the same were not established. The Commission cannot tell the opposite parties that they should argue their case without knowing and referring to pricing data of each other. In the issue of cartelization pricing data, the profit margin, cost of per unit of the material are the relevant factors which would reflect whether there was a cartelization or not. As in a conspiracy the direct evidence of meeting of minds is not available, so is

the case in cartelization, direct evidence of agreement between different parties to a cartel is normally not available and it is to be inferred from price parallelism and other factors.

16. In order to address the Commission on the issue of cartel it is necessary for all the parties who are facing the charge of cartelment to show by comparison of pricing data of their company and other companies that there was no cartel. During the argument the counsel for the Lafarge and ACC were asked if they can argue the case of their client without referring to the pricing data of their client vis-à-vis pricing by other parties. The counsel had no reply. The counsel was made an offer that if he considers that pricing data need not be made known to other parties and Commission without hearing arguments on pricing, of its own decide the issues, he should make a statement before the Commission to this effect and state that he would not refer to the price data of his company and other companies and would argue the matter. The counsel did not give this undertaking. It is thus apparent that pricing data, which was given confidentiality by the Commission, can not continue to be treated as confidential vis-à-vis other opposite parties, so as to allow the other parties to argue the matter before the Commission regarding confidentiality and give them a fair opportunity to defend.

17. The argument advanced by the counsel that Commission has no power to review its decision is baseless. The Competition Act of 2002 was amended in 2007 to make

it clear that Competition Commission of India was not an adjudicatory body. The power of review which was earlier in the Act was also deleted because it was considered that Commission is not a Court. Moreover concept of Revision, Review and Appeals are with reference to orders which are adjudicatory in nature and which decide the substantive rights of the parties. No substantive rights of the parties were adjudicated by granting confidentiality. These powers are not called in, in respect of procedural orders made by regulatory body. Rule 3 of the CCI (General) Regulations makes it abundantly clear that in a situation which is not provided by the Regulation, the Commission has to evolve a procedure and has to record in writing the reasons for the procedure being followed in a particular case. We consider that wherever the Commission finds difficulty in procedure, the Commission can remove such difficulty by recording reasons and determine the procedure. The Commission, if has given some concession to a party by exercising discretion, can withdraw the concession if necessary. If the commission granted confidentiality to a party without realizing that the data about which confidentiality was granted would be necessary to be provided to other parties for effective hearing, Commission can always withdraw the confidentiality. There is no legal bar in the Act, or in the Regulations on the Commission disabling it to withdraw the confidentiality over particular data as and when necessary. What is to be seen is that withdrawing this confidentiality must be in consonance with the objective of the Act. The Commission considers that the alternate method of indexing

suggested by the counsel is not an effective method of arguments. The arguments on price parallelism can be addressed by the parties only by comparing the prices per unit of cement in view of demand in different geographical region. The concerns shown by Lafarge about divulging business secrets are misplaced and unfounded. Most of the pricing data is either known or can be easily collected from market.

18. We therefore, direct the DG that the data in respect of pricing of the cement provided by different opposite parties be not treated as confidential and non-confidential part of the report be accordingly prepared and furnished to opposite parties so that the matter can be listed for final arguments.”

12. The Commission then considered the matter in its ordinary meeting held on 14.12.2011 and passed the following order :

“The Commission considered the matter in the ordinary meeting held on 14.12.2011. The Commission considered the investigation report (confidential version) in the ordinary meeting held on 14.12.2011. The Commission decided to send a copy of the investigation report (non-confidential version), on receipt of the same from the Director General, to the parties (except Grasim Cements which has been merged with UltraTech Cement Ltd.) for filing their reply/objections within two weeks of receipt of the report. The Commission also directed the opposite parties to file profit & loss accounts and balance sheet of their

enterprise for last three financial years along with reply/objections to the DG Report.

The Commission directed the parties to appear for oral hearing, if they so desire, either personally or through their authorized representatives on 17.01.2012 & 18.01.2012 at 10:30 A.M.

Secretary is directed to communicate the parties accordingly.”

13. In furtherance of the aforesaid order, the Secretary of the Commission issued notice dated 23.12.2011 to the appellants requiring them to appear through their authorized representatives for oral hearing on 17.01.2012 and 18.01.2012. On 17.01.2012, the Commission comprising the Chairperson and six Members passed the following order :

“The Commission considered the matter in the ordinary meeting held on 17.01.2012. The Commission considered the applications as well as the oral request of some of the opposite parties requesting for extension of time for filing their response/objections to the investigation report in the matter.

2. After considering the request of the parties, the Commission decided to extend time up to 14.02.2012 as last opportunity for filing their response/objections (both in hard copies and soft copy), along with profit & loss accounts and balance sheet of their enterprise for last three financial years, and to give oral hearing to the parties, either personally or through their authorized representative on 21.02.2012, 22.02.2012 and 23.02.2012. It was made clear

to the parties that no further extension of time will be granted in the matter and no adjournment of hearing argument will be granted.

3. The Commission considered the applications filed on behalf of ACC Ltd. and Ambuja Cements Ltd. seeking confidential treatment to their reply/objections filed with the Commission. The Commission directed them to file non-confidential version of their reply/objections at the earliest in hard and soft copy.

4. The Commission considered the application filed on behalf of Jaiprakash Associates requesting for an electronic/coloured copy of the report. The Commission decided that the Vol. I [i.e. Main Report of 204 pages without Annexures (as available in the CD)] of the investigation report (non-confidential version) be provided in the electronic form, in accordance with the CCI (General) Regulations.

5. The parties shall file sufficient number of soft copies of reply so that a copy each may be given to other opposite parties as agreed by the parties during hearing.

6. The matter be listed for hearing in the ordinary meeting to be held on 21.02.2012, 22.02.2012 and 23.02.2012.

7. Secretary is directed to inform the parties accordingly.”

14. In the meanwhile, Ambuja Cement Limited filed another application dated 02.12.2011 for grant of confidentiality to certain information/documents furnished along with the objections. That application was rejected by the Commission comprising six Members by recording a detailed order (14 pages) dated 14.02.2012. Last two paragraphs of that order are reproduced below :

“The counsel for the applicant stated that even data of pricing in invoices, capacity and production data etc. should be given confidential treatment. We consider that the prayer of confidentiality made by the applicant is bereft of any merit. In order to find out whether there was a cartel or not between the producers, the Commission has to consider any attempts of the members of alleged cartel at controlling production, non-use of capacity of their plants, sale and prices of the products through out India or in a limited region, regulating supplies within certain areas and price, intention of the producers to monopolise geographical markets etc. In order to consider all these matters, the production data, data regarding use of capacity, data regarding prices, data regarding supply of material within different regions by different operators and different operators and other material having impact on prices cannot be granted confidentiality vis-à-vis parties. The general confidentiality is always maintained by the Commission and there is a prohibition on disclosure of this data to the persons who are not parties to the matter. As has been rightly observed by EC Court that even in its orders the Commission has to take care of the interests of general public, consumers and other players. The Commission has not only the role of putting penalties on violators of the provisions of section 3, 4, 5 & 6 of the Act but

the Commission has an onerous duty of promoting competition and competitive attitude in the country. The Commission is duty bound to inform in its orders as to why a penalty was imposed on certain parties and what were the economic concerns which Commission considered.

Before parting with this application, we feel that the application was deliberately made to delay the proceedings and the parties should desist from making such applications. The application is hereby dismissed.”

15. The oral arguments were heard by the Commission comprising six Members on three consecutive dates i.e. 21.02.2012, 22.02.2012 and 23.02.2012. On the first day, the arguments were advanced by the advocates representing Ambuja Cements Limited, ACC Limited and Ultratech Cement Limited. On the second day, the arguments were advanced by the counsel representing Lafarge India Pvt. Limited, Jaiprakash Associates Ltd., Madras Cement, India Cement, Century Cement, J.K. Cement, Binani Cement and Cement Manufacturers' Association. On the last day, the Commission heard the advocates for BAI and granted two weeks' time to the parties to file written arguments.

16. In furtherance of the liberty given by the Commission, nine of the appellants, namely, Builders Association of India, Cement Manufacturers' Association, ACC Ltd., Ambuja Cement Ltd., Ultratech Cement Ltd., Jaypee Cement (Jai Prakash Associates Ltd.), J.K. Cements Ltd., Century Textiles & Industries and Madras Cements Ltd., filed their written arguments. The same were considered in the ordinary meeting of the Commission (comprising the Chairperson and six Members) held on 14.03.2012 and it was decided to pass an appropriated order. The decision taken in that meeting was reduced in the form of an order, which reads as under:

“The Commission considered the matter in the ordinary meeting held on 14.03.2012.

The matter was earlier considered on 23.02.2012 and arguments on DG Report were concluded. The parties had requested to file written arguments. The Commission allowed their request and directed the parties to file the same within two weeks.

The Commission, in the ordinary meeting held on 14.03.2012, considered the post argument written submissions filed by the following parties :

1. Builders Association of India
2. Cement Manufacturers' Association (CMA)
3. ACC Ltd. (seeking confidential treatment)
4. Ambuja Cement Ltd. (seeking confidential treatment)
5. Ultratech Cement Ltd.
6. Jaypee Cement (Jai Prakash Associates Ltd.)
7. J.K. Cement Ltd.
8. Century Textiles & Industries
9. Madras Cements Ltd.

The Commission decided to pass an appropriate order in the matter.”

17. After about three months, the Commission comprising the Chairperson and six Members passed two orders dated 20.06.2012 and declared that the appellants have acted in violation of Section 3(3)(a), 3(3)(b) and Section 3(1) and imposed cumulative penalty of Rs.6,316.59 Crores. One of the two orders is non-confidential version of the decision taken by the Commission and the other is confidential version. All the pages of both the orders have been initialed by the Chairperson. On

the last pages of both the orders the Chairperson and six Members have appended their signatures without date(s).

18. The Secretary of the Commission sent public version of the order to the appellants and the informant. The appellants challenged the same by filing appeals under Section 53-A(2) read with Section 53(1) of the Act. They also applied for stay. The Tribunal issued notice of the appeals and stay application and directed that no coercive steps should be taken for recovery of penalty till the next date.

19. During the pendency of the appeals before the Tribunal, applications dated 16.07.2012 and 18.07.2012 were filed on behalf of Ambuja Cement Ltd. and ACC Limited respectively under Section 38 of the Act for supply of un-redacted copy of order dated 20.06.2012. Both the applications were disposed of by the Commission comprising the Chairperson and six Members vide order dated 04.09.2012 and it was decided to rectify the final order by supplying the information, which was earlier redacted from the order. Paragraphs 4 to 9 of that order, which have some bearing on the decision of these appeals are reproduced below :

“3. It may be noted here that due to the involvement of confidentiality aspect in this case, the Commission passed two versions of the final order dated 20.06.2012 i.e. confidential and public versions. In public version of the order, certain data relating to pricing and production was redacted by the Commission and the public version was forwarded to the parties for compliance. The applicant has sought a copy of the order which contains necessary data regarding pricing and production so as to enable the applicant to prepare an effective appeal against the order.

4. The factual matrix leading to this application is that on 15.09.2010, the Commission passed an order under section

26(1) of the Act directing the DG to conduct an investigation into the matter. Accordingly, after conducting an investigation, DG filed its investigation report on 01.06.2011. In between, on 07.07.2011, ACC and Ambuja Cement Limited filed applications before the Commission, *inter alia*, stating that confidential information of ACC and Ambuja (and every other Opposite Party in the case) has been disseminated in the DG Reports to ACC and Ambuja (and to every other party) to the case and as such confidentiality has been breached.

5. These applications were disposed of by the Commission holding that the data used and annexed in the DG report related to price of cement, capacity and dispatch of cement etc., was historical in nature and was available in public domain. The dissemination of the information through the reports of the DG was considered not to have resulted in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or to be reasonably expected to cause serious injury. However, noting that since the DG has already decided to grant confidential treatment to the information which was disseminated through the reports of the DG, the Commission held the information to be kept confidential. The Commission directed the DG to file the non-confidential version of the report. The parties to whom the DG report was forwarded were asked to return/destroy the same and to furnish an undertaking that they would not use the data as available in the report.

6. Further the application filed by Ultra Tech seeking confidentiality to the information submitted by it before the DG regarding cost, date-wise price and names of dealers etc. for five years was disposed of by the Commission vide order dated 14.09.2011 and the DG was directed to consider the request of the Ultra Tech for confidential treatment of the said data in line with the confidential treatment granted to ACC, Jaypee and Lafarge. Accordingly, the public version of the report already submitted by the DG pursuant to order dated 08.08.2011, was returned to the Office of DG in sealed cover for resubmitting the same with necessary changes, if any.

7. Pursuant to the aforesaid directions, the office of the DG sent a note date 10.10.2011 to the Commission wherein it was stated that the state-wise monthly price data submitted by all the top companies have been used in the report for economic analysis of price parallelism and have been made part of the report. Also when the price data of Ultra Tech being already supplied to four parties as per direction of CCI, it may be meaningless to grant confidentiality status to the price data of Ultra Tech and remaining parties.

8. The Commission, after considering the note of DG office, vide order dated 18.10.2011, decided that the price data of Ultra Tech cannot be treated as confidential. The Commission also directed ACC and Lafarge to show cause as to why the confidential treatment given by DG to their

price data, be not revoked. After hearing these parties, the Commission vide order dated 29.11.2011 directed the DG that the data in respect of pricing of the cement provided by different Opposite Parties be not treated as confidential, holding that the Opposite Parties who are facing the charge of cartelization, need to show by comparison of pricing data of their company and other companies that there was no cartelization and non-confidential version of the report be prepared accordingly and furnished to the Opposite Parties. Also the application of the Ambuja Cements Limited, seeking confidential treatment to certain information furnished to the DG during investigation was dismissed by the Commission by its order dated 27.12.2011. Final order (public version) in this case passed by the Commission on 20.06.2012, however, inadvertently redacted some of the information which was earlier declared by the Commission as non-confidential.

9. After careful perusal of all the relevant record on the subject and the public and confidential versions of the order, the Commission finds that due to inadvertence some data relating to pricing has been redacted from the final order dated 20.06.2012 (public version) which was not confidential and the same was required to form part of that order. In exercise of the powers conferred by Section 38 of the Act, the Commission thinks it appropriate to rectify the final order dated 20.06.2012 by supplying information which was earlier redacted from that order.”

10. The Secretary is hereby directed to get the required portions of the final order dated 20.06.2012 (public version) amended and supply the same to the parties after due approval and signatures of the Commission.”

20. On 11.10.2012, the Tribunal took cognizance of the statement made by Shri Balbir Singh, learned counsel for the Commission that all the copies maintained under Regulation 35(13) of the Regulations shall be supplied to the concerned appellants within one week. After taking note of his statement, the Tribunal granted liberty to the appellants to amend the memos of appeals within next two weeks. Corresponding opportunity was given to the respondents.

21. In furtherance of the statement made on its behalf, the Commission comprising six Members passed order dated 16.10.2012 for providing certified copy of the confidential version of order dated 20.06.2012 to the parties. That order also reads as under :

“With due permission of the Chair, the Commission considered the matter in the ordinary meeting held on 16.10.2012.

The Commission considered the Competition Appellate Tribunal’s orders dated 11th October, 2012 in the Appeals filed by various cement companies in the matter regarding supply of all the copies maintained under Sub Regulation 13 of Regulation 35 of the Competition Commission of India (General) Regulations, 2009 to the concerned Appellants within one week from that day.

In view of the above, the Commission directed to provide the certified copy of the order dated 20.06.2012

(confidential version) u/s 27 of the Competition Act, 2002 to the parties or their authorized representative.”

22. The interlocutory applications filed by the appellants were finally disposed of by the Tribunal vide order dated 17.05.2013 and penalty imposed by the Commission was stayed subject to the condition that the appellants shall deposit 10% thereof.

23. When the appeals were taken up for final hearing, learned counsel for the parties pointed out that the records have not been received from the Commission. Thereupon, the Tribunal passed order dated 26.11.2014 and directed the Registry to send for the records of the Commission and that of the Jt. DG. The Tribunal further directed that the parties shall be free to inspect the record once the same is received from the office of the Commission and the DG. However, the parties could not inspect the record because the same was in total disarray. Therefore, the Registry was directed to return the records to the Commission for arranging the same methodically. On 25.02.2015, 22.04.2015, 20.07.2015 and 03.08.2015, the Tribunal gave directions that the records be arranged properly and copies of the documents be made available to the parties. In the intervening period, the appellants in Appeals Nos. 108, 110, 132 and 133 of 2012 filed applications for supply of specified documents. Those applications were disposed of by the Tribunal vide order dated 20.07.2015, which reads as under :

“This order shall dispose of the applications filed by the appellants for issue of a direction to the Commission to supply documents mentioned in Annexures B and C.

Since, the averments contained in all the applications are identical, it would be sufficient to make a reference to IA No.109/2015 filed in Appeal No.108/2012. In paragraphs 2 to 6 of that application, the applicant has averred as under:

- “2. It is submitted that the Applicant in its Appeal No.108/2012 filed before the Hon’ble Tribunal had raised the issue of non-delivery of documents relied upon by the Director General (DG) in its report dated 21 December 2011 and by the Commission in the order dated 20 June 2012 (Impugned Order).
3. It is submitted that on 26 November 2014, the Hon’ble Tribunal directed its Registry to provide the record of the Commission and also records of the DG including a copy of the Report. The Hon’ble Tribunal further granted the liberty to the parties to inspect the same. The relevant excerpts from the Order is reproduced hereunder for ready reference:

“Learned counsel for the parties submits that these appeals may be listed for final arguments.

The request of the learned counsel is accepted and it is directed that the appeals be listed for final hearing on 25th February 2015.

In the mean while, the Registry shall send for the records of the Competition Commission of India as also records of the Director General (Investigation & Registration) including his report. Once

the records are received, the parties shall be free to inspect the same.”

4. The Applicant was informed by the Registry that the Commission record was brought to the Hon’ble Tribunal on 19 February 2015. The Applicant conducted an inspection on 20 February 2015 of these documents, however it was discovered that the record was in complete disarray without proper indexing. Due to the record being voluminous and in a disorganized state the Applicant was unable to conduct a meaningful inspection of the records.
5. The captioned matter was listed before the Hon’ble Tribunal on 25 February 2015 wherein the Hon’ble Tribunal was pleased to pass the following order:

“Learned counsel for the Applicants complained that the record sent by the Competition Commission of India has not been properly arranged making it impossible for them to inspect the same in a methodical manner.

Since hearing of these appeals cannot take place without giving adequate opportunity to the counsel for the parties to inspect the record and, if necessary, take copies of the documents, I direct the learned counsel appearing for Competition

Commission of India to ensure that the record is arranged methodically within a period of two days.

Learned counsel for the Applicant may inspect the record and take copies of documents from the Tribunal within four weeks. List the appeals for final arguments on 22.04.2015...”

6. As per the directions of the Hon’ble Tribunal, the record was sent back to the Commission for arranging the same in a methodological manner. Upon following up with the Registry, the Applicant was orally informed that the Commission records had been received on 16 March 2015. The Applicant filed a request for inspection, and conducted an inspection of the documents on 18 March 2015, and discovered that the record was not complete and the DG records were still missing. The only records received from the Commission related to (a) pleadings of the parties, (b) the DG Report and the Annexures thereto, (c) Confidential and Non-confidential copy of the Order of the Commission order dated 20 June 2012, (d) orders passed by the Commission, (e) letters filed by the parties, and the (f) office notings of the Commission. In addition to the missing records, the Applicant was informed by the Registry that certain documents had been taken back by the Commission for indexing and would be sent to the Hon’ble Tribunal for inspection at a later date. Nevertheless, the Applicant filed an application for certified copies of certain incomplete

records. Certified copies of the documents as requested in the application dated 18 March 2015 have not been provided by the Hon'ble Tribunal. A copy of the application dated 18 March 2015 is annexed at Annexure– A.”

The Commission has opposed the applications. In the reply filed on its behalf, it has been pleaded that the appellants are deliberately delaying the disposal of the appeals. It has also been pleaded that the copies sought by the appellants cannot be supplied because the documents are internal documents of the Commission.

Learned counsel for the applicants referred to the final order passed by the Commission to show that the Director General and the Commission have relied upon Economic Data, Analysis of Cement Industry in India, Economic Analysis of the Cement Data, etc. and arrived at findings adverse to their clients and submitted that a direction be given to the Commission to supply copies of the documents enumerated in Annexure C because the same are absolutely necessary for effectively presenting the case before the Tribunal.

Learned counsel for the Commission could not controvert assertion of the applicants' advocate that the Director General and the Commission have relied upon the documents enumerated in Annexure–C for recording findings adverse to the appellants.

In view of the above, the applications are allowed and the Commission is directed to supply copies of the documents mentioned in Annexure – C to the applicants-appellants. The needful be done within 4 weeks from the date of submission of copy of this order.”

ARGUMENTS :

24. Shri Gopal Subramnium, Senior Advocate appearing for the appellant in Appeal No. 105 of 2012 (Lafarge India Limited) made the following arguments :

- (a) The impugned order is vitiated due to violation of the rule that ‘only the one who hears can decide’. They pointed out that even though the Chairperson of the Commission was not a party to the hearing held on 21st, 22nd and 23rd February, 2012 and had no idea about the contentions raised by the counsel appearing for the parties, not only became a party to the final order but also authored the same. According to the learned senior counsel, this amounts to gross violation of the rule of fairness and impartiality and casts a shadow on the integrity of the process adopted by the Commission for adjudicating the issues raised in the information filed by BAI.
- (b) The procedure adopted by the Commission is vitiated due to bias and lack of fairness. Learned counsel submitted that even before receipt of the information from BAI, the Commission had already expressed its views before the Parliamentary Standing Committee on the issue of cartelization by cement industry and, therefore, the entire exercise undertaken for conducting investigation and inquiry culminating into the passing of final order will be deemed to have been undertaken with a pre-determined mind to hold the appellants guilty of having formed a cartel. Shri Subramaniam pointed out that the Members of the Commission, who participated in the decision-making process had entertained private communications dated 12.02.2011

and 20.02.2011 sent by a former member of the Indian Administrative Service, Shri Ravi Mohan Sethi, who, after retirement joined as Chairman and Managing Director of a construction company, namely, Stellar Ventures (P) Ltd. He referred to the xerox copies of the two letters sent by Shri Ravi Mohan Sethi to Shri H.C. Gupta, Shri Anurag Goel (both Members) and Shri Dhanendra Kumar (Chairperson) of the Commission complaining against the alleged cartel formation by the cement industry and argued that the very existence of these communications in the record of the DG casts a serious doubt on the fairness of the procedure adopted for conducting investigation and passing of final order. Learned senior counsel also pointed out that, after receiving the order passed by the Commission under Section 26(1), the Jt. DG submitted a Note dated 22.02.2011, wherein he suggested the name of Shri Hari Prasad, an expert in the Economic division of the Commission for assistance knowing fully well that said Hari Prasad had already conducted economic analysis of the data on price fixation and its determination, the demand and supply of product and price parallelism in the cement industry and the DG as well as the Member heading the Economic Division approved his proposal knowing fully well that the expert will not be in a position to objectively assist the DG. He made pointed reference to Note dated 22.02.2011 recorded by Dr. Geeta Gouri (Member), who was heading the Economic Division of the Commission and argued that the investigation was prejudiced on account of the observations contained in that note. In support of his arguments, Shri Subramaniam relied upon the following judgements and orders :

- (i) Morgan Vs. United States, 289 U.S. 468, 56 S. Ct. 906
- (ii) Gullapalli Nageswar Rao Vs. Andhra Pradesh State Road Transport Corporation and another, AIR 1959 SC 308
- (iii) Rasid Javed and others Vs. State of Uttar Pradesh, (2010) 7 SCC 781

- (iv) Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and others, (2001) 2 SCC 182
 - (v) Automotive Tyre Manufacturers Association Vs. Designated Authority and others, (2011) 2 SCC 258
 - (vi) Kwality Restaurants & Ice-cream Co. Vs. Commissioner, (2012) 194 DLT 195 (DB)
 - (vii) Union of India Vs. Shiv Raj and others, (2014) SCC 546
 - (viii) NanhekhanguabkhanPathan Vs. The State of Maharashtra, 1992 (2) BomCR 121
 - (ix) Union of India Vs. E.K. Andrew, ILR 1996 (2) Kerala 118
 - (x) Order of the Competition Appellate Tribunal dated 27.04.2015 in All India Organisation of Chemists and Druggists Vs. Competition Commission of India.
 - (xi) Cement Workers KaramchariSangh Vs. Jaipur Udyog Ltd., (2008) 4 SCC 701
 - (xii) Nagarjuna Construction Company Ltd. Vs. Govt. of A.P. (2008) 16 SCC 276
 - (xiii) Bryan Finlay QC & Richard Ogden, "Consistence in Tribunal Decision Making: Mini LLB for Regulators, September 10, 2012
 - (xiv) Bharti Airtel Ltd. Vs. Union of India, judgement and order dated 28.09.2012 in Petition No. 444 of 2011.
 - (xv) Doyle vs. Canada (Restrictive Trade Practices Commission), 1985 Carswell Nat 26=(1985) IFC 362
- (c). Shri Subramanium further argued that the impugned order is liable to be set aside because the entire exercise for deciding the information filed by BAI was conducted with a pre-determination to penalize the cement manufacturers and give publicity to the role of the Commission. In support of this assertion, he relied upon the interviews given by the Chairperson and

Member of the Commission on 30.06.2012 to the correspondent of 'Businessworld', in 'Walk The Talk' show on NDTV 24x7 on 03.07.2012 and 'Mint' dated 24.01.2013. Learned senior counsel also pointed out that even before the order was signed, news about the same was published in the morning edition of 'Economic Times' dated 20.06.2012.

25. Shri Ramji Srinivasan, Senior Advocate appearing for the appellants in Appeal Nos. 110 and 113 of 2012 (Ambuja Cement Ltd.) argued that the principles of natural justice are integral part of the procedural safeguard evolved by the Courts against arbitrary exercise of power by judicial, quasi-judicial and administrative bodies/authorities and any violation of the rule of hearing and the rule of bias/ pre-determination has the effect of vitiating the final decision/ order. In support of this argument, learned senior counsel relied upon the judgments of the Supreme Court in A Kripak Vs. Union of India, (1969) 2 SCC 262; Mahipal Singh Tomar Vs. State of UP, (2013) 16 SCC 771; Manohar Vs. State of Maharashtra, (2012) 13 SCC 14; Bharat SewakSamaj v. Lt. Governor, (2012) 12 SCC 675 and Swadeshi Cotton Mill vs. Union of India, (1981) 1 SCC 664. Shri Ramji Srinivasan also referred to para 4.5 of the analysis conducted by Anti -Trust Division of the Commission of the Jt. DG's report and argued that even though the Anti-Trust Division had opined that the report is based on the circumstantial behavioural evidence and is not based on any concrete evidence and suggested that economic analysis thereof may be got conducted but the Commission did not act upon the recommendations of Anti-Trust Division and proceeded to pass the impugned order.

26. Shri Gourab Banerji, Senior Advocate appearing for the appellants in Appeal Nos. 104 and 126 of 2012 (Ultratech Cement Ltd.) argued that the manner in which the Jt. DG conducted the investigation and the Commission dealt with the report shows that even before initiation of proceedings, the guilt of the appellants had been presumed and the exercise of investigation and inquiry was done with a closed mind. He submitted that Dr. GeetaGouri, Member, who was heading

economic division, had by her note dated 24.02.2011 determined the course of investigation and the sole object thereof was to record a finding that the appellants are guilty of violating Section 3 of the Act. He argued that such pre-determined investigation was a farce and, therefore, the decision taken by the Commission is liable to be declared as nullity. Shri Banerjee relied upon the judgment of the Supreme Court in Rangi International Vs. Nova Scotia Bank [(2013) 7 SCC 160] to show that the adjudicatory functions of the Commission are quasi-judicial in nature and argued that it is bound to act in consonance with the principles of natural justice. He also relied upon the judgment of Karnataka High Court in M/s. Blaze and Central (P) Ltd. vs. Union of India, AIR 1980 Karnataka, 186 in support of the argument that a person, who is interested in the subject which he is required to decide is not competent to do so.

27. Sarva/Shri Harman Singh Sandhu, learned counsel appearing for Associated Cement Companies Limited (Appeal Nos. 108 and 132 of 2012), P.K. Bhalla, learned counsel appearing for J.K. Cement Ltd (Appeal Nos. 112 and 128 of 2012), G.R. Bhatia, learned counsel appearing for Jai Prakash Associates Ltd. (Appeal Nos. 107 and 129 of 2012), T. Srinivasa Murthy, learned counsel appearing for the Ramco Cements Ltd. (Appeal Nos. 111 and 123 of 2012), Aditya Verma, learned counsel appearing for M/s. India Cement Limited (Appeal Nos. 106 and 134 of 2012), RaghunathaSethupathy, learned counsel appearing for Binani Cements (Appeal Nos. 109 and 125 of 2012), Pramod B. Aggarwala, learned counsel appearing for Century Textile Industries (Appeal Nos. 113 and 124 of 2012) and Cement Manufacturers' Association (Appeal Nos. 103 and 122 of 2012) stated that they are adopting the arguments made by Sarva/Shri Gopal Subramaniam, Ramji Srinivasan and Gaurab Banerji and do not want to advance independent arguments.

28. The stand taken by the Commission is that adjudication of issues relating to anti-competitive agreements, abuse of dominant position and regulation of

combinations is purely administrative function and as such the orders passed under Sections 3, 4 and 6 read with Section 27 cannot be termed as quasi-judicial so as to attract the application of the principles of natural justice. It is also the case of the Commission that the powers exercised by it under the Act are meant to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by different participants in the markets and, therefore, it is not bound to comply with the rule of audi alteram partem in strict sense. An alternative plea taken by the Commission is that various provisions of the Act are regulatory in nature and as such, it is not bound to comply with the rule of hearing etc. In the alternative, it has been pleaded that in this case there has been substantial compliance with the principles of natural justice in as much as the Jt. DG had issued notices to the appellants under Section 36(2) read with Section 41(2) and called upon them to furnish the specified information, the statements of their representatives were recorded and final order was passed after supplying copies of the investigation report, giving them opportunity of filing replies/objections and hearing their advocates.

28.1 Shri Pallav Shishodia, Senior Advocate appearing for the Commission referred to Section 36(1) and submitted that even though in the discharge of its functions, the Commission is to be guided by the principles of natural justice, the same cannot be treated to have been violated merely because the Chairperson, who had not heard oral arguments on 21st, 22nd, and 23rd February, 2012, joined other six Members in passing the final order. Shri Shishodia emphasized that similar plea taken by the appellants in the arguments advanced at the time of hearing of the applications for interim relief was not accepted by the Commission and, therefore, the repeat of that argument should not be entertained. He then submitted that natural justice cannot be put into straight jacket formula and applicability thereof is required to be considered in the light of the relevant statute, regulatory nature of the functions performed by the Commission, its powers and

duties and if that is done, the Chairperson's participation in the final order cannot be considered as having affected the merits of the case. Shri Shishodia referred to Section 22 of the Act, which regulates the meetings of the Commission and argued that participation of the Chairperson and all Members in each and every meeting is not *sine qua non* and the absence of Chairperson in the meetings held for hearing the arguments of the Advocates for the parties has not adversely affected the validity of the final order. He pointed out that the Commission is required to discharge several functions other than making an enquiry into the cases relating to violation of Sections 3, 4 or 5 and it is quite possible that the Chairperson or some Member who may be overseeing cases of mergers and combinations or who may be discharging functions relating to competition advocacy under Section 49 is not precluded from becoming a party to the final order, despite the fact that he may not have participated the meetings held for hearing the parties. Learned senior counsel pointed out that the Chairperson had participated at various stages of the proceedings of the complaint filed by BAI and argued that his absence in the meetings of the Commission held on 21st, 22nd and 23rd February, 2012 cannot, by itself, be treated as fatal to the impugned order. In support of this argument, learned senior counsel also relied upon Section 15, which declares that no act or proceedings of the Commission shall be invalid merely by reason of any vacancy or any defect in its constitution, any defect in the appointment of a person acting as a Chairperson or as a Member or any irregularity in the procedure. Shri Shishodia then submitted that non-participation of Chairperson of the Commission in the oral hearing should not be made a ground to invalidate the impugned order because the findings recorded on the issue of violation of Section 3(3)(a) and 3(3)(b) of the Act are based on cogent reasons and the appellants have neither pleaded nor any evidence has been produced to show that they were prejudice due to the Chairperson's participation in the final order.

28.2 Learned senior counsel further argued that the Tribunal should not accept the argument based on the rule that 'one who has not heard the case is not entitled to decide' because originally only six out of eleven appellants had taken a ground in their memo of appeals to question the participation of the Chairperson in the decision making process on the premise that he had not heard the argument and the other five took this objection at a later stage. In support of this argument, Shri Shishodia strongly relied on *Cumbum Roadways (P) Ltd., Madurai and others Vs. Somu Transport (P) Ltd. and others* – [(1996) 3 SCR 7]. Shri Shishodia submitted that the Tribunal should remove the smoke screen of invalidity created by the appellants on the ground of alleged illegality, which has crept in the final order due to participation of Chairperson and decide the issue of cartelization on merits, else they will feel emboldened and continue such anti-competitive practice with impunity and that would be highly detrimental to public interest. Learned counsel emphasized that the findings recorded by the Jt. D.G. and Commission are based not only on the information/ material furnished by the appellants themselves on the issues of "price parallelism, limiting of production for the particular period and availability of cement in the market at a given point of time but also from various other sources and argued that the detailed analysis conducted by the experts in the field of economics etc., do not call for interference by the Tribunal. He also invoked the doctrine of 'useless or empty formality' and argued that if the appellants are not able to show any legal infirmity in the findings recorded by the Joint D.G. and Commission on the question of violation of Section 3(3)(a) and 3(3)(b) of the Act, then the Tribunal should not nullify the impugned order by accepting the hyper technical argument relating to violation of principles of natural justice. In support of his arguments Shri Shishodia relied upon the following judgments of the Supreme Court:

1. *Lala Shri Bhagwan and another vs. Shri Ram Chand and Another*- [AIR 1965 SC 1767].
2. *Madhya Pradesh Industries Ltd. v. Union of India and others*-[AIR 1966 SC 671].

3. State of Jammu and Kashmir and Others Vs. Bakshi Gulam Mohammad and Another—[AIR 1967 SC 122].
4. Union of India and another v. P.K. Roy and Others—[(1968) 2 SCR 186].
5. General Manager, Eastern Railway and another vs. Jawala Prasad Singh—[(1970) 1 SCC 103].
6. M/s. Kanungo and Company vs. Collector of Customs and others—[(1973) 2 SCC 438].
7. K.L.Tripathi vs. State Bank of India and others—[(1984) 1 SCC 43].
8. Ossein and Gelatine Manufacturers Association v. Modi Alkalies and Chemicals Limited and another – [(1989) SCC 264].
9. Managing Director, ECIL, Hyderabad and others v. B. Karunakar and Others [(1993) 4 SCC 727].
10. Dr. Umrao Singh Choudhary v. State of Madhya Pradesh and another—[(1994) 4 SCC 328].
11. High Court of Judicature at Bombay vs. Shirishkumar Rangrao Patil and another—[(1997) 6 SCC 339].
12. Board of Directors, Himachal Pradesh Transport Corporation vs. K C Rahi—[(2008) 11 SCC 502].
13. Union of India vs. Alok Kumar—[(2010) 5 SCC 349].
14. Mohd. Shahabuddin vs. State of Bihar—[(2010) 4 SCC 653].
15. Securities and Exchange Board of India vs. Akshya Infrastructure Private Limited— [(2014) 11 SCC 112].
16. Dhrampal Satyapal Limited v. Deputy Commissioner of Central Exercise—[(2015) 8 SCC 519].

28.3 Learned senior counsel highlighted the following differences in the powers and functions of the Commission and Competition Appellate Tribunal and like bodies to show that the Commission is not required to comply with the rules of natural justice in strict sense :

- “a) CCI is a body corporate having perpetual succession and a seal. No such provision exists in relation to COMPAT or any judicial body.

- b) Earlier, the word used in section 19 was “complaint”. It has now been amended to read as “information” which makes CCI only an administrative body and not a judicial body.
- c) A third party can file an information before the CCI. However, there is no such power given to COMPAT. An appeal is to be filed only by an aggrieved person. Even in judicial proceedings, courts do not allow a person who is not a proper or a necessary party to initiate proceedings.
- d) The CCI has the power to initiate suo moto action and direct investigation by the DG which is another arm of the body. No such powers are contemplated to any judicial body. It’s only under the inherent powers of the extraordinary jurisdiction of the Courts of record is such a power contemplated which is exercised only under grave circumstances. However, the suo moto power of CCI is a provision of general and routine application.
- e) The CCI has no power of review its own orders while the COMPAT has been vested with the right to review its own orders, which is in tune with a judicial proceedings.
- f) No powers of contempt with the CCI while the same have been provided with the COMPAT.
- g) The DG, CCI in order to conduct a raid would require a search warrant from a CMM under section 41(3) of the Act. If the CCI was to be treated as any other judicial body, it would not be requiring to seek any such permission as they are incidental to any judicial process.
- h) There is a deeming provision under section 53-O(3) of the Act that the proceedings before the COMPAT shall be judicial proceedings within

the meaning of Sections 193, 196 and 228 IPC and a civil court for the purpose of section 195 and Chapter XXVI of Cr.P.C. while the said deeming fiction is conspicuously missing from section 35 of the Act which relates to the CCI.

- i) Courts require a mandatory deposit of penalty (or a portion of it) while filing an appeal. However, no such provision has been made in relation to filing an appeal to COMPAT.
- j) CCI is specifically empowered under Section 53(T) of the Act to file an appeal before the Supreme Court of India. It is trite law that a judicial body cannot be defending its own orders and hence, it flows that the legislature never wanted to treat CCI as a judicial body. Had CCI been a judicial body, the power to file appeal (if any), would have been with COMPAT and not CCI.
- k) Sections 21 & 21A of the Act provide that the CCI and other Statutory bodies can seek each others opinion and refer issues to each other for advice and action. The same is not a function that can be undertaken by a judicial body nor has been vested with COMPAT.
- l) The CCI does not have the power to award compensation to aggrieved parties but the said right has been provided to the COMPAT i.e. to determine the compensation for the parties to the case before the CCI as well as any other aggrieved person even if the person was not a prty to the CCI.
- m) The word “temporary injunction” under section 33 has been amended with the word order. The ministry’s stand before the standing committee is that grant of temporary injunction is a judicial process which is not performed by the CCI.

- n) The 2007 amendment removed the provisions of a judicial member and an expert member as well as sitting in benches by the Commission to be in tune with the BrahmDutt judgement. The entire strength of the CCI now sits to look into contraventions of the Act, a feature non-existent in judicial determinations. The legislature in its wisdom realized that every issue that the Commission would need to evaluate would involve complex questions of economics, commerce and competition law which would have an impact on the entire economy of the country.
- o) Under Section 55, the Central Government can issue directions to the Commission. Such provision is non-existent for a judicial body and no such provision exists for COMPAT.
- p) Under section 56, the Central Government has the power to supersede the Commission. This is a power provided against an administrative body/authority but is unheard of in relation to a judicial body.

28.4 Shri Shishodia also pointed that while deciding the interlocutory applications filed by the appellants for stay of the order passed by the Commission, the Tribunal had heard lengthy arguments and passed a detailed order in which the plea of violation of natural justice was not accepted.

28.5 In the end, Shri Shishodia argued that the defect/deficiency, if any, in the order of the Commission will be deemed to have been rectified because this Tribunal has afforded fullest possible opportunity of hearing to the advocates representing the parties.

29. Shri AnkushWalia, learned counsel appearing for Respondent No. 2, BAI adopted the arguments of Shri Shishodia.

30. Before dealing with the arguments of the learned counsel for the parties, we consider it necessary and proper to first determine whether in exercise of its adjudicatory functions, the Commission acts as a quasi-judicial body and as such, it is bound to comply with the principles of natural justice and whether non-compliance of an important facet of natural justice, namely 'only the one who hears should decide' has the effect of rendering the impugned order a nullity.

31. With the globalisation in economy, the adoption of the policy of liberalisation and technological developments in the fields of science, agriculture, communication etc., issues and disputes, which were hitherto unknown to the judicial system started cropping up. To deal with such issues and disputes, it became necessary to create bodies comprising experts and persons possessing specialised knowledge in the fields of economics, technology, science etc. The Monopolies and Restrictive Trade Practices Act, 1969, which was enacted with the primary objective of controlling monopoly and prohibiting monopolistic, restrictive and unfair trade practices was considered to have become obsolete in the new dispensation and it was felt that the focus should shift from curbing monopolies to promoting competition. For achieving this, the Government of India constituted a High Level Committee to examine various issues relating to competition. The Committee submitted its report on 22.05.2002. After considering the report and consultations made by various segments of the society including the trade and industry associations, Central Government decided to enact a new law. Accordingly, a Bill was introduced in Parliament, the Statement of Objects and Reasons contained therein were :

“1. In the pursuit of globalization, India has responded to opening up 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 Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift our focus from curbing monopolies to promoting competition.

2. The Central Government constituted a High Level Committee on Competition Policy and Law. The Committee submitted its report on the 22nd May, 2000 to the Central Government. The Central Government consulted all concerned including the trade and industry associations and the general public decided to enact a law on Competition.

3. The Competition Bill, 2001 seeks to ensure fair competition in India by prohibiting trade practices, which cause appreciable adverse effect on competition in markets within India and, for this purpose, provides for the establishment of a quasi-judicial body to be called the Competition Commission of India (hereinafter referred to as CCI) which shall also undertake competition advocacy for creating awareness and imparting training on competition issues.

4. The Bill also aims at curbing negative aspects of competition through the medium of CCI. CCI will have a Principal Bench and Additional Benches and will also have one or more Merger Benches. It will look into violations of

the Act, a task which could be undertaken by the Commission based on its own knowledge or information or complaints received and references made by the Central Government, the State Governments or statutory authorities. The Commission can pass orders for granting interim relief or any other appropriate relief and compensation or an order imposing penalties, etc. An appeal from the orders of the Commission shall lie to the Supreme Court. The Central Government will also have powers to issue directions to the Commission on policy matters after considering its suggestions as well as the power to supersede the Commission if such a situation is warranted.

5. The Bill also provides for investigation by the Director-General for the Commission. The Director-General would be able to act only if so directed by the Commission but will not have any suo moto powers for initiating investigations.

6. The Bill confers power upon the CCI to levy penalty for contravention of its orders, failure to comply with its directions, making of false statements or enterprise a penalty of not more than ten per cent. of its average turn-over for the last three financial years. It can also order division of dominant enterprises. It will also have power to order demerger in the case of mergers and amalgamations that adversely affect competition.

7. The Bill also seeks to create a fund to be called the Competition Fund. The grants given by the Central Government, costs realized by the Commission and

application fees charged will be credited into this Fund. The pay and allowances and the other expenses of the Commission will also be borne out of this Fund. The Bill provides for empowering the Comptroller and Auditor-General of India to audit the accounts of the Commission. The Central Government will be required to lay the annual accounts of the Commission, as audited by the Comptroller and Auditor-General and also the annual report of the Commission before both the Houses of Parliament.

8. The Bill aims at repealing the Monopolies and Restrictive Trade Practices Act, 1969 and the dissolution of the Monopolies and Restrictive Trade Practices Commission. The Bill provides that the cases pending before the Monopolies and Restrictive Trade Practices Commission will be transferred to the CCI except those relating to unfair trade practices which are proposed to be transferred to the relevant fora established under the Consumer Protection Act, 1986.”

32. Section 2 of the Act contains definitions of various terms i.e. (a) acquisition (b) agreement (c) cartel (d) Chairperson (e) Commission (f) consumer (g) Director - General (h) enterprise (i) goods (j) Member (k) notification (l) person (m) practice (n) prescribed (o) price (p) public financial institution (q) regulations (r) relevant market (s) relevant geographical market (t) relevant product market (u) service (v) shares (w) statutory authority (x) trade (y) turnover and (z) words and expressions used but not defined in this Act and defined in the Companies Act, 1956 shall have the same meanings respectively assigned to them in that Act. By Amending Act 39 of 2007, the definition of ‘Appellate Tribunal’ was added.

33. Chapter II of the Act which is titled as "Prohibition of Certain Agreements, Abuse of Dominant Position and Regulations of Combinations" contains four sections. Section 3 deals with anti-competitive agreements. Section 4 deals with abuse of dominant position. Section 5 defines Combination and Section 6 deals with the issue of Regulation of Combinations. Chapter III contains provisions for establishment of Commission (Section 7), Composition of Commission (Section 8), Selection Committee for Chairperson and Members of Commission (Section 9), Term of office of Chairperson and other Members (Section 10), Resignation, removal and suspension of Chairperson and other Members (Section 11), Restriction on employment of Chairperson and other Members in certain cases (Section 12), Administrative powers of Chairperson (Section 13), Salary and Allowances and other terms and conditions of service of Chairperson and other Members (Section 14). Section 15 carries the heading 'Vacancy, etc., not to invalidate proceedings of Commission'. Section 16 provides for appointment of Director General by the Central Government for the purpose of assisting the Commission in conducting inquiry into contravention of any of the provisions of the Act. Section 17 empowers the Commission to appoint a Secretary and such officers and other employees as area considered necessary for the efficient performance of its functions under the Act. Sub-section (3) of this section empowers the Commission to engage experts and professionals having special knowledge of and experience in economics, law, business or such other disciplines related to competition, as it deems necessary to assist in the discharge of its functions under the Act. Chapter IV contains provisions relating to duties, powers and functions of Commission. Section 18 enumerates duties of the Commission. Section 19 contains provisions relating to inquiry into certain agreements and dominant position of enterprise. Section 20 provides for inquiry into combination by Commission. Section 21 speaks of reference by statutory authority. Sections 22 to 25, as they stood before their substitution or repeal by Act 39 of 2007, provided for

constitution of benches of Commission, distribution of business of Commission amongst Benches, procedure for deciding a case where Members of a Bench differed in opinion and jurisdiction of a bench. Section 26 contains procedure of enquiry under Section 19. Section 27 empowers the Commission to impose penalty for contravention of Section 3 and/or Section 4 to give appropriate directions. Section 28 provides for division of enterprise enjoying dominant position. Section 29 contains procedure for investigation of combinations. Section 30 enumerates the procedure to be followed in case where any person or enterprise is given notice under Section 6(2). Section 31 provides for orders of Commission on certain combinations. Section 32 deals with acts taking place outside India but having an effect on competition in India. Section 33 enumerates the powers to the Commission to issue interim orders. Before its repeal in 2007, Section 34 powered the Commission to award compensation. Section 35 deals with issue relating to appearance before the Commission. Section 36 enumerates the power of the Commission to regulate its own procedure. Before its repeal, by Act 37 of 2009, Section 37 conferred power upon the Commission to review its order. Section 38 provides for rectification of orders. Section 39 deals with execution of orders of the Commission imposing monetary penalty. Before its repeal by Act 39 of 2007, Section 40 provided for an appeal directly to the Supreme Court against any decision or order of the Commission. Chapter V (Section 41) relates to investigation by the Director General into any contravention of the provisions of the Act or any rules or regulations made thereunder. Chapter VI of the Act contains nine sections. Section 42 provides for consequences of contravention of the orders of Commission. Section 43 enumerates the Commission's power to impose penalty for failure to comply with the directions of Commission and Director General. Section 44 provides for imposition of penalty for making false statement or omission to furnish material information. Section 45 provides for imposition of penalty for offences in relation to furnishing of information. Section 46 gives power to the Commission to impose lesser penalty in certain

cases. Section 48 deals with the issue relating to contravention by companies. Chapter VII (Section 49) deals with competition advocacy. Chapter VIII contains provisions relating to Finance, Accounts and Audit. Chapter IX contains Miscellaneous Provisions. Section 54 empowers the Central Government to grant exemption from the application of the Act, or any provision thereof to any class of enterprise provided that such exemption is considered necessary in the interest of security of the State or public interest; any practice or agreement arising out of or in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries; any enterprise which performs a sovereign function on behalf of the Central Government or a State Government. Section 55 confers power upon the Central Government to issue directions to the Commission on the question of policy, other than those relating to technical and administrative matters and the same are binding on the Commission in exercise of its power or the performance of its functions under the Act. In terms of proviso of that section, the Commission is, as far as practicable entitled to an opportunity to express its views before any direction is given under Section 55(1). Sub-section (2) of Section 55 declares that the decision of the Central Government whether a question is one of policy or not shall be final. Section 56 empowers the Central Governments to supersede Commission and also lays down the procedure for exercise of that power. Section 57 prohibits disclosure of information relating to any enterprise, which has been obtained by or on behalf of the Commission for the purposes of the Act. The only exception to this rule is that the information can be disclosed with the previous written permission of the enterprise. Section 58 declared that Members, Director General, Registrar, officers and other employees etc. are public servants. Section 59 gives protection to action taken in good faith. Section 60 declares that the provisions of the Act shall have overriding effect qua any other law for the time being in force. Section 61 declares that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act

to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. Section 62 lays down that the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. Section 63 confers power upon the Central Government to make rules to carry out the provisions of the Act. Under Section 64, the Commission is empowered to make regulations consistent with the provisions of the Act and for carrying out the purposes of the Act. Section 65 empowers the Central Government to pass an order for removing difficulties. Section 66 provides for repeal and saving.

34. For appreciating the true nature, ambit and scope of the amendments made by Act 39 of 2007 and Act 39 of 2009, it will be useful to notice un-amended Sections 22 to 25, 26, 33, 36, 42 and 43, which read as under :

Sec. 22. Benches of Commission – (1) The jurisdiction, power and authority of the Commission may be exercised by Benches thereof.

(2) The Benches shall be constituted by the Chairperson and each Bench shall consist of not less than two Members.

(3) Every Bench shall consist of at least one Judicial Member.

Explanation.—For the purposes of this sub-section, “Judicial Member” means a Member who is, or has been, or is qualified to be, a Judge of a High Court.

(4) The Bench over which the Chairperson presides shall be the Principal Bench and the other Benches shall be known as the Additional Benches.

(5) There shall be constituted by the Chairperson one or more Benches to be called the Mergers Bench or Mergers

Benches, as the case may be, exclusively to deal with matters referred to in sections 5 and 6.

(6) The places at which the Principal Bench, other Additional Bench or Mergers Bench shall ordinarily sit, shall be such as the Central Government may, by notification, specify.”

“Sec. 23. Distribution of business of Commission amongst Benches. –(1) Where any Benches are constituted, the Chairperson may, from time to time, by order, make provisions as to the distribution of the business of the Commission amongst the Benches and specify the matters, which may be dealt with by each Bench.

(2) If any question arises as to whether any matter falls within the purview of the business allocated to a Bench, the decision of the Chairperson thereon shall be final.

(3) The Chairperson may -

- (i) transfer a Member from one Bench to another Bench , or
- (ii) authorize the Members of one Bench to discharge also the functions of the Members of other Bench:

Provided that the Chairperson shall transfer, with the prior approval of the Central Government, a Member from one Bench situated in one city to another Bench situated in another city.

(4) The Chairperson may, for the purpose of securing that any case or matter which, having regard to the nature of the questions involved, requires or is required in his opinion or under the rules made by the Central Government in this behalf, to be decided by a Bench composed of more than two

Members issue such general or special orders as he may deem fit.”

“Sec. 24. Procedure for deciding a case where Members of a Bench differ in opinion. - If the Members of a Bench differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case, including those who first heard it.”

“Sec. 25. Jurisdiction of Bench - An inquiry shall be initiated or a complaint be instituted or a reference be made under this Act before a Bench within the local limits of whose jurisdiction—

(a) the respondent, or each of the respondents, where there are more than one, at the time of the initiation of inquiry or institution of the complaint or making of reference, as the case may be, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the respondents, where there are more than one, at the time of the initiation of the inquiry or institution of complaint or making of reference, as the case may be, actually and voluntarily resides or carries on business or personally works for gain provided that in such case either the leave of the Bench is given, or the respondents who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation.—A respondent, being a person referred to in sub-clause (iii) or sub-clause (vi) or sub-clause (vii) or sub-clause (viii) of clause (1) of section 2, shall be deemed to carry on business at its sole or principal place of business in India or at its registered office in India or where it has also a subordinate office at such place.”

“Sec. 26. Procedure for inquiry on complaints under Section 19. - (1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, 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.

(2) 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.

(3) Where on receipt of a complaint under clause (a) of sub-section (1) of section 19, the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it may deem fit, including imposition of costs, if necessary.

(4) The Commission shall forward a copy of the report referred to in sub-section (2) to the parties concerned or 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 relates to a complaint and such report recommends that there is no contravention of

any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director General.

(6) If, after hearing the complainant, the Commission agrees with the recommendation of the Director General, it shall dismiss the complaint.

(7) If, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.

(8) If the report of the Director General relates on a reference made under sub-section (1) and such report recommends that there is no contravention of the provisions of this Act, the Commission shall invite comments of the Central Government or the State Government or the statutory authority, as the case may be, on such report and on receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a prima facie case.

(9) If the report of the Director General referred to in sub-section (2) 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.”

“Sec. 33. Power to grant interim relief. - (1) Where during an inquiry before the Commission, it is proved to the satisfaction of the Commission, by affidavit or otherwise, 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, grant a temporary injunction restraining any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to the opposite party, where it deems it necessary.

(2) Where during the inquiry before the Commission it is proved to the satisfaction of the Commission by affidavit or otherwise that import of any goods is likely to contravene subsection (1) of section 3 or subsection (1) of section 4 or section 6, it may, by order, grant a temporary injunction restraining any party from importing such goods until the conclusion of such inquiry or until further orders, without giving notice to the opposite party, where it deems it necessary and a copy of such order granting temporary injunction shall be sent to the concerned authorities.

(3) The provisions of rules 2A to 5 (both inclusive) of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall, as far as may be, apply to a temporary injunction issued by the Commission under this Act, as they apply to a temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to any inquiry before the Commission.”

“Sec. 36. Power of Commission to regulate its own procedure. - (1) The Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5

of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have powers to regulate its own procedure including the places at which they shall have their sittings, duration of oral hearings when granted, and times of its inquiry.

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

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
- (f) dismissing an application in default or deciding it ex parte;
- (g) any other matter which may be prescribed.

(3) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Commission shall be deemed to be a civil court for the purposes of

section 195 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973.

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

(5) The Commission may direct any person—

(a) to produce before the Director General or the Registrar or an officer authorised by it, such books, accounts or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;

(b) to furnish to the Director General or the Registrar or any officer authorised by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

(6) If the Commission is of the opinion that any agreement referred to in section 3 or “abuse of dominant position referred to in section 4 or the combination referred to in section 5 has caused or is likely to cause an appreciable adverse effect on competition in the relevant market in India and it is necessary to protect, without further delay, the interests of consumers and other market participants in India, it may conduct an inquiry or adjudicate upon any

matter under this Act after giving a reason able oral hearing to the parties concerned.”

“Sec. 42. Contravention of orders of Commission. - (1) Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Commission, or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or fails to pay the penalty imposed under this Act, he shall be liable to be detained in civil prison for a term which may extend to one year, unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakhs.

(2) The Commission may, while making an order under this Act, issue such directions to any person or authority, not inconsistent with this Act, as it thinks necessary or desirable, for the proper implementation or execution of the order, and any person who commits breach of, or fails to comply with, any obligation imposed on him under such direction, may be ordered by the Commission to be detained in civil prison for a term not exceeding one year unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakhs.”

“Sec. 43. Penalty for failure to comply with directions of Commission and Director General. – If any person fails to comply with a direction given by—

- (a) the Commission under sub-section (5) of section 36; or
- (b) the Director General while exercising powers referred to in sub-section (2) of section 41, the Commission shall impose on such person a penalty of rupees one lakh for each day during which such failure continues.

35. The constitutional validity of Rule 3 of the Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules, 2003 was challenged in by one Shri BrahmDutt by filing a petition under Article 32 of the Constitution. His main contention was that the appointment of non-judicial person as Chairperson of the Commission violated the doctrine of separation of power. He relied upon the judgment of the Constitution Bench of the Supreme Court in S.P. Sampath Kumar Vs. Union of India [(1987) 1 SCC 124] and argued that the Commission, which was essentially a judicial body having adjudicatory powers on the questions of importance should be headed by a retired Judge of the Supreme Court or a High Court. The Union of India contested the writ petition and pleaded that the Commission was essentially a Regulatory Body which requires expertise in the field and such expertise cannot be supplied by the members of judiciary alone and in any case, the power of judicial review is available with the High Courts and the Supreme Court. During the pendency of the writ petition, two additional counter-affidavits were filed on behalf of the Union of India, in which it was submitted that the Government was proposing to make certain amendments so as to enable the Chairman and the Members to be selected by a Committee presided over by the Chief Justice of India or his nominee.

36. The Supreme Court noticed the background in which the Act was enacted, referred to the statements contained in the additional affidavits filed on behalf of Union of India and observed :

“We find that the amendments which the Union of India proposes to introduce in Parliament would have a clear bearing on the question raised for decision in the writ petition essentially based on the separation of powers recognised by the Constitution. The challenge that there is usurpation of judicial power and conferment of the same on a non-judicial body is sought to be met by taking the stand that an Appellate Authority would be constituted and that body would essentially be a judicial body conforming to the concept of separation of judicial powers as recognised by this Court”.....

We may observe that if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way in meeting the challenge sought to be raised in this writ petition based on the doctrine of separation of powers recognised by the Constitution.”

[Braham Dutt Vs. Union of India -(2005) 2 SCC 431]

37. Although, during the course of hearing in BrahmDutt’s case (supra), an impression was given to the Supreme Court that the Commission will have two bodies, one dealing with regulatory and advisory functions and the other dealing with adjudicatory functions, a half-hearted attempt was made in 2006 to denude the Commission of its adjudicatory functions by proposing addition of paragraphs 3(b) in the Competition (Amendment) Bill, 2006 to omit the provisions relating to

adjudication of disputes between two or more parties. This is evident from the following extracts of the Bill presented before the Parliament :

“3. The Competition (Amendment) Bill, 2006, inter alia, seeks to make the following amendments to the Competition Act so as to address various legal issues and to make the CCI fully operational on a sustainable basis, namely :-

- (a) to provide the CCI would be an expert body which will function as a market regulator for preventing anti-competitive practices in the country and it would also have advisory and advocacy functions in its role as a regulator;
- (b) to omit the provisions relating to adjudication of disputes between two or more parties by the CCI and to provide for investigation through the Director General in case there exist a prima facie case relating to anti competitive agreements or abuse of dominant position under the Competition Act, 2002 and conferring power upon the CCI to pass orders on completion of an inquiry and impose monetary penalties and in doing so the CCI would work as a collegium and its decisions would be based on simple majority”

38. However, when the amendments were finally made in the Act, the Competition (Amendment) Act, 2007 (for short Act 39 of 2007), most of the provisions relating to adjudicatory functions of the Commission were retained with minor modifications in some sections and the provision contained in paragraph 3(b) of the Competition (Amendment) Bill, 2006 was dropped. By Act 39 of 2007,

Sections 8, 9, 10, 12, 13, 16, 17, 19, 20, 22, 26, 27, 28, 29, 30, 33, 36, 42, 43, 46, 49, 51, 52, 58, 61, 63, 64 and 66 were amended and Sections 23, 24, 25, 37 and 40 were repealed. Simultaneously, Sections 17(3), Sections 21-A, 42-A and 43-A were inserted. Chapter VIII-A (Sections 53-A to 53-U) was also inserted by Act 39 of 2007 to provide for establishment of the Appellate Tribunal, its composition, jurisdiction, powers, procedure etc.

39. In terms of amended Section 13, all administrative powers of general superintendence, directions and control in respect of all administrative matters came to be vested with Chairperson, who has also been empowered to delegate powers relating to administrative matters of the Commission to any other Member or officer. Section 17(3) was inserted to empower the Commission to engage experts and professionals in the fields of economics, law, business and other disciplines relating to competition. Section 22 (unamended), which postulated that the jurisdiction, power and authority of the Commission may be exercised by Benches was substituted by a new section with the heading 'Meetings of the Commission'. The new section provides that the Commission shall meet at such times and such places and shall observe such rules or procedure in regarding to the transaction of business at its meetings as may be provided by regulations; that the Chairperson and in his absence the senior most Member present at the meeting shall Preside; that all questions which came up before any meeting shall be decided by the majority of Members present and voting, and in the event of an equality of votes, the Chairperson and in his absence the Presiding Member, shall have a second or casting vote and that quorum for such meeting shall be three. Simultaneously, Sections 23, 24 and 25 relating to distribution of business of the Commission amongst Benches, procedure for deciding a case involving dissent by a Member and jurisdiction of the Bench and Section 40, which provided for an appeal to the Supreme Court against any decision or order was repealed and Chapter VIII A was inserted for Establishment of Appellate Tribunal, its jurisdiction,

composition, qualification for appointment of Chairperson and Members, the term of office of Chairperson and Members and conditions of their service, resignation, removal and suspension of Chairperson and Members, restriction on employment of Chairperson and other Members in certain cases, power of the Tribunal to award compensation, procedures and powers of the Tribunal etc. Section 53T, which is a part of Chapter VIIIA provides for an appeal to the Supreme Court against any decision or order of the Appellate Tribunal. Section 26 was substituted and certain amendments were made in the 'Procedure for inquiry under section 19'. Some cosmetic changes were made in Section 28, which postulates division of enterprise enjoying dominant position and Section 36(1), which deal with power of Commission to regulate its own procedure by deleting the declaration that the Commission shall not be bound by the procedure laid down by Code of Civil Procedure, 1908. Section 42A was inserted to provide for 'Compensation in case of contravention of orders of Commission'. Section 43A was inserted to empower the Commission to impose penalty for non-furnishing of information on combinations. The amended Sections 22, 26, 33 and 36 and new Sections 42A and 43A read as under:

“Sec. 22. Meetings of Commission.—(1) The Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations.

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

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

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

“Sec. 26. Procedure for inquiry under section 19.- 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 sub- section (3) to the

Central Government or the State Government or the statutory authority, as the case may be.

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

(6) If, after consideration of the objections 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.]

“Sec. 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.”

“Sec. 36. Power of Commission to regulate its own procedure.-- (1) In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

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

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

1872), any public record or document or copy of such record or document from any office.

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

(4) The Commission may direct any person--

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

42A. Compensation in case of contravention of orders of Commission.- Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any

decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

[43A. Power to impose penalty for non-furnishing of information on combinations.-- If any person or enterprise who fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination.

40. After about two years, Legislature again amended the Act by Act 39 of 2009. By these amendments, Section 66 was amended and proviso to the Explanation appearing in sub-section 2(a) was omitted. Simultaneously, certain substitutions/insertions were made in sub-sections (3), (4), (5) and (7) of Section 66.

41. In exercise of its power under Section 63 (unamended and amended), the Central Government has framed the following Rules

“THE COMPETITION COMMISSION OF INDIA (SELECTION OF
CHAIRPERSON AND OTHER MEMBERS OF THE
COMMISSION) RULES, 2003

THE COMPETITION COMMISSION OF INDIA (OATH OF
OFFICE AND OF SECRECY FOR CHAIRPERSON
AND OTHER MEMBERS) RULES, 2003.

THE COMPETITION COMMISSION OF INDIA (SALARY,
ALLOWANCES AND OTHER TERMS AND CONDITIONS
OF SERVICE OF CHAIRPERSON AND OTHER

MEMBERS) RULES, 2003

THE COMPETITION COMMISSION OF INDIA (TERM OF THE
SELECTION COMMITTEE AND THE MANNER OF SELECTION
OF PANEL OF NAMES) RULES, 2008

THE COMPETITION COMMISSION OF INDIA (RETURN ON
MEASURES FOR THE PROMOTION OF COMPETITION
ADVOCACY, AWARENESS AND TRAINING ON
COMPETITION ISSUES) RULES, 2008

THE COMPETITION COMMISSION OF INDIA (FORM AND
TIME OF PREPARATION OF ANNUAL REPORT)
RULES, 2008

THE COMPETITION COMMISSION OF INDIA (FORM OF
ANNUAL STATEMENT OF ACCOUNTS) RULES, 2009”

42. Likewise, the Commission has, in exercise of its power under Section 64,
made the following Regulations :

“THE COMPETITION COMMISSION OF INDIA
(GENERAL) REGULATIONS, 2009

THE COMPETITION COMMISSION OF INDIA
(LESSER PENALTY) REGULATIONS, 2009

THE COMPETITION COMMISSION OF INDIA
(DETERMINATION OF COST OF PRODUCTION)
REGULATIONS, 2009

THE COMPETITION COMMISSION OF INDIA
(PROCEDURE FOR ENGAGEMENT OF EXPERTS
AND PROFESSIONALS) REGULATIONS, 2009

THE COMPETITION COMMISSION OF INDIA
(MANNER OF RECOVERY OF MONETARY
PENALTY) REGULATIONS, 2011

THE COMPETITION COMMISSION OF INDIA
(PROCEDURE IN REGARD TO THE TRANSACTION
OF BUSINESS RELATING TO COMBINATIONS)
REGULATIONS, 2011

43. Some of the provisions contained in the Competition Commission of India (General) Regulations, 2009, which also have bearing on these appeals read as under :

20. Investigation by Director General.

(1) The Secretary shall, while conveying the directions of the Commission under regulation 18, send a copy of the information or reference, as the case may be, with all other documents or materials or affidavits or statements which have been filed either along with the said information or reference or at the time of preliminary conference, to the Director General.

(2) The Commission shall direct the Director General to submit a report within such time as may be specified by the Commission which ordinarily shall not exceed sixty days from the date of receipt of the directions of the Commission as is reasonable.

(3) The Commission may, on an application made by the Director General, giving sufficient reasons extend the time for submission of the report by such period as it may consider reasonable.

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

Provided that when considered necessary, the Director General may, for maintaining confidentiality, submit his report in two parts. One of the parts shall contain the documents to which access to the parties may be accorded and another part shall contain confidential and commercially sensitive information and documents to which access may be partially or totally restricted.

(5) Ten copies of the report of the Director General, along with a soft copy in document format, shall be forwarded to the Secretary within the time specified by the Commission:

Provided that the Secretary may ask for more copies of the report as and when required.

(6) If the Commission, on consideration of the report, is of the opinion that further investigation is called for, it may direct the Director General to make further investigation and submit a supplementary report on specific issues within such time as may be specified by the Commission but ordinarily not later than forty five days.

21. Procedure for inquiry under section 26 of the Act.

(1) On receipt of the report of the Director-General, the Secretary shall place the said report within seven days before the Commission for further orders and, in accordance

with the direction of the Commission, forward either a hard or a soft copy (in electronic form) of non-confidential version thereof to the Central Government or the State Government or statutory authority or the parties concerned, as the case may be.

(2) If the report of the Director-General finds no contravention of the provisions of the Act, the Secretary shall within seven days convey the directions of the Commission for inviting objections or suggestions to be filed within 15 days from the Central Government or the State Government or the statutory authority, or from the parties concerned, as the case may be on such report of the Director-General.

(3) If the Commission orders closure of the matter on consideration of the objections or suggestions, if any, referred to in sub-regulation (2), and agrees with the findings of the Director-General, the Secretary shall convey the orders of the Commission to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(4) If the Commission, on consideration of the objections or suggestions, referred to in sub-regulation (2), directs further investigations in the matter by the Director General or further inquiries in the matter to be made by an officer of the Commission so authorized by it, the Secretary shall within seven days convey the directions of the Commission to the Director General or the officer so authorized, as the case may be.

(5) On an application made by the officer authorized by the Commission justifying the production of specified books or other documents, as may be required to make further inquiries under sub-regulation (4), the Commission may direct any person to produce such specified books or other documents relating to any trade carried out by such person or enterprise, as per the provisions of sub-section (4) of section 36 of the Act.

Explanation. – For the purpose of this sub-regulation, the word “officer” shall include the experts and professionals mentioned under sub-section (3) of section 17 or sub-section (3) of section 36 of the Act.

(6) On receipt of the report of the Director General on further investigation or report of the authorized officer on further inquiries, as the case may be, the Secretary shall with the approval of the Chairperson fix the meeting of the Commission within seven days for consideration thereof.

(7) If the report of the Director General mentioned under sub-regulation (1) finds contravention of any of the provisions of the Act, the Secretary shall obtain the orders of the Commission for inviting objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(8) On consideration of the objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, or the report

of further investigation or further inquiries, as the case may be, if the Commission is of the opinion that further inquiry is called for, the Secretary shall fix the meeting of the Commission for consideration thereof, after issue of notice as per regulation 22, to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(9) The Secretary shall keep the Director General informed of the dates of the meetings of the Commission for inquiry under sub-section (7) or sub-section (8) of section 26 of the Act for appearing in person or through any of his officers in accordance with the provisions of section 35 of the Act.

25. Power of Commission to permit a person or enterprise to take part in proceedings.

(1) While considering a matter in an ordinary meeting, the Commission, on an application made to it in writing, if satisfied, that a person or enterprise has substantial interest in the outcome of proceedings and that it is necessary in the public interest to allow such person or enterprise to present his or its opinion on that matter, may permit that person or enterprise to present such opinion and to take part in further proceedings of the matter, as the Commission may specify.

(2) The application referred to in sub-regulation (1) shall be accompanied by proof of payment of fees, in accordance with regulation 49.

(3) The application referred to in sub-regulation (1) shall contain, –

- (a) legal name of the person or the enterprise making the request;
- (b) address in India for service of notice or documents;
- (c) telephone number, facsimile number and electronic mail address, if available;
- (d) the mode of service of notice or documents to be used;
- (e) a concise statement of the matters in issue in the proceedings which affect the person or the enterprise making the request;
- (f) documents or affidavits or evidence in support of the statement, with a list thereof.

(4) On an order made under sub-regulation (1), –

- (a) on an application made by a party, Secretary shall furnish to the person or enterprise permitted to participate in the proceedings, copies of such documents previously filed in the matter by other parties as may be decided by the Commission within ten days of the order;
- (b) the person or enterprise permitted to participate in the proceedings shall furnish

copies of all documents filed under sub-regulation (3) to all other parties to the proceedings within ten days of the order.

29. Manner of making submissions or arguments by parties before Commission.

(1) Without prejudice to sub-section (1) of section 36 of the Act, the parties to the proceedings or their authorized representatives, as the case may be, shall declare to the Commission at the earliest opportunity whether they would make oral submissions or file written arguments during the course of an inquiry under section 26 of the Act:

[1 proviso omitted]

(2) Subject to sub-regulation (1), the Commission may fix or limit the time during which the oral submissions or written arguments shall be addressed or filed by the parties or their authorized representatives, as the case may be, before it and may proceed to decide a matter in the absence of the party which does not abide by such timings as per regulation 30.

30. Power of the Commission to continue proceedings in absence of party.

(1) Where on the day fixed for any particular matter during an ordinary meeting, including the day of the meeting re-fixed on adjournment, if any party or parties to the proceeding do not appear even after service of notice or

having noted the date, the Commission may decide to continue proceedings in the absence of party or parties, as the case may be, and pass appropriate orders as it deems fit.

(2) If any party refuses access to or otherwise does not provide necessary information within the stipulated time or significantly impedes investigation, the Commission may pass such order as it may deem fit on the basis of available facts.

(3) Where an order has been passed by the Commission under sub-regulation (1) or sub-regulation (2) and the party shows that it was prevented from participating in the proceeding before the Commission and/or furnishing the information required, for reasons beyond its control, the Commission, on being satisfied, may recall the order.

32. Final order.

(1) Every order of the Commission shall be signed and dated by the Members including a dissenting note by the dissenting Member, if that be the case.

(2) Every order or decision of the Commission shall, as far as practicable, be made within twenty-one working days from the date of conclusion of final arguments.

(3) A copy of the order duly certified by the Secretary or such other officer authorized by the Secretary shall be served on the parties to the proceeding as provided in regulation 22 within four weeks of the date of the order.

41. Taking of evidence.

(1) Subject to the provisions of the Act, the Commission or the Director General, as the case may be, may determine the manner in which evidence may be adduced in the proceedings before them.

(2) Without prejudice to sub-regulation (1), the Commission or the Director General, for the purpose of inquiry or investigation, as the case may be, may –

(a) admit evidence taken in the form of verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail, telephone records including authenticated mobile telephone records, written signed unsworn statements of individuals or signed responses to written questionnaires or interviews or comments or opinions or analyses of experts based upon market surveys or economic studies or other authoritative texts or otherwise, as material evidence;

(b) admit on record every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact provided it is duly certified by a gazetted officer of the Central Government

or by a State Government or a statutory authority, as the case may be or a Magistrate or a Notary appointed under the Notaries Act, 1952 (53 of 1952) or the Secretary of the Commission;

- (c) admit the entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business, including entries in any public or other official book, register or record or an electronic record, made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, as documentary evidence;
- (d) admit the opinion of any person acquainted with the handwriting of the person by whom a document is supposed to have been written or signed, as relevant fact to prove the handwriting of the person by whom the document was written or signed;
- (e) admit the opinion of the handwriting experts or the experts in identifying finger impressions or the persons specially skilled in interpretation of foreign law or of science or art;

- (f) take notice of the facts of which notice can be taken by a court of law under section 57 of the Indian Evidence Act, 1872 (1 of 1872);
- (g) accept the facts, which parties to the proceedings admit or agree in writing as proved;
- (h) presume that any document purporting to be a certified copy of any record of any authority, court or government of any country not forming part of India as genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the National Government of such country to be the manner commonly in use in that country for the certification of copies of such records, including certification by the Embassy or the High Commission of that country in India.
- (i) admit such documents including electronic records in evidence as may be considered relevant and material for the proceedings.

(3) Subject to the provision of sub-regulation (2), the following sections of the Indian Evidence Act, 1872 (1 of

1872), in so far as they are applicable to the matters relating to, –

- (a) section 22-A –when oral admission as to contents of electronic records are relevant;
- (b) section 47-A - opinion as to digital signature when relevant;
- (c) section 65-B - admissibility of electronic records;
- (d) section 67-A - proof as to digital signature;
- (e) section 73-A - proof as to verification of digital signature;
- (f) section 81-A - presumption as to Gazettes in electronic forms;
- (g) section 85-A - presumption as to electronic agreements;
- (h) section 85-B - presumption as to electronic records and electronic signatures;
- (i) section 85-C - presumption as to digital signature certificates;
- (j) section 88-A - presumption as to electronic messages;

(k) section 89 – presumption as to due execution etc., of documents not produced;

(l) section 90-A - presumption as to electronic records five years old;

may be applicable for the purpose of inquiry or investigation, by the Commission or the Director General, as the case may be.

(4) The Commission or the Director General, as the case may be, may call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter.

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

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

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

42. Supporting of facts by filing of affidavit.

(1) The Commission or the Director General, as the case may be, may at any time, for sufficient reason, order that any particular fact or facts may be supported by affidavit.

(2) Every affidavit shall be typed in Arial 12 fonts on one side of A4 size (210 x 297 mm or 8.27" x 11.69") white bond paper in double space with 2" margin on the left and 1" margin on all other sides.

(3) Every affidavit shall clearly state the cause or matter in which it is sworn.

(4) Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs to be numbered consecutively, and shall state the description, occupation and the true place of residence of the deponent.

(5) Affidavits for the purposes of any cause or matter before the Commission may be sworn before any Court or Magistrate or a Notary appointed under the Notaries Act, 1952 (53 of 1952) or any officer or other person a High Court may appoint in this behalf or any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf vide authority mentioned in section 139 of the Code of Civil Procedure, 1908 (5 of 1908).

(6) Every exhibit annexed to an affidavit shall be marked with the title and number of the cause or matter and shall be initialled and dated by the authority before whom it is sworn.

(7) No affidavit having any interlineations, alteration or erasure shall be filed in Commission or the Director General, as the case may be, unless the interlineations or alteration is initialled or unless in the case of an erasure the words or figures written on the erasure are re-written in the margin and initialled, by the authority before whom, the affidavit is sworn.

(8) The Commission or the Director General, as the case may be, may refuse to receive an affidavit where in its opinion the interlineations, alterations or erasures are numerous as to make it expedient that the affidavit should be rewritten.

(9) Where a specific time is given for filing affidavits, no affidavit filed after that time shall be used except by leave of the Commission or the Director General, as the case may be.

(10) In these regulations, 'affidavit' includes a document required to be sworn, affirmed or verified. In the verification of petitions and other proceedings, statements based on personal knowledge shall be distinguished from statement based on information and belief.

(11) The Commission or Director General may, during the course of the proceedings, where considered necessary and expedient, in the interest of justice, relax any or all of the above provisions in this regulation.

43. Production of additional evidence before Commission.

(1) The parties to the proceedings shall not be entitled to produce before the Commission additional evidence, either oral or documentary, which was in the possession or knowledge but was not produced before the Director General during investigation under section 26 or sub-section (1A) of section 29 of the Act, but if the Commission requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the Director General has not given sufficient opportunity to the party to adduce evidence, the Commission, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

(2) Such document may be produced or such witness examined or such evidence adduced either before the Commission or before such authority as the Commission may direct.

(3) If the document is directed to be produced or witness examined or evidence adduced before any authority, he or she shall comply with the direction of the Commission and after compliance send the document, the record of the deposition of the witness or the record of the evidence adduced, to the Commission.

(4) Additional evidence/document shall be made available by the Commission to the parties to the proceedings other than the party adducing the evidence and

they may be afforded an opportunity to rebut the contents of the said additional evidence.

44. Power of Commission to call for information etc.

(1) The Commission may, at any time before passing orders in a proceeding, require any of the parties or any other person whom the Commission considers appropriate, to produce such documents or other material objects as evidence as the Commission may consider necessary for the purpose of enabling it to pass orders.

(2) The Commission or the Director General, as the case may be, may direct the summoning of the witnesses, discovery and production of any document or other material objects producible in evidence, requisition of any public record from any office, examination by an officer of the Commission the books, accounts or other documents or information in the custody or control of any person which the Commission considers relevant for the purpose.

(3) The Commission or the Director General, as the case may be, at any time, summon and enforce the attendance of any person and examine him, or cause him to be examined on oath.

45. Power of Commission or Director General to issue commissions for examination of witnesses or documents.

(1) Subject to the provisions of clause (d) of subsection (2) of section 36 and subsection (2) of section 41 of

the Act, the Commission or the Director General, as the case may be, either on its or his own motion or on an application made by a party to any proceeding before the Commission or the Director General, may issue a commission for the examination on questionnaires or otherwise of the specified witness (es), –

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

evidence is considered necessary in the interest of justice.

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

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

(4) A commission for the examination of a witness on questionnaires or otherwise or for examination of a document issued under sub-regulation (1) or (2) or (3) may be issued to any public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860) or a counsel and

such public servant or the counsel, as the case may be, shall be appointed as “the Commissioner” only for the purposes of executing the commission.

(5) Every public servant or the counsel, referred to in sub-regulation (4), upon receiving a commission under sub-regulation (4) shall examine the witness or the document, as the case may be, or cause the witness or the document to be examined pursuant thereto and on due execution, shall return the commission together with the evidence taken under it to the Commission or the Director General, as the case may be.

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

(7) Any Commissioner appointed under this regulation may, unless otherwise directed by the order of appointment

—

- (a) examine the witness himself;
- (b) call for and examine the documents and other things relevant to the subject of inquiry.

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

53. Publication

(1) The Commission may cause publication of a brief summary or the full text of its orders or decisions in the media, if it so desires in the interest of public, but shall have regard to the business secrets of the persons concerned and may direct deletion of such portions of the orders or decisions as it deems fit.

(2) A summary of all orders or decisions made by the Commission under subsection (2) or sub-section (6) of section 26 of the Act directing the closure of the matter, as the case may be, shall be published on the web site of the Commission.

(3) It shall be the duty of the Secretary to publish the orders or decisions referred to in this regulation.”

44. An analysis of the provisions noticed hereinabove gives a clear indication of the nature of powers and functions exercisable by the Commission and the Director General. The inquiry envisaged by Section 19(1) into any alleged contravention of Section 3(1) or Section 4(1) can be initiated by the Commission either on its own motion or on receipt of any information from any person, consumer or their association or trade association or a reference made by the Central or State Government or a statutory authority. After the information or reference received in

the office of the Commission is scrutinized by the Secretary of the Commission and if the same is found to be fulfilling all the requirements of the Regulation 14, then the same is placed before the Commission for consideration whether a prima facie case has been made out for investigation. In terms of Regulation 17, the Commission can hold preliminary conference for that purpose. The Commission can invite the information provider and such other person, as may be considered necessary for the preliminary conference. Section 26(1) read with Regulation 18 provides that if the Commission forms an opinion that there exists a prima facie case, then it is required to issue direction to the Director General to cause an investigation to be made into the matter. The detailed procedure for conducting investigation is contained in Section 41 read with Section 36 and Regulations 20, 21, 35, 41, 42 and 45. In terms of Regulation 41, the Director General can determine the manner in which the evidence may be adduced. In the proceedings before him in terms of Regulation 41(2), the Director General can admit evidence taken in the form of verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail, telephone records including authenticated mobile telephone records, written signed unsworn statements of individuals or signed responses to written questionnaires or interviews or comments or opinions or analyses of experts based upon market surveys or economic studies or other authoritative texts or otherwise, as material evidence; admit on record every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact provided it is duly certified by a gazetted officer of the Central Government or by a State Government or a statutory authority, as the case may be or a Magistrate or a Notary appointed under the Notaries Act, 1952 or the Secretary of the Commission; admit the entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business, including entries in any public or other official book, register or record or an electronic record, made by a public servant in the discharge of his official duty, or by any other person in performance of a duty

specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, as documentary evidence; admit the opinion of any person acquainted with the handwriting of the person by whom a document is supposed to have been written or signed, as relevant fact to prove the handwriting of the person by whom the document was written or signed; admit the opinion of the handwriting experts or the experts in identifying finger impressions or the persons specially skilled in interpretation of foreign law or of science or art; take notice of the facts of which notice can be taken by a court of law under Section 57 of the Indian Evidence Act, 1872; accept the facts, which parties to the proceedings admit or agree in writing as proved; presume that any document purporting to be a certified copy of any record of any authority, court or government of any country not forming part of India as genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the National Government of such country including certification by the Embassy or the High Commission of that country in India and admit such documents including electronic records in evidence as may be considered relevant and material for the proceedings. Clause (3) of Regulation 41 makes Sections 22A, 47A, 65B, 67A, 73A, 81A, 85A 85B, 85C, 88A, 89 and 90A of the Evidence Act applicable for the purpose of investigation by the Director General, subject, of course, to clause (2) of Regulation

45. In terms of clause (4), the Director General can call for the parties to lead evidence by way of affidavit or lead oral evidence in the matter. In terms of clause (5), the Director General can give an opportunity to the other party or parties to cross-examine the person giving the evidence. Clause (6) empowers the Director General to entrust the task of recording evidence to any officer or person designated for the said purpose. Regulation 42 provides that the Director General can, for sufficient reasons, order that any particular fact or facts may be supported by an affidavit. Various clauses of this Regulation prescribe the mode and manner in which the affidavit required to be filed under clause (1) is to be prepared. On completion of investigation, the Director General is required to submit his report to

the Commission. Clause (4) of Regulation 20 provides that the report shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation. Proviso to this clause empowers the Director General to grant partial or total confidentiality to the commercially sensitive information and documents.

46. Once the report of the Director General is received, the Commission is required to act in accordance with the procedure enshrined in sub-sections (4) to (8) of Section 26, which provide for forwarding a copy of the record to the parties concerned including the Central or the State Government or the statutory body, as the case may be, sub-sections (5) and (6) of Section 26 deal with the situation in which the report of the Director General recommends that there is no contravention of the provisions of the Act. In that event, the Commission is required to invite objections or suggestions from the Central Government or the State Government or the statutory authority or parties concerned, as the case may be. If after considering the objections/suggestions filed in terms of sub-section (5), the Commission agrees with the recommendations of the Director General, then it is required to close the matter and pass orders, which may be communicated to the Central or State Government or statutory authority or the concerned parties. If after considering the objections/suggestions referred to in sub-section (5), the Commission forms an opinion that the further investigation is to be made, or cause further inquiry to be made in the matter or itself proceed with further inquiry in accordance with the provisions of the Act [Regulation 26(7)]. If the report of the Director General recommends that there is contravention of any of the provisions of the Act and the Commission forms the view that further inquiry is called for then it shall inquire into such contravention in accordance with the provisions of the Act [Regulation 26(8)]. Regulations 21 to 27 and Regulations 41 to 44 contain the procedure for conducting inquiry by the Commission. Under Regulation 35, the

Commission can make a reference to any statutory authority for opinion under Section 21A. Regulation 35 empowers the Commission to grant confidentiality in certain situations. Regulation 43 empowers the Commission to take additional evidence. Regulation 46 postulates representation of the parties by their representatives before the Commission. Regulation 52 empowers the Commission to invite experts of eminence to assist the Commission in discharging of its functions under the Act. Section 36(2) lays down that the Commission shall have, for the purposes of discharging its functions under the Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 in respect of the matters relating to summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavit; issuing commissions for the examination of witnesses or documents and requisitioning any public record or document or copy of such record or document from any office. Under Section 36(3), the Commission is empowered to call upon experts, from the fields of economics, commerce and accountancy. Under Section 36(4), the Commission can issue direction to any person to produce books of accounts or other documents in his custody or under the control before the Director General and to furnish to him or Secretary of the Commission such other information as may be in his possession in relation to trade carried on by such person as may be required for the purposes of the Act. At the end of this exercise, the Commission can pass appropriate orders under Section 27 including an order for imposing penalty in cases involving contravention of Section 3 and/or Section 4. By virtue of Section 41(2), Director General is entitled to exercise the powers conferred upon the Commission under Section 36(2). Section 42(2) provides for imposition of fine for contravention of orders or directions issued under Section 27, 28, 31, 32, 33, 42A and 43A. The quantum of fine may extend to rupees one lakh per day, subject to a maximum of rupees ten crores. If any person fails to comply with the orders or directions issued by the Commission or fails to pay the fine imposed under Section 42(2), then he can be punished with imprisonment

for a term which may extend to three year of with fine upto rupees twenty five crores or with both, as the Chief Judicial Magistrate may determine. Section 42A postulates award of compensation for contravention of decision or order of the Commission issued under Section 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption has been granted or for delay in carrying out such orders or directions. Section 43 provides for imposition of fine for non-compliance of direction by the Commission under Section 36(2) and (4) or by the Director General under Section 41(2). The amount of fine may extend to rupees one lakh per day duringthe period of continuance of such failure subject to a maximum of rupees one crore. Section 43A provides for imposition of penalty for non-furnishing of information under Section 6(2). The extent of such penalty may be upto 10% of the total turnover or the assets of the wrong doer, whichever is higher. Section 44 provides for imposition of penalty for making a false statement or omission to furnish material information in combination case. Section 45 contains a general provisions for imposition of fine upto rupees one crore for making false statement or omission to state any material fact knowing it to be a material or willful alteration, suppression or destruction of any document, which is required to be furnished.

47. From what we have mentioned above, it is clear that the procedure required to be followed by the Director General for conducting investigation and by the Commission as a prelude to the passing of orders/issue directions under Section 27 and/or the various provisions contained in Chapter-VI of the Act and corresponding regulations is akin to the procedure required to be followed by the Civil Court for deciding a suit except that the Director General and the Commission are not bound by the technicalities of the procedure contained in the Code of Civil Procedure, 1908 and rules embodied in the Evidence Act except to the extent indicated in the Act.

48. The above survey of various provisions of the Act and the Regulations shows that even while amending the Act by Act 39 of 2007 and Act 39 of 2009, Parliament consciously decided to retain provisions relating to adjudicatory functions of the Commission in their full vigour and the mere fact that by virtue of substituted Section 22, the business of the Commission is required to be transacted in its meetings and the business would necessarily include exercise of adjudicatory functions/powers, cannot lead to an inference that while deciding the allegations contained in the information filed or reference made under Section 19(1)(a) and passing orders under Sections 27, 33, 39, 42, 42A, 43, 43A, 44 and 45, the Commission exercises purely administrative power or discharge administrative functions or that while passing orders under those sections and also under Section 28, which can have far-reaching impact on the rights of the parties, the Commission is not required to act as per the accepted standard of fairness and render just decision after complying with the principles of natural justice as expounded by the Courts across the globe including the Supreme Court of India. Rather, on the basis of case law developed in this country, it must be held that like any other adjudicatory body, the Commission is bound to comply with various facets of the principles of natural justice and its proceedings conform to the objective standard of fairness.

49. The nature of the powers vested in the Commission and its functions came to be considered by a three-Judge Bench of the Supreme Court in Competition Commission of India Vs. Steel Authority of India Limited and Another - [(2010) 10 SCC 744] in the backdrop of challenge to an order passed by the Tribunal in an appeal filed by the respondent against the direction issued by the Commission under Section 26(1) of the Act. Though, the issue raised before the Supreme Court lay in a narrow compass, the Bench dealt with various facets of the Act and Regulations framed thereunder and made important observations. After noticing the contemporaneous legislations of United States, United Kingdom and Australiaas

also the Statement of Objects and Reasons incorporated in the Competition Bill, the Court observed :

“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....

The Bench then referred to Sections 19, 26, 53A and 53B and held that an appeal against the direction given by the Commission under Section 26(1) to the Director General to hold investigation is not appealable.

50. In *Rangi International Limited vs. Nova Scotia Bank and others* [(2013) 7 SCC 160], a two-Judge Bench of the Supreme Court considered the question whether the Commission and the Appellate Tribunal should record reasons in support of their orders and observed :

“The Competition Commission as well as the Competition Appellate Tribunal are exercising very important quasi-judicial functions. The orders passed by the Commission and the Appellate Tribunal can have far-reaching consequences. Therefore, the minimum that is required of the Commission as well as the Appellate Tribunal is that the orders are supported by reasons, even briefly.”

51. At this stage, we consider it appropriate to mention that till mid-sixties, the Courts having power of judicial review did not readily interfere with the orders passed by the administrative bodies and authorities. However, with the proliferation of the Regulatory Bodies like Commissions and Tribunals, which have been clothed with enormous powers to pass orders adversely affecting the rights of the parties, it became necessary for the Courts to exercise power to correct substantive and procedural errors committed by such bodies and the thin line between the exercise of the administrative power and quasi-judicial power got gradually obliterated. One of the main reasons for this shift in the Court's approach is that even though the Legislations under which these bodies have been created envisaged appointment of experts and persons possessing specialised knowledge in the particular fields, most of these bodies i.e. the Commissions and Tribunals are packed with retired civil servants and former members of judiciary, who may have acquired sufficient knowledge and experience of working in their respective organisations but can hardly be called experts and at times, they adopt procedure and pass orders, which lack minimum fairness and judicious approach.

52. In a number of decisions, the High Courts and Supreme Court have repeatedly ruled that the Commissions, Tribunals and other administrative bodies clothed with the power to adjudicate upon the rights of the parties or pass orders adversely affecting a person or a body of persons or imposing penalty for contravention of any statutory provision or otherwise are bound to act justly, fairly and in consonance with the principles of natural justice. One of the earliest judgement on the subject is *State of Orissa Vs. Dr. (Miss) Binapani Dei and others* - [AIR 1967 SC 1269]. In that case, the Supreme Court unequivocally recognised that duty to act judicially would arise from the very nature of the function intended to be performed and it need not be shown to be super-added and that if there is a power to decide and to determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. In that case, the respondent was retired by

the State Government from the service on the basis of what the Government thought to be her correct date of birth determined on the basis of a preliminary enquiry. The respondent succeeded in convincing the High Court that the order made by the State Government was violative of the principles of natural justice because she had not been given opportunity of hearing. In the appeal preferred by the State Government, it was argued that the order fixing the age of Dr. Binapani Dei was purely an administrative action and the High Court did not have the power to sit in appeal over the decision of the State Government. While rejecting the argument and approving the order of the High Court, the Supreme Court made the following significant observations :

“An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is however under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that

every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed: it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting aside the order of the State.”

[Underlining is ours]

53. In *A. Kraipak Vs. Union of India and others* - [(1969 2 SCC 262)], the Supreme Court considered whether a person who was a candidate for selection from the State Service to All India Service (Indian Forest Service) could himself be made a member of the Selection Committee. The facts of that case show that Naqishbund, who was himself a candidate for selection to the Indian Forest Service was made a member of the Selection Board. He did not participate in the meeting

of the Selection Board when his own name was considered, but did take part in the meetings held for selecting other persons including his competitors. The selections were challenged in a petition filed under Article 32 of the Constitution of India. On behalf of the respondents, it was argued that the selection of members for promotion to Indian Forest Service was purely an administrative matter and as such the rule of natural justice were not applicable. While rejecting the plea, the Supreme Court observed :

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

decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

[Underlining is ours]

54. While holding that the participation of Naqishbund in the meetings by the Selection Board has the effect of influencing the final recommendation on the ground of bias, the Supreme Court took cognisance of the fact that each member of the Selection Board filed affidavits swearing that Naqishbund had, in no manner, influenced their decision in making the selections and observed :

“The members of the selection board other than Naqishbund, each one of them separately, have filed affidavits in this Court swearing that Naqishbund in no manner influenced their decision in making the selections. In a group deliberation each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder that the other members of the selection board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept the contention that in adjudging the suitability of the candidates the members of the board did not have any mutual discussion. It is not as if the records spoke of themselves. We are unable to believe that the members of selection board functioned like computers. At this stage it may also be noted that at the time the selections were made, the members of the selection board other than Naqishbund

were not likely to have known that Basu had appealed against his supersession and that his appeal was pending before the State Government. Therefore there was no occasion for them to distrust the opinion expressed by Naqishbund. Hence the board in making the selections must necessarily have given weight to the opinion expressed by Naqishbund.”

[Underlining is ours]

55. The Court then considered the question whether the principles of natural justice are applicable in such matters, referred to the Queen’s Bench judgement in *re H.K. (An Infant)* – [(1967) 2 QB 617] and answered the same in the affirmative. The observations made in that regard are extracted below :

“This takes us to the question whether the principles of natural justice apply to administrative proceedings similar to that with which we are concerned in these cases. According to the learned Attorney General those principles have no bearing in determining the validity of the impugned selections. In support of his contention he read to us several decisions. It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding. The question how far the principles of natural justice govern administrative enquiries came up for consideration before the Queen’s Bench Division In *re H.K. (An Infant)*. [(1967) 2 QB 617 at p. 630] Therein the validity of the action taken by an Immigration Officer came up for consideration. In the course of his judgment Lord Parker C.J. observed thus:

“But at the same time, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially.”

In the same case Blain, J., observed thus:

“I would only say that an immigration officer having assumed the jurisdiction granted by those provisions is in a position where it is his duty to exercise that

assumed jurisdiction whether it be administrative, executive or quasi-judicial, fairly, by which I mean applying his mind dispassionately to a fair analysis of the particular problem and the information available to him in analysing it. If in any hypothetical case, and in any real case, this court was satisfied that an immigration officer was not so doing, then in my view mandamus would lie.”

The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (*Nemo debet esse iudex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the

rules of natural justice is to prevent miscarriage of justice
one fails to see why those rules should be made inapplicable
to administrative enquiries. Often times it is not easy to draw
the line that demarcates administrative enquiries from quasi-
judicial enquiries. Enquiries which were considered
administrative at one time are now being considered as
quasi-judicial in character. Arriving at a just decision is the
aim of both quasi-judicial enquiries as well as administrative
enquiries. An unjust decision in an administrative enquiry
may have more far reaching effect than a decision in a
quasi-judicial enquiry. As observed by this Court in *Suresh*
Koshy George v. University of Kerala [Civil Appeal No.
990/68, decided on 15-7-1968] the rules of natural justice are
not embodied rules. What particular rule of natural justice
should apply to a given case must depend to a great extent
on the facts and circumstances of that case, the framework
of the law under which the enquiry is held and the
constitution of the Tribunal or body of persons appointed for
that purpose. Whenever a complaint is made before a court
that some principle of natural justice had been contravened
the court has to decide whether the observance of that rule
was necessary for a just decision on the facts of that case.”

[Underlining is ours]

56. In *Sayeedur Rehman Vs. State of Bihar* – [(1973) 3 SCC 333], the Supreme Court while considering the challenge the decision of the Board of Secondary Education, which had reviewed its earlier order granting salary and allowances to the appellant albeit without giving him notice and opportunity of hearing, reversed the order of the Patna High Court and held :

“This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties..... The omission of express requirement of fair hearing in the rules or other source of power claimed for reconsidering the order dated 22-4-1960, is supplied by the rule of justice which is considered as an integral part of our judicial process which also governs quasi-judicial authorities when deciding controversial points affecting rights of parties.”

[Emphasis supplied]

57. In *Maneka Gandhi Vs. Union of India* - [(1978) 1 SCC 248], the seven-Judge Bench of the Supreme Court observed :

“.... Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action..... The inquiry must, therefore, always be : does fairness in action demand that an opportunity to be heard should be given to the person affected?”

58. In *Mohinder Singh Gill Vs. Chief Election Commissioner* – [(1978) 1 SCC 405], the Constitution Bench explained the Indian origin of principles of natural justice in the following words :

“Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the hone [Ed.: The word “hone” is usually used as a verb, meaning “to sharpen”. Rarely, it is also used a noun, as here, meaning “whetstone”.] of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed from the legendary days of Adam—and of Kautilya's *Arthasastra*—the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.”

The Court further observed :

“Fair hearing is thus a postulate of decision making cancelling a poll, although fair abridgement of that process is

permissible. It can be fair without the rules of evidence or form of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

..... The silence of a statute has no exclusionary effect except where it flows from necessary implication.”

59. In *Mahipal Singh Tomar Vs. State of Uttar Pradesh* (supra), the Supreme Court examined the issue relating to violation of natural justice in a case where copy of the enquiry report was not furnished to the affected person and he was not given opportunity to represent his cause against the allegation of large scale irregularities in the placement of selected candidates in different colleges. While setting aside the order of the High Court and declaring the termination of the appellant's service as illegal, the Court observed :

“ In administrative law, the “rules of natural justice” have traditionally been regarded as comprising *audi alteram partem* and *nemo judex in sua causa*. The first of these rules requires the maker of a decision to give prior notice of the proposed decision to the persons affected by it and an opportunity to them to make representation. The second rule disqualifies a person from judging a cause if he has direct pecuniary or proprietary interest or might otherwise be biased. The first principle is of great importance because it embraces the rule of fair procedure or due process. Generally speaking, the notion of a fair hearing extends to the right to have notice of the other side's case, the right to bring evidence and the right to argue. This has been used by

the courts for nullifying administrative actions. The premise on which the courts extended their jurisdiction against the administrative action was that the duty to give every victim a fair hearing was as much a principle of good administration as of good legal procedure.”

For making the aforesaid observations, the Supreme Court relied upon paragraph 6 of the European Convention on Human Rights and Fundamental Freedoms of 1950, and a number of decisions including A.K. Kraipak Vs. Union of India (supra), State of Orissa Vs. Binapani Dei (supra), SayeedurRehman V. State of Bihar-[(1973) 3 SCC 333], Sirsi Municipality v. CecliaKom Francis Tellis-[(1973) 1 SCC 409], Maneka Gandhi Vs. Union of India- [(1978) 1 SCC 248], Mohinder Singh Gill Vs. Chief Election Commissioner- [(1978) 1 SCC 405], Union of India Vs. Tulsiram Patel – [(1985) 3 SCC 398], Inderpreet Singh Kahlon Vs. State of Punjab – [(2006) 11 SCC 356] and Onkar Lal Bajaj Vs. Union of India – [(2003) 2 SCC 673].

60. In Manohar Vs. State of Maharashtra and another – [(2012) 13 SCC 14], the Supreme Court explained the applicability of the principles of natural justice to the State Information Commission performing adjudicatory functions in the following words :

“The State Information Commission has been vested with wide powers including imposition of penalty or taking of disciplinary action against the employees. Exercise of such power is bound to adversely affect or bring civil consequences to the delinquent. Thus, the provisions relating to penalty or to penal consequences have to be construed strictly. It will not be open to the Court to give them such liberal construction that it would be beyond the

specific language of the statute or would be in violation of the principles of natural justice.

The State Information Commission is performing adjudicatory functions where two parties raise their respective issues to which the State Information Commission is expected to apply its mind and pass an order directing disclosure of the information asked for or declining the same. Either way, it affects the rights of the parties who have raised rival contentions before the Commission. If there were no rival contentions, the matter would rest at the level of the designated Public Information Officer or immediately thereafter. It comes to the State Information Commission only at the appellate stage when rights and contentions require adjudication. The adjudicatory process essentially has to be in consonance with the principles of natural justice, including the doctrine of audi alteram partem. Hearing the parties, application of mind and recording of reasoned decision are the basic elements of natural justice. It is not expected of the Commission to breach any of these principles, particularly when its orders are open to judicial review. Much less to Tribunals or such Commissions, the courts have even made compliance with the principle of rule of natural justice obligatory in the class of administrative matters as well.”

[Underlining is ours]

61. Institute of Chartered Accountants of India Vs. L.K. Ratna – [(1986) 4 SCC 537] contains an interesting discussion on the question of violation of principle of natural justice. Respondent Lalit Kumar Ratna was a partner in M/s. A.F. Ferguson

& Co., a reputed firm of Chartered Accountants. The other respondents, namely – Ashok Kumar Behal and P.R. Bhoopatkar were employees in the firm. In 1947 Ferguson & Co. established a Management Consultancy Division. Ratna was head of the Division, and Behl and Bhoopatkar worked under him. On April 15, 1970, Ferguson & Co. wrote to the Institute enquiring whether it could send out letters to Auditor Firms apprising them of the existence of the Management Consultancy Service and whether it was forbidden from doing so by any rules of the Institute. The Secretary of the Institute replied that the Council had appointed a Sub-Committee for considering the ethical problems arising out of the functioning of the Institute's members in the area of Management Consultancy Service and the firm was requested to wait for the recommendations of the Sub-Committee.

On December 8, 1971, Ratna issued a circular to the partners and principals of the firm setting forth guidelines on bringing the Management Consultancy Service brochures to the attention of their respective clients. Meanwhile, Ferguson & Co. also referred the matter to their solicitors, and the solicitors advised that making available of printed informative material in the form of a brochure would not be in contravention of clauses 6 and 7 in Part I of the First Schedule to the Act or otherwise amount to professional misconduct.

A few days later the Council published an “exposure draft”, setting forth the proposals under consideration by the Council regarding the regulations and ethical rules in respect of Management Consultancy Services by Chartered Accountants and invited members to send their suggestions on the proposals. It was pointed out further that the recommendations to be made by the Council would require appropriate amendments in Part I of the First Schedule to the Act which contained rules in respect of professional misconduct. Meanwhile, Ratna had prepared a brochure relating to the Management Consultancy Service to be provided by Ferguson & Co. It was stated that the brochure was intended for the use of the clients of the firm who requested information regarding such services and that it was

for limited circulation only, the clients themselves being warned of that restriction. On February 19, 1973, the Council wrote to Ferguson & Co. inviting its attention to the brochure and alleging that it contained information against the firm under Section 21 of the Chartered Accountants Act read with clauses 6 and 7 of Part I of the First Schedule to the Act, and in accordance with Regulation 11(5)(b) read with Regulation 12 of the Chartered Accountants Regulations, 1964, the firm was required to disclose to the Council the name of the member answerable to the charge of misconduct. In reply, the firm named Ratna as the Member responsible for the brochure.

Thereafter, a charge-sheet was served upon L.K. Ratna, who filed written statement and denied allegation that he was guilty of professional misconduct. After considering the reply, the Council formed a prima-facie opinion that Ratna was guilty of professional misconduct and referred the case to the Disciplinary Committee comprising of its President, Vice-President and two Members as also nominee of the Government. The Disciplinary Committee heard Ratna and submitted report dated 14.02.1974 with the finding that Ratna was guilty of professional misconduct. The Institute accepted the findings recorded by the Disciplinary Committee and issued notice to the Ratna to show cause as to why his name may not be removed from the Register of Members for a period of five years. Copies of the report of the Disciplinary Committee and the findings of the Council were forwarded to Ratna. Similar proceedings were held against Behl and Bhoopatkar and they were found guilty by the Disciplinary Committee. They were also issued show cause notice as was done in the case of Ratna.

Ratna, Behl and Bhoopatkar filed writ petitions in the Bombay High Court, which were allowed by a learned single Judge on the ground that they had not been given opportunity by the Council and also on the ground that two members of the Institute, who were members of the Disciplinary Committee, were disqualified from participating in the proceedings of the Council when it considered the report of the

Disciplinary Committee. The Division Bench dismissed the appeal filed by the Institute. The Supreme Court referred to the relevant provisions of the Act and observed:

“The Council is empowered to find a member guilty of misconduct. The penalty which follows is so harsh that it may result in his removal from the Register of Members for a substantial number of years. The removal of his name from the Register deprives him of the right to a certificate of practice. As is clear from Section 6(1) of the Act, he cannot practice without such certificate. In the circumstances there is every reason to presume in favour of an opportunity to the member of being heard by the Council before it proceeds to pronounce upon his guilt. As we have seen, the finding by the Council operates with finality in the proceeding, and it constitutes the foundation for the penalty imposed by the Council on him. We consider it significant that the power to find and record whether a member is guilty of misconduct has been specifically entrusted by the Act to the entire Council itself and not to a few of its members who constitute the Disciplinary Committee. It is the character and complexion of the proceeding considered in conjunction with the structure of power constituted by the Act which leads us to the conclusion that the member is entitled to a hearing by the Council before it can find him guilty.”

The Supreme Court rejected the appellant's argument that the person against whom the proceedings are held does not have a right to make representation before the Council questioning the report of the Disciplinary Committee by making the following observations :

“It is next pointed out on behalf of the appellant that while Regulation 15 requires the Council, when it proceeds to act under Section 21(4), to furnish to the member a copy of the report of the Disciplinary Committee, no such requirement is incorporated in Regulation 14 which prescribes what the Council will do when it receives the report of the Disciplinary Committee. That, it is said, envisages that the member has no right to make a representation before the Council against the report of the Disciplinary Committee. The contention can be disposed of shortly. There is nothing in Regulation 14 which excludes the operation of the principle of natural justice entitling the member to be heard by the Council when it proceeds to render its finding. The principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary.”

62. In BCCI Vs. Cricket Association of Bihar and others, the Supreme Court considered whether Shri Srinivasan, who had commercial interest in India cement could become a party to the body constituted for selecting the teams for Indian Premier league and observed :

“To sum up: public policy is not a static concept. It varies with times and from generation to generation. But what is in public good and public interest cannot be opposed to public policy and vice versa. Fundamental Policy of Law would also constitute a facet of public policy. This would imply that all those principles of law that ensure justice, fair play and bring transparency and objectivity and promote probity in

the discharge of public functions would also constitute public policy. Conversely, any deviation, abrogation, frustration or negation of the salutary principles of justice, fairness, good conscience, equity and objectivity will be opposed to public policy. It follows that any rule, contract or arrangement that actually defeats or tends to defeat the high ideals of fairness and objectivity in the discharge of public functions no matter by a private non-governmental body will be opposed to public policy. Applied to the case at hand Rule 6.2.4 to the extent, it permits, protects and even perpetuates situations where the administrators can have commercial interests in breach or conflict with the duty they owe to BCCI or to the people at large must be held to be against public policy, hence, illegal. That is particularly so when BCCI has in the Anti-Corruption Code adopted by it recognised public confidence in the authenticity and integrity of the sporting contest as a fundamental imperative. It has accepted and, in our opinion rightly so, that all cricket matches must be contested on a level playing field with the outcome to be determined solely by the respective merits of the competing teams. The Anti-Corruption Code of BCCI does not mince words in accepting the stark reality that if the confidence of the public in the purity of the game is undermined then the very essence of the game of cricket shall be shaken. BCCI has in no uncertain terms declared its resolve to protect the fundamental imperatives constituting the essence of the game of cricket and its determination to take every step in its power to prevent corrupt betting practices undermining the integrity of the sport including any effort to influence the outcome of any

match. Unfortunately, however, the amendment to Rule 6.2.4 clearly negates the declarations and resolves of BCCI by permitting situations in which conflict of interest would grossly erode the confidence of the people in the authenticity, purity and integrity of the game. An amendment which strikes at the very essence of the game as stated in the Anti-Corruption Code cannot obviously co-exist with the fundamental imperatives. Conflict of interest situation is a complete antithesis to everything recognised by BCCI as constituting fundamental imperatives of the game hence unsustainable and impermissible in law.”

[Underlining is ours]

63. In *M/s. Blaze and Central (P) Ltd. Vs. Union of India*, the Karnataka High Court considered whether the procedure adopted by the Estate Officer for passing an order of eviction under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 was just and fair and whether the person, who was interested in getting the premises vacated could himself decide the case. After answering the second question in the affirmative, learned Single Judge (K.J. Shetty, J., as he then was) of the High Court observed :

“This takes me to the second contention relating to the denial of natural justice. Learned Counsel for the petitioner urged that the Estate Officer did not record the statements of the witness produced for the Bank in the presence of the petitioner and he did not even furnish a copy of the statement of that witness in spite of a specific request made for the purpose. The learned District Judge summarily rejected the latter part of the contention on the ground that

there is no provision under the Act to, furnish copies of the statements recorded in the proceedings. This reasoning would be leading into the trap of legalism of the 17th century. The Act need not provide for all the minor details low an enquiry should be conducted by the Estate Officer. The Estate Officer must hold an enquiry as required under Section 4 of the Act, read with the public Premises (Eviction of Unauthorised Occupants) Rules, 1971. Rule 5 of the Rules provides that the Estate Officer shall record the summary of the evidence tendered before him and the summary of such evidence and any relevant documents filed before him shall form part of the record of the proceedings. Exercise of the power under the Act is undoubtedly quasi-judicial. The petitioner has a right to be heard before the Estate Officer and if the right to be heard is to be a real right which is worth anything, it must carry with it a right to know the evidence of the opposite side. The petitioner must therefore be told what evidence has been given or what statements have been made by the opposite side. In other words, to put it shortly, the petitioner must be given a fair opportunity to correct or contradict the statements recorded or the evidence collected in his presence or absence. This one principle uniformly appears in all the cases commencing from the celebrated judgment of Lord Loreburn *L.C. in Board of Education v. Rice* [(1911) A.C. 179 at page 182.] wherein the following passage appears:

“Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty, of deciding or

determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose usually be of an administrative kind but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in anyway they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.”

Since then, Judges and writers have expanded the procedure laid down by statutes and laid down the obligation to observe the principles of natural justice where it is not plainly contrary to the intention of the legislature. The courts recently have also resorted to such alternatives to natural justice as “fairplay in action” or “fairness of procedure” or “the fundamental principles of a fair trial”, while discouraging a tendency to subject hearing to “legal strait-jackets”. Sometimes, “fairness” has been understood to impose a

higher standard than that required by natural justice. In a historic decision of our Supreme Court in *Menaka Gandhi v. Union of India* [(1978) 1 SCC 248 : A.I.R. 1978 S.C. 597 at 624.] Bhagawati, J., who spoke for the majority view observed:

“A tribunal or a person to whom judicial or quasi-judicial functions are entrusted is thus presumed to have an obligation to act with fairness, that is not only the obligation to observe the principles of natural justice but, on the contrary, to observe a higher standard of behaviour than that required by natural justice.”

[Underlining is ours]

64. The question whether the one who hears must decide was considered by the Supreme Court in *Gullapalli Nageswara Rao and Others Versus Andhra Pradesh State Road Transport Corporation and Another* (supra), and it was held that an order passed by a person who had not heard the arguments offends the principle of judicial procedure. The facts of that case were that the second and third ground on which the appellant has questioned the impugned order can be taken up simultaneously. The appellants were carrying on motor transport business for several years in Krishna District in the State of Andhra Pradesh, Shri Guru Pershad, styled as the General Manager of the State Transport Undertaking of the Andhra Pradesh Road Transport, published a scheme for nationalization of motor transport in the said State from the date to be notified by the State Government. Objections to the said proposed scheme were invited by the State Government, and the appellants among others, filed their objects. On December 26, 1957, the Secretary in charge of the Transport Department gave a person hearing to the objectors and heard the representations made on behalf of the State Transport undertaking. The

entire material gathered by him was placed before the Chief Minister of the State in charge of transport who made the order approving the scheme. The approved scheme was published in the Andhra Pradesh Gazette dated January 9, 1958, and it was directed to come into force with effect from January 10, 1958. Thereafter the Andhra Pradesh Road Transport Corporation, which was formed under the provisions of the Road Transport Corporation Act, 1950, took over the Undertaking and proceeded to implement the scheme under a phased programme. The appellant moved the Supreme Court under Article 32 of the Constitution for quashing the said scheme on various grounds. The Court rejected most of the objections raised by the appellants except in regard to two pertaining to the hearing given by the Secretary in charge of the Transport department which resulted in the quashing of the order of the Government approving the scheme and directing it to forbear from taking over any of the routes on which the appellants were engaged in transport business. After the said order, notices were issued by the Government to all the objectors informing them that a personal hearing would be given by the Chief Minister on December 9, 1958, and they were further informed that they were at liberty to file further objections before November 30, 1958. The Chief Minister heard the representatives of the objectors and the Corporation and passed order dated December 19, 1958, rejecting the objections filed and approving the scheme as originally published. The order approving the scheme was duly published by the Government in the official gazette on December 22, 1958. On December 23, 1958, the Corporation applied to the Road Transport Authority for the issue of permits for plying stage carriages and for eliminating the permits granted to the private bus operators. On December 24, 1958, the said Authority passed orders rendering the permits of the appellants ineffective from December 24, 1958, and also issuing permits to the Corporation in respect of the routes previously operated by the appellants. The said orders were communicated to the appellants on December 24, 1958, and they were also directed to stop plying their buses from December 25, 1958, in their respective routes. The appellants, who were aggrieved by the orders

of the Government as well by the order of the Regional Transport Authority filed petitions in the High Court under Art. 226 of the Constitution for quashing the same. The High Court negated the appellant's plea that the impugned order was vitiated due to violation of the principles of natural justice. In appeal the Supreme Court reversed the order of the High Court and held :

“... In the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter of fundamental importance that a person interest in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. This is one the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The hearing given by the Secretary, Transport Department, certainly offends the said principle of natural justice and the proceedings and the hearing given, in violation of that principle, are bad.”

The second objection is that while the Act and the rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules imposes a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedures defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the

demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argued to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold the said procedure followed in this case also offends another basic principle of judicial procedure.”

[Underlining is ours]

65. In *RasidJaved Vs. State of U.P.* - [(2010) 7 SCC 781], the Supreme Court relied upon the judgment of GullapalliNageswara Rao’s case and observed :

“...a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing is too fundamental a proposition to be doubted.”

66. In *AutomotiveTyre Manufacturers Association Vs. Designated Authority and others* - [(2011) 2 SCC 258], one of the questions considered by the Supreme Court was whether the Designated Authority was discharging the quasi-judicial functions under the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. After posing the question, the Supreme Court observed :

“More often than not, it is not easy to draw a line demarcating an administrative decision from a quasi-judicial decision. Nevertheless, the aim of both a quasi-judicial function as well as an administrative function is to arrive at a just decision. In *A.K. Kraipak v. Union of India* [(1969) 2 SCC 262] this Court had observed that the dividing line between

an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, regard must be had to:

- (i) the nature of the power conferred;
- (ii) the person or persons on whom it is conferred;
- (iii) the framework of the law conferring that power;
- (iv) the consequences ensuing from the exercise of that power; and
- (v) the manner in which that power is expected to be exercised.”

The Court then referred to the judgements in Province of Bombay Vs. Khushaldas S. Advani – [AIR 1950 SC 222], Jaswant Sugar Mills Ltd. Vs. Lakshmi Chand – [AIR 1963 SC 677] and observed :

“Having examined the scheme of the Tariff Act read with the 1995 Rules on the touchstone of the aforementioned principles, particularly the first principle enunciated in Khushaldas S. Advani [AIR 1950 SC 222], we have no hesitation in coming to the conclusion that this is an obvious case where the DA exercises quasi-judicial functions and is bound to act judicially. A cursory look at the relevant Rules would show that the DA determines the rights and obligations of the “interested parties” by applying objective standards based on the material/information/evidence presented by the exporters, foreign producers and other “interested parties” by applying the procedure and principles laid down in the 1995 Rules.”

The Supreme Court then in *Swadeshi Cotton Mills Vs. Union of India* – [(1981) 1 SCC 664] took cognizance of the fact that the opportunity to file objections and adduce evidence as also opportunity of personal hearing was quoted by one officer and the final order was passed by another officer and held :

“In the present case, admittedly, the entire material had been collected by the predecessor of the DA; he had allowed the interested parties and/or their representatives to present the relevant information before him in terms of Rule 6(6) but the final findings in the form of an order were recorded by the successor DA, who had no occasion to hear the appellants herein. In our opinion, the final order passed by the new DA offends the basic principle of natural justice. Thus, the impugned notification having been issued on the basis of the final findings of the DA, who failed to follow the principles of natural justice, cannot be sustained. It is quashed accordingly.”

67. In *Union of India Vs. Shiv Raj* – [(2014) 6 SCC 564], a three-Judge Bench of the Supreme Court reiterated the principle laid down in *GullapalliNageswara Rao’s* case. This is evident from paragraphs 17 to 20 of the judgement, which are reproduced below :

“17. This Court in *GupllapalliNageswara Rao*, held : (AIR p. 327, para 31)

“31. ...Personal hearing enables the authority concerned to watch the demeanor of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of

view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore, hold that the said procedure followed in this case also offends another basic principle of judicial procedure.”

18. This Court in *RasidJaved Vs. State of U.P.* following the judgement in *GullapalliNageswara Rao*, held that :
(*RasidJaved* case, SCC p. 796 para 51) :

“51. “...a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing is too fundamental a proposition to be doubted.”

19. A similar view has been reiterated by this Court in *AutomotiveTyre Manufacturers Assn. v. Designated Authority*, wherein this Court dealt with a case wherein the designated authority (DA) under the relevant statute passed the final order on the material collected by his predecessor-in-office who had also accorded the hearing to the parties concerned. This Court held that the order stood vitiated as it offended the basic principles of natural justice.

20. In view of the above, the law on the issue can be summarized to the effect that the very person/officer, who accords the hearing to the objector must also submit the report/take decision on the objection and in case his successor decides the case without giving a fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice.”

68. We may now revert to the factual matrix necessary and relevant for deciding the question posed in the opening paragraph of this order. It is not in dispute that even though the Chairperson of the Commission did not participate in the meetings held on 21st, 22nd and 23rd February, 2012 and did not hear the arguments of seven Senior Advocates namely – S/Shri Ashok Desai, K.K. Venugopal, Ramji Srinivasan, AspiChinoy, Parag Tripathi, Shri AnantHaksar and Shri O.P. Dua and other learned counsel, he joined six remaining Members in passing the final order. As noted earlier, two orders were recorded on 20.06.2012. The fact that the Commission has passed two orders is clearly born out from order dated 04.09.2012, the relevant portions of which have been extracted hereinabove but what is interesting and intriguing to note is that even though in paragraph 10 of that order, the Commission comprising Chairperson and six Members had directed the Secretary to get the required portions of the final order dated 20.06.2012 (public version) amended and supply the same to the parties after due approval and signatures of the Commission, the latter did not undertake that exercise and served copies of confidential version of the order on the parties in the purported compliance of order dated 11.12.2012 passed by the Tribunal on the basis of the statement made by the Commission's own advocate. Each page of both the orders have been initialed by the Chairperson and the last page has been signed by other six Members and the Chairperson albeit without putting the date on which they had signed the ordersignoring the mandate of Regulation 32(1) in terms of which every order of the Commission is required to be signed and dated by the Members including the dissenting note by the dissenting Member.

69. The signing of each page by the Chairperson is strongly indicative of the fact that the orders were authored by him and not by any of the six Members, who had heard the arguments on the above noted three dates. During the course of hearing, Shri VaibhavGaggar, learned counsel assisting ShriPallavShishodia, Senior Advocate for the Commission made a statement that by putting initials on each

page of the order, the Chairperson had authenticated the signatures of the remaining six Members but Shri Shishodiadid not endorse this assertion and, in our view, he rightly did so because it is beyond comprehension that the signatures of the Members, most of whom are former Class-I officers of the Government and one is a former Judge of the High Court, are required to be authenticated by someone. In this context, it is necessary to remember that the Members of the Commission are not minions. They are part of an important body, whose powers have few parallels in the country. While exercising adjudicatory powers, all the Members and the Chairperson act as coordinates. If for any reason, the Chairperson is absent then the senior most Member is required to preside over the meeting of the Commission. Therefore, it is naïve to suggest that the Chairperson had put initials on each page of orders dated 20.06.2012 to authenticate the signatures of six Members.

70. We may consider this issue de hors the judicial precedents. It is beyond the comprehension of even a lay person that one who has not heard the parties (in person or through their advocate or authorized representative), could join the decision making process and pass final order. How could a person (in this case Chairperson of the Commission), who did not have the opportunity to hear the arguments of the Advocates for the parties (for three days), who included eminent lawyers like S/Shri Ashok Deasi, K.K. Venugopal, Anant Haksar, Parag Tripathi, Ramji Srinivasan, Aspi Chinoy and O.P. Dua could decide the matter. How could he know the nature and contents of the arguments made by the Advocates representing the parties. For anybody, who has not heard the Advocates for the parties, it will be nothing more than a wild guess as to what they may have argued. The learned counsel may have pointed out several infirmities in the procedure adopted by the Jt. Director General in conducting the investigation and the conclusion recorded by him. They might have pointed out that the report of the Jt. Director General is contrary to the record or is otherwise laconic in several respects. They might have argued that the Jt. Director General did not take into

consideration the relevant material or considered the irrelevant material. For us, it is not possible to imagine as to what the learned counsel representing the parties might have argued. It is a matter of mystery that without having any idea about the arguments advanced by the Advocates representing the parties, which lasted for three days, the Chairperson of the Commission could become party to the final order, which resulted in imposition of penalty of over Rs.6100 crores. It must be remembered that the rule of law is an important corner stone of our democratic setup and principles of natural justice are required to be followed in each and every case where an order adversely affecting a person is passed, except when the application of the particular facet of natural justice or all of them are excluded by legislation and it is nobody's case that 2002 Act has expressly excluded the applicability of the principles of natural justice. Rather, Section 36(1) mandates that in the discharge of its functions, the Commission shall be guided by the principles of natural justice. In other words, the principles of natural justice have been statutorily engrafted in the scheme of the Act and the Commission is bound to comply with the same in the exercise of its adjudicatory functions.

71. Learned senior counsel for the Commission tried to play down the participation of the Chairperson in the final order by making the following submissions :

- (i) The Chairperson was only one of the seven persons who had participated in the decision-making process and all the Members, who heard the arguments must have independently applied their mind without being influenced by the views of the Chairperson.
- (ii) The participation of the Chairperson in the decision-making process and passing of final order was a trivial and insignificant irregularity, which deserves to be ignored because the Tribunal has heard the parties and as such, no prejudice can be said to have been caused to the appellants.

- (iii) The signing of the impugned order by the Chairperson can at best be treated as an irregularity and in view of Section 15, such irregularity does not have the effect of vitiating the order.

72. Though appears attractive, the submissions of Shri Shishodia lack merit and deserve to be rejected. The significance of the hearing by the decision-maker has been aptly highlighted in the celebrated judgement of the Supreme Court in Gullapalli Nageswara Rao's case (supra) in the following words :

“...This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality.”

In Rasid Javed's case (supra), this rule was reiterated in the following words:

“A person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing is to fundamental proposition to be doubted.

The same view has been reiterated in Automotive Tyre Manufacturers Association Vs. Designated Authority and Others (supra) and Union of India vs. Shiv Raj and others (supra).

73. Although no concrete evidence can possibly be produced by any person other than the Members of the Commission as to what extent the Chairperson influenced their views on the merits of the case but there can be no doubt that his presence in the decision-making process must have had telling effect. Even though, while discharging adjudicatory functions of the Commission, all Members enjoy coordinate position vis-à-vis Chairperson, there can be no denying that the latter, who is over-all In-charge of the Commission plays a pivotal role in the functioning of the body including orders passed by it on the basis of investigation conducted by the Director General. His influence on the decision-making process is subtle and it is not possible to accept the argument that the Chairperson had not influenced the final verdict. None of the Members, who heard the arguments on 21st, 22nd and 23rd February, 2012, has filed affidavit to swear that the decision to penalize the appellants was taken without being influenced by the view of the Chairperson or that he was a mute spectator in the meetings held for discussing the final verdict. Even if, such an affidavit was filed, the same would have been discarded in view of the observations made by the Supreme Court in A.K. Kraipak's case (supra). In that case, all the members of the selection board have separately filed affidavits to swear that Naqishbund, who was also a member of the Selection Board had not influenced their decision. While refusing to rely upon those affidavits, the Supreme Court observed :

“In a group deliberations, each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder that the other members of the selection board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept the contention that in adjudging the suitability of the candidates the members of the board did

not have any mutual discussion. It is not as if the records spoke of themselves. We are unable to accept the contention that in adjudging the suitability of the candidates the members of the board did not have any mutual discussion.”

74. At the cost of repetition, we deem it appropriate to observe that even though he was not present during the hearing held on 21st, 22nd and 23rd February, 2012, the Chairperson not only participated in the decision-making process but also initialled each page of the final order, which, as mentioned above, is strongly indicative of the fact that he had authored the impugned order. It is true that the Chairperson had taken part in some other meetings held for considering whether a prima facie case is made out for investigation and for dealing with the applications filed by the parties or even by the Jt. DG for extension of time, but he did not participate in the most crucial meetings held on 21st, 22nd and 23rd February, 2012 when the arguments of the advocates representing the parties were heard. We may also observe that if the Chairperson had participated in all the meetings including those in which the arguments of the learned counsel for the parties were heard, then he would not have passed two orders, one containing public version and other containing confidential version ignoring the earlier detailed order passed on 29.11.2011 substantially diluting two earlier orders whereby the prayer of ACC Ltd., Ambuja Cement Ltd. and Ultratech Cement Limited for grant of confidentiality to pricing data was accepted and another order passed on 02.12.2011 refusing to grant confidentiality to certain information/ documents furnished by Ambuja Cement Limited along with its objections. How could the Chairperson and other Members of the Commission be oblivious of the detailed order passed on the issue of confidentiality of the pricing data and record two orders on the same date (public version and confidential version). It is, therefore, reasonable to conclude that the final order was passed without thorough examination of the record of the Director

General, the submissions made by the parties and the interlocutory orders passed by the Commission.

75. Although, we have decided not to deal with other grounds of challenge, including the one that entire exercise of finding the appellants guilty of violating Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the 2002 Act was undertaken with a pre-determination, the anxiety of Chairperson to become a party to the final order and initial each page of the two versions of the order can be gauged from the detailed interviews given by him on 30.06.2012 and 03.07.2012.

76. The argument of Shri Shishodia that the provision of appeal before the Tribunal should be treated as a safeguard against any insufficiency or inadequacy or irregularity in the proceedings held by the Commission cannot be accepted in view of the law laid down by the Supreme Court in *Institute of Chartered Accounts of India Vs. L.K. Ratna* (supra). While rejecting a similar argument, the Supreme Court observed :

“Any insufficiency, it is said, can be cured by resort to such appeal. Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases as mentioned in Sir William Wade's erudite and classic work on *Administrative Law* 5th Edn. But as that learned author observes (at p. 487), “in principle there ought to be an observance of natural justice equally at both stages”, and

“If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial.”

And he makes reference to the observations of Megarry, J. in *Leary v. National Union of Vehicle Builders* [(1971) Ch 34, 49] . Treating with another aspect of the point, that learned Judge said:

“If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.”

The view taken by Megarry, J. was followed by the Ontario High Court in Canada in *Re Cardinal and Board of Commissioners of Police of City of Cornwall* [(1974) 42 DLR (3d) 323] . The Supreme Court of New Zealand was similarly inclined in *Wislang v. Medical Practitioners Disciplinary Committee* [(1974) 1 NZLR 29] , and so was the Court of Appeal of New Zealand in *Reid v. Rowley* [(1977) 2 NZLR 472].”

“But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal. For instance, as in the present case, where a member of a highly respected a publicly trusted profession is found guilty of misconduct and suffers penalty, the damage to his professional reputation can be immediate and far-reaching. “Not all the King's horses and all the King's men” can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. To many a man, his professional reputation is his most valuable possession. It affects his standing and dignity among his fellow members in the profession, and guarantees the esteem of his clientele. It is often the carefully garnered fruit of a long period of scrupulous, conscientious and diligent industry. It is the portrait of his professional honour. In a world said to be notorious for its blase attitude towards the noble values of an earlier generation, a man's professional

reputation is still his most sensitive pride. In such a case, after the blow suffered by the initial decision, it is difficult to contemplate *complete* restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding.”

“The conclusion reached by us has not been an easy one. The authorities on the subject have oscillated from one extreme to the other, and an analysis of the cases points at times to some rather slender element in the mosaic of facts which has influenced the outcome. There is good reason ultimately for adopting a liberal view, for as has been observed by the late Professor S.A. de Smith in his *Judicial Review of Administrative Action* [FourthEdn., p. 261].”

77. The reliance placed by Shri Shishodia on Section 15 of the Act to defend participation of the Chairperson in the decision-making process is clearly misplaced. That section operates as a shield against the invalidation of the proceedings of the Commission only on the ground that there exists any vacancy in the Commission or any defect in its constitution or any defect in the appointment of a person acting as a Chairperson or as a Member or any irregularity in the procedure of the Commission not affecting the merits of the case. The present one is not a case of a

vacancy or any defect in the constitution of the Commission. It is also not a case of any defect in the appointment of a Chairperson or a Member. The challenge to the impugned order is also not founded on any irregularity in the procedure of the Commission. Rather, one of the main grounds of attack is that the Chairperson, who did not hear the arguments could not have participated in the decision-making process and passed the impugned order and as we have held in the earlier part of this order, the final verdict is vitiated due to participation of the Chairperson in the decision-making process despite the fact that he did not have the opportunity to hear the arguments of the Advocates for the parties on any of the three dates i.e. 21st, 22nd and 23rd February, 2012.

78. We shall now deal with judgments relied upon by learned senior counsel for the Commission. In *Cumbum Roadways (P) Ltd., Madurai and others Vs. Somu Transport (P) Ltd. and others (Supra)*, which was cited by learned senior counsel in support of his argument that those who had not initially challenged the Chairperson's participation in the decision making process are precluded from doing so. In that case, only one of several persons aggrieved by the order passed by the State Transport Appellate Tribunal had approached the High Court. A learned Single Judge of the High Court allowed the writ petition and quashed the order of the Appellate Tribunal leaving it free to dispose of the appeal afresh if it could do so or remit the matter to the Transport Authority. The appeal filed against order of the learned Single Judge was dismissed by the Division Bench of the High Court. While doing so, the Division Bench directed that the cases of all the parties including those who had not approached the High Court should be re-considered by the Appellate Tribunal because all the appeals were disposed of by one order. While setting aside that direction, the Supreme Court observed :

“The appellant then contends that even so the Appellate Tribunal should have been asked to consider the cases of the appellant and the respondent only on remand and the

Appeal Court was not right in ordering the Appellate Tribunal to consider all the appeals afresh. It is true that generally the Appellate Tribunal deals with all appeals relating to one route by one order. It is also true that before the decision of this Court the Appellate Tribunals were generally influenced by the Government Order in question. There is therefore some force in the observation of the Appeal Court that where the disposal of appeals has been found to have departed from known principles of judicial procedure, all the appeals disposed of by one order should be revived. But there is one serious difficulty in accepting this view of the Appeal Court. Even though all the appeals with respect to one route may have been disposed of by a single appellate order in form, in reality the appellate order consists of as many orders as there are appeals disposed of thereby. In this very case there were seven appeals before the Appellate Tribunal and the order says that the appeal of the appellant alone was allowed while the other appeals were dismissed. Now if none of the parties concerned in the seven appeals had come to the High Court in writ proceedings within a reasonable time, the order of the Appellate Tribunal would have become final, even though it might have been influenced by the Government Order in question. Therefore there seems to be no reason why when only one party brought the matter before the High Court by way of writ proceedings against another party, and the appellants in the other six appeals were content with the order passed by the Appellate Tribunal, the High Court should interfere in favour of those persons also who had not thought fit to challenge the order

of the Appellate Tribunal. On principle therefore it does not appear right that the High Court should set aside orders in appeal passed by the Appellate Tribunal when the parties to those appeals do not bring up the matter before the High Court, simply because as a matter of convenience the Appellate Tribunal deals with all the appeals relating to one route by a consolidated order. Therefore, we are of opinion that the remand should only be confined to those parties which came to the High Court and not extend to others, as the High Court would have no jurisdiction to interfere with the orders of the Appellate Tribunal either in favour of or against the parties which have not come to it. In the circumstances the order of the Appeal Court will have to be modified and the remand confined to a reconsideration of the appeal of the present appellant alone as against the claims of the respondent, and the Appellate Tribunal should decide between these two only who should be granted the permit for the route in question.”

The facts of the present appeals are entirely different from the matter decided by the Supreme Court. Here, six of the appellants namely – Lafarge India Limited, Century Textile & Industries Limited, J.K. Cement, Ultra Tech Cement Limited, Cement Manufacturers Association and India Cement Limited initially attacked the impugned order on the ground that the Chairperson was not entitled to participate in the decision making process. The remaining appellants took this ground by way of amendment. In any case, this is not a matter in which the appellants are trying to take advantage of some order passed by the Tribunal in which the issue relating to illegality committed due to participation of Chairperson of the Commission had

already been decided. Therefore, ratio of Supreme Court judgement cannot be invoked for non-suiting some of the appellants.

79. In *Harold Withrow Vs. Duane Larkin* – [421 U.S. 35, 43 L. Ed. 2d 712], the US Supreme Court considered whether the Statute of the State of Wisconsin, which prohibited the practice of medicine without a licence from an examining Board composed and practicing physician was unconstitutional and whether the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication.

Appellant, Withrow, who was a resident of Michigan and licensed to practice medicine there, obtained a Wisconsin licence under reciprocity agreement between Michigan and Wisconsin governing medical licensing. His practice in Wisconsin consisted of performing abortion at an office in Milwaukee. On June 20, 1973, the Board sent a notice to the appellant that it would hold an investigative hearing under Wisconsin Statute Ann. § 448.17 to determine whether he had engaged in certain proscribed acts.

The appellant challenged the notice and sought preliminary and permanent injunctive relief and a temporary restraint order against the Board from investigating him and from conducting the investigative hearing. The District Court denied temporary injunction. He then filed an amended complaint in which among other reliefs, the appellant prayed for declaring the concerned Statute as unconstitutional on the ground that the same violates his constitutional rights. Initially, the District Court declared the Statute unconstitutional but subsequently modified its judgement to eliminate the declaration of unconstitutionality.

While dealing with the contention that the combination of investigative and adjudicative functions necessarily create an unconstitutional risk of bias in administrative adjudication, the U.S. Supreme Court made a reference to an earlier decision in *Murchison* and observed :

“Plainly enough, Murchison has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications. The Court did not purport to question the Cement Institute case, *supra*, or the Administrative Procedure Act and did not lay down any general principle that a judge before whom an alleged contempt is committed may not bring and preside over the ensuing contempt proceedings. The accepted rule is to the contrary. *Ungar v. Sarafite*, 376 U.S. 575, 584 - 585, 84 S.Ct. 841, 846 - 847, 11 L.Ed.2d 921 (1964); *Nilva v. United States*, 352 U.S. 385, 395—396, 77 S.Ct. 431, 437—438, 1 L.Ed.2d 415 (1957).

Nor is there anything in this case that comes within the strictures of *Murchison*. When the Board instituted its investigative procedures, it stated only that it would investigate whether proscribed conduct had occurred. Later in noticing the adversary hearing, it asserted only that it would determine if violations had been committed which would warrant suspension of appellee's license. Without doubt, the Board then anticipated that the proceeding would eventuate in an adjudication of the issue; but there was no more evidence of bias or the risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate. Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice. The processes utilized by the Board, however, do not in themselves contain an unacceptable risk of bias. The investigative proceeding had been closed to the public, but appellee and his counsel were permitted to be present throughout; counsel actually attended the hearings and knew the

facts presented to the Board. No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing. Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941).

We are of the view, therefore, that the District Court was in error when it entered the restraining order against the Board's contested hearing and when it granted the preliminary injunction based on the untenable view that it would be unconstitutional for the Board to suspend appellee's license 'at its own contested hearing on charges evolving from its own investigation..... The contested hearing should have been permitted to proceed."

80. *Union of India Vs. Jyoti Prakash Mitter* – [1971 (1) SCC 396] is an interesting case in which a Judge of the Calcutta High Court had approached the President for change of his recorded date of birth but could not succeed. While rejecting the contention of the appellant that the President had not given him an opportunity of oral hearing, the Supreme Court observed :

"The President had given ample opportunities at diverse stages to the respondent to make his representations. All evidence placed before the, President when he considered the question as to the age of the respondent was disclosed to him and he -

respondent - was given an opportunity to make his representation thereon. There is nothing in clause (3) of Article 217 which requires that the Judge whose age is in dispute, should be given a personal hearing by the President. The President may in appropriate cases in the exercise of his discretion give to the Judge concerned an oral hearing, but he is not bound to do so. An order made by the President which is declared final by clause (3) of Article 217 is not invalid merely because no oral hearing was given by the President to the Judge concerned. An opportunity to make representation to the Judge, after apprising him of the evidence which was likely to be used against him and consideration of the representation and the evidence comply with the requirements of Article 217(3). The respondent it is true did make requests that the President should give him an oral hearing. The respondent claims that his request was granted and he remained under an impression that he would be given an oral hearing, and the order made without granting him an opportunity of an oral representation was contrary to the rules of natural justice. By his representation, dated December 7, 1964, the respondent had requested that he be given an oral hearing before the President and an opportunity to adduce his evidence and to produce in original the documents viz. an almanac and a horoscope, and to make submissions in support of his case. He repeated that request in the letter addressed to the Secretary to the President also on the same day. In reply thereto by letter, dated December 21, 1964, the Secretary to the Ministry of Home Affairs informed the respondent that no oral evidence of witnesses would be received but the respondent was free to submit the affidavits of witnesses as he relied upon. Regarding his request for the personal hearing the respondent was informed that the President will decide

after considering the evidence whether any personal hearing was necessary. He was also informed that should the President decide that the respondent should be heard in person, he will be informed in due course. Again in reply to the letter written by the respondent on January 4, 1965, the Secretary to the Ministry of Home Affairs informed the respondent that the procedure to be followed and the opportunities to be given to the respondent were entirely to depend upon the direction of the President and the respondent will be given an opportunity to put forward his case about the evidentiary value of the documents produced by him and any decision thereon would be arrived at by the President after affording him reasonable opportunities in that behalf. By his letter, dated April 28, 1965, to the Secretary, Ministry of Home Affairs, the respondent stated that he had no further evidence to produce on the subject of his age, beside the evidence he had already produced. By his telegram, dated September 1, 1965, the respondent requested the President to send for the papers and documents, if not already sent for and to grant him an audience "if at all necessary". But in his letter addressed to the Secretary of the Ministry of Home Affairs on the same day he stated that all the papers may be placed before the President and the President may be "pleased to grant an audience for the purpose of deciding the question of his age".

Article 217(3) does not guarantee a right of personal hearing. In a proceeding of a judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not necessarily an incident of the Rules of natural justice that personal hearing must be given to a party likely to be affected by the order. Except in proceedings in Courts, a mere denial of opportunity of making an

oral representation will not, without more, vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him, and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not constituted by the Constitution or a Court. Whether in a given case the President should give a personal hearing is for him to decide. The question is left to the discretion of the President to decide whether an oral hearing should be given to the Judge concerned. The record amply supports the view that the President did not deem it necessary to give an oral hearing. There were no complicated questions to be decided by the President. On the one hand there was the evidence of the matriculation certificate and the representation made by the respondent before the Board of Commissioners in the United Kingdom when the respondent submitted himself for being admitted to the Indian Civil Service Examination. On the other hand there was the evidence of the assertion made by the respondent that he was born on December 27, 1904, which was sought to be supported by the almanac with an entry in the margin, a horoscope, an affidavit of Panchkari Banerjee, Secretary to the then Chief Justice Sir Arthur Trevor Harries, in which it was stated that the question about the age of the respondent was discussed with the Chief Justice. The truth of the statements made by the respondent had to be judged in the light of his conduct, that he gave no evidence of the date of his birth when he was appointed permanent Judge of the High Court, nor when in 1960 opportunity was given to him to furnish any material in support of his contention regarding

his age. If upon this evidence the President was of the view that the disputed question may be decided without giving an opportunity of personal hearing, this Court cannot set aside the order on the ground that the order was made without following the rules of natural justice.”

[Underlining is ours]

81. In Madhya Pradesh Industries Ltd. Vs. Union of India and Others (supra), it was observed by the Supreme Court that the appellant’s plea that denial of personal hearing had the effect of vitiating the final order passed by the Central Government under Rule 55 framed under Section 13 of the Mines and Minerals (Regulation and Development) Act, 1957 was untenable and that a written representation would effectively meet the requirements of the principles of natural justice. The relevant observations made in the judgement are extracted below :

“As regards the second contention, I do not think that the appellant is entitled as of right to a personal hearing. It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. Indeed Rule 55 of the Rules, quoted supra, recognizes the said principle and states that no order shall be passed against any applicant unless he has been given an opportunity to make his representations against the comments, if any, received from the State Government or other authority. The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation

would effectively meet the requirements of the principles of natural justice.....”

[Emphasis supplied]

82. In *K.L. Tripathi Vs. State Bank of India and others* (supra), the Supreme Court while dismissing the appeal filed by the appellant against the order of Allahabad High Court, which had declined to interfere with the punishment imposed on the appellant, observed :

“Wade in his *Administrative Law*, Fifth Edition at pages 472-475 has observed that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter, the application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.

The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular *lis*, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no *lis* regarding the

facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement.”

83. In General Manager, Eastern Railway and Another Vs. Jawala Prasad Singh (supra), the Supreme Court considered and answered in negative the question whether change of the personnel of the Inquiry Committee had the effect of vitiating the order of punishment by making the following observations :

“In our opinion, the above procedure does not leave any scope for the guidance of a member of an Inquiry Committee consisting of more than one person by the impression formed by him about the truthfulness or otherwise of a particular witness examined during the inquiry. From the stage antecedent to the framing of the charges everything is recorded in writing: the allegations on which the charges are based are made known to the railway servant and he is called upon to file his written statement after looking into all the relevant records. The oral evidence of all the witnesses tendered during the enquiry is recorded in writing. Whereas here the oral evidence is recorded in the presence of three persons constituting the Inquiry Committee, any impression created by the demeanour of a particular witness on the mind of any one member cannot affect the conclusion afterwards arrived at

jointly by them. It cannot be suggested that all the three persons would record their impressions separately about the demeanour of a witness and it is quite possible that a particular witness may appear to one member of the committee to be untruthful without his being considered so by the others. The members of the Inquiry Committee cannot record their findings separately but it is their duty to record findings on each of the charges together with the reasons therefor. It is to be noted that the duty of the Inquiry Committee ends with the making of the report. The Disciplinary Authority has to consider the record of the inquiry and arrive at its own conclusion on each charge. Whatever may be the impression created by a particular witness on the mind of one member of the committee, the same is never translated into writing and the Disciplinary Committee merely goes by the written record after giving a personal hearing to the railway servant if he asks for it. Even if the Inquiry Committee makes a report absolving the railway servant of the charges against him, the Disciplinary Authority may, on considering the entire record come to a different conclusion and impose a penalty. This is amply borne out by a judgment of this Court in Union of India v. H.C. Goel [AIR 1964 SC 364] where it was said that neither the findings nor the recommendations of the Inquiry Committee are binding on the Government.

In such a state of affairs a change in the personnel of the Inquiry Committee after the proceedings are begun and some evidence recorded cannot make any difference to the case of the railway servant. The record will speak for itself and it is the record consisting of the documents and the oral evidence as recorded which must form the basis of the report of the Inquiry Committee.

The committee is not the punishing authority and the personal impression of a member of the committee cannot possibly affect the decision of the Disciplinary Authority. In a state of affairs like this, we cannot see any reason for holding that any known principles of natural justice is violated when one member of the committee is substituted by another.”

[Emphasis supplied]

84. In *Ossein and Gelatine Manufacturers' Association of India Vs. Modi Alkalies and Chemicals Limited and Another* – [(1989) 4 SCC 264], the Supreme Court ruled that where the final order granting approval for establishment of new undertaking was passed by the Government, the mere fact that the order was passed by an officer other than the one, who heard the parties will not make any difference because it did not cause any prejudice to the appellant. Some of the observations made in the judgement are extracted below :

“.....It is true that the order has been passed by an officer different from the one who heard the parties. However, the proceedings were not in the nature of formal judicial hearings. They were in the nature of meetings and full minutes were recorded of all the points discussed at each meeting. It has not been brought to our notice that any salient point urged by the petitioners has been missed. On the contrary, the order itself summarises and deals with all the important objections of the petitioners.....

“There was some discussion before us on a larger question as to whether the requirements of natural justice can be said to have been complied with where the objections of parties are heard by one officer but the order is passed by another. Shri Salve, referring to certain passages in *Local Government Board v. Alridge*[1915 AC 120 : 84 LJKB 72]

, Ridge v. Baldwin [1964 AC 40 : (1963) 2 All ER 66 : (1963) 2 WLR 3] , Regina v. Race Relations Board, Ex parte Selvarajan [(1975) 1 WLR 1686] and in de Smith's Judicial Review of Administrative Action (4th Edn., pp. 219-220) submitted that this was not necessarily so and that the contents of natural justice will vary with the nature of the enquiry, the object of the proceeding and whether the decision involved is an "institutional" decision or one taken by an officer specially empowered to do it. Shri Divan, on the other hand, pointed out that the majority judgment in GullappalliNageswara Rao v. APSRTC has disapproved of Alridge case [1915 AC 120 : 84 LJKB 72] and that natural justice demands that the hearing and order should be by the same officer. This is a very interesting question and Alridge case has been dealt with by Wade. We are of opinion that it is unnecessary to enter into a decision (sic discussion) of this issue for the purposes of the present case. Here the issue is one of grant of approval by the Government and not any particular officer statutorily designated. It is also perfectly clear on the records that the officer who passed the order has taken full note of all the objections put forward by the petitioners. We are fully satisfied, therefore, that the requirements of natural justice have been fulfilled in the present case."

[Emphasis supplied]

85. In the High Court of Judicature at Bombay Through its Registrar Vs. ShirishkumarRangaraoPatil and Another - [(1997) 6 SCC 339], the appellant had unsuccessfully challenged his dismissal by the High Court. One of the contentions raised by the appellant was that the power of disciplinary action was delegated to a Committee of five Judges but the recommendation came to be made only by a Committee of four Judges. The Supreme Court observed that even though his

contention is prima facie plausible to be accepted, the records show that after retirement of one of the five Judges, the Committee of five Judges was re-constituted. The file was circulated among all Judges. The Supreme Court further noted that due to unavoidable reasons, one of the Judges was absent on the date of meeting and observed :

“...It is true that there is no further resolution passed to constitute quorum for taking a decision. It is common experience that in some of the High Courts there is no express resolution constituting quorum. *Ex abundantia cautela* some High Courts pass such resolution as to the quorum. However, the practice has grown that generally majority of the Committee, when assembled, would transact the administrative business and take decisions. In the light of the settled legal position that the decision taken is that of the High Court and the Committee acted for and on behalf of the High Court, the majority of four Judges of the Committee, even in the absence of such express resolution, does constitute the quorum and is competent to transact the administrative business of the Court. Out of five, three members always constitute a quorum so as to be competent to take decision since even if it is assumed that all the five members were present and they decided against the respondent, the opinion of four Judges would constitute majority decision. It may be expedient that all the Judges sit or the record is circulated to all of them and they take decision. Unless someone of the members express their/his dissent from the decision taken per majority, the fifth member also must be deemed to have agreed to the decision of the majority, though no formal concurrence in that behalf was recorded. It is seen that all the four learned Judges unanimously decided recommending to the Governor to impose the punishment of dismissal of the respondent from service. It

constitutes the quorum. The Governor acted upon the same and issued order of dismissal of the respondent. A resume of the contents of the dismissal order by the Government, does indicate that the Government did in fact understand the recommendation as of the High Court, i.e., the Chief Justice and his companion Judges. The Governor being the competent authority, validly and legally passed the order dismissing the respondent from service. Even if there is any irregularity in the procedure, i.e., absence of a Judge, it does not vitiate the order of dismissal by any error of law. Considered from this perspective also, we hold that the order of the Governor acting upon the recommendation made by the High Court is not vitiated by any manifest error of law. The order of dismissal does indicate that the Governor independently considered the record and came to the conclusion that the proposed punishment of respondent's dismissal from service was warranted on the proved facts.”

[Underlining is ours]

86. In Union of India and Another Vs. P.K. Roy and Others – [AIR 1968 SC 850], the Supreme Court modified the judgement of Madhya Pradesh High Court, which had ruled that preparation of provisional gradation list by the State of Madhya Pradesh under the relevant provisions of the States Reorganisations Act, 1956 was legally infirm. One of the arguments which found favour with the High Court but was negated by the Supreme Court was that a second opportunity should have been given to the concerned officers to make representation regarding inter se seniority of the officers of various regions. While accepting the contention, the Supreme Court observed :

“It was argued by Mr. Asoke Sen that in regard to both these matters the respondents have a right of representation and the final

gradation list should have been published after giving them further opportunity to make a representation. Normally speaking, we should have thought that one opportunity for making a representation against the preliminary list published would have been sufficient to satisfy the requirements of law. But the extent and application of the doctrine of natural justice cannot be imprisoned within the straitjacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case (See the decision of this Court in *Shri Bhagwan v. Ram Chand* [1965] 3 SCR 218, 222] . In view of the special circumstances of the present case we think that the respondents were entitled to an opportunity to make a representation with regard to the two points urged by Mr.Asoke Sen before the final gradation list was published. As no such opportunity was furnished to the respondents with regard to these two matters we hold that the combined final gradation list dated April 6, 1962, so far as category 6 is concerned, is ultra vires and illegal and that part of the notification alone must be quashed by grant of a writ in the nature of certiorari. The rest of the notification of the State Government dated April 6, 1962 with regard to other categories will stand unaffected. So far as Category 6 is concerned, the Central Government is directed to give an opportunity to the respondents to make a representation in regard to the two points mentioned in this paragraph and thereafter take steps to finalise and publish the list in accordance with law.”

87. In Securities and Exchange Board of India Vs. Askhya Infrastructure Private Limited – [(2014) 11 SCC 112], the Supreme Court considered whether denial of opportunity of hearing before passing an order of takeover is vitiated and answered the same in the following words :

“...It is a matter of record that the respondent had asked for an opportunity of hearing but none was granted. But the question that arises is as to whether this is sufficient to nullify the decision of SEBI. In our opinion, the respondent has failed to place on the record either before SAT or before this Court the prejudice that has been caused by not observing rules of natural justice. It is by now settled proposition of law that mere breach of rules of natural justice is not sufficient. Such breach of rules of natural justice must also entail avoidable prejudice to the respondent. This reasoning of ours is supported by a number of cases. We may, however, refer to the law laid down in Natwar Singh v. Director of Enforcement [(2010) 13 SCC 255] wherein it was held that: (SCC p. 268, para 26)

“26. ... There must also have been caused some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice.”

88. In DharampalSatyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and Others (supra), the Supreme Court considered whether the denial of opportunity of hearing to the appellant before ordering recovery of the amount of taxes not collected in furtherance of the notification issued by the Central Government under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, whereby exemption of the central excise was withdrawn in respect of goods falling under Chapter 21.06 (Pan Masala) and Chapter–24 (Tobacco and tobacco substitutes, including cigarettes, chewing tobacco etc.) The withdrawal of

exemption was challenged by the appellant in a writ petition filed before the Gauhati High Court. The learned Single Judge dismissed the writ petition but the appeal was allowed by the Division Bench by invoking the doctrine of promissory estoppel. The Union of India challenged the order of the Division Bench by filing Special Leave Petition which was converted into Civil Appeals Nos. 8841 - 44 of 2003. During the pendency of the appeals, the withdrawal of the benefit of exemption was given with retrospective effect by Section 154 of the Finance Act, 2003, the validity of which was upheld by the Supreme Court in R.C. Tobacco (P) Ltd. Vs. Union of India –[(2005) 7 SCC 725]. Thereafter, Respondent No. 1 passed recovery order dated 03.06.2003 and demanded Rs. 2,93,43, 244/- from the appellant. By another order, the appellant was directed to pay excise duty. The recovery orders were challenged by the appellant before the Gauhati High Court but the writ petition was dismissed by the learned Single Judge. During the pendency of the appeal before the Division Bench, a direction was given not to dismiss the appeals preferred by the appellant. The Commissioner (Appeals) set aside the orders for recovery on the ground that notice had not been given. After this, the appeals pending before the Division Bench of the High Court were disposed of as infructuous.

The Union of India challenged the decision of the Commissioner by contending that the issue of show cause notice was not mandatory. The appellant also challenged the order by which the matter was remanded to the competent authority. The Customs, Excise and Service Tax Appellate Tribunal allowed the appeal of the Union of India and dismissed the one filed by the appellant.

The appellant again approached the Gauhati High Court. The learned Single Judge dismissed the writ petition as also the review petition. The appellant then approached the Supreme Court and contended that the orders of recovery could not have been passed without issuing show cause notice under Section 11-A of the Excise Act. While negating the appellant's contention, the Supreme Court referred to the development of principles of natural justice in various jurisdictions referred to

the views of several academicians, referred to several decisions including the often quoted decision in Managing Director, ECIL Hyderabad and other Vs. B. Karunakar and others– [(1993) 4 SCC 737] and held that the appellant was not entitled to seek invalidation of the recovery because no prejudice was caused to it. This is evident from paragraphs 46 to 48 of the judgement, which are extracted below :

“46. To recapitulate the events, the appellant was accorded certain benefits under the Notification dated 8-7-1999. This Notification stands nullified by Section 154 of the 2003 Act, which has been given retrospective effect. The legal consequence of the aforesaid statutory provision is that the amount with which the appellant was benefited under the aforesaid Notification becomes refundable. Even after the notice is issued, the appellant cannot take any plea to retain the said amount on any ground whatsoever as it is bound by the dicta in R.C. Tobacco [(2005) 7 SCC 725] . Likewise, even the officer who passed the order has no choice but to follow the dicta in R.C. Tobacco [(2005) 7 SCC 725] . It is important to note that as far as quantification of the amount is concerned, it is not disputed at all. In such a situation, issuance of notice would be an empty formality and we are of the firm opinion that the case stands covered by “useless formality theory”.

47. In Escorts Farms Ltd. v. Commr. [(2004) 4 SCC 281] , this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same time, it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms: (SCC pp. 309-10, para 64)

“64. Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure prescribed and violation of rules of natural justice. In these appeals preferred by the holder of lands and some other transferees, we have found that the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the Constitution of India.

48. Therefore, on the facts of this case, we are of the opinion that non-issuance of notice before sending communication dated 23-6-2003 has not resulted in any prejudice to the appellant and it may not be feasible to direct the respondents to take fresh action after issuing notice as that would be a mere formality.”

89. In *State of Jammu and Kashmir and Others Vs. Bakshi Gulam Mohammad and Another* – [AIR 1967 SC 122], the respondent had successfully challenged before the High Court of Jammu and Kashmir the proceedings of the Commission of inquiry appointed by the State Government. One of the contentions urged before

the Supreme Court was that the proceedings were vitiated due to violation of the rules of natural justice, in as much as the Commission did not allow him inspection of all the documents and he was not given opportunity to cross-examine the persons, who had filed affidavits in support of the allegations made against him. The Supreme Court noted that the respondent had been granted opportunity to inspect all the documents and held that there was no violation of rules of the natural justice on that count. While rejecting the plea that he had right to cross-examine the persons who had filed affidavits, the Supreme Court observed :

“...We have to remember that we are dealing with a statute which permits a Commission of inquiry to be set up for fact-finding purposes. The report of the Commission has no force proprio vigore. This aspect of the matter is important in deciding the Rules of natural justice reasonably applicable in the proceedings of the Commission of inquiry under the Act. Then we find that Section 10 to which we have earlier referred, gives a right to be heard but only a restricted right of cross-examination. The latter right is confined only to the witnesses called to depose against the person demanding the right. So the Act did not contemplate a right of hearing to include a right to cross-examine. It will be natural to think that the statute did not intend that in other cases a party appearing before the Commission should have any further right of cross-examination. We, therefore, think that no case has been made out by Bakshi Ghulam Mohammad that the Rules of natural justice require that he should have a right to cross-examine all the persons who had sworn affidavits supporting the allegations made against him.”

90. In *M/s. Kanungo & Company Vs. Collector of Customs and Others* – [(1973) 2SCC 438], a somewhat similar contention raised for challenging seizure of goods

under the Sea Customs Act, 1878 was rejected by the Supreme Court by making the following observations :

“12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant.”

91. In *Mohd. Shahabuddin Vs. State of Bihar and Others* – [(2010) 4 SCC 653], an administrative order passed by the High Court for shifting the criminal trial of the appellant from a regular court to a special court was challenged on several grounds including the one of violation of the principles of natural justice. While rejecting the contention, the Supreme Court relied upon some of the precedents and observed :

“It has been the consistent view of this Court that an administrative order when passed by a competent authority may not necessarily be required to be issued only after due compliance with the principles of natural justice.”

92. In *Board of Directors, Himachal Pradesh Transport Corporation and Another Vs. K.C. Rahi* – [(2008) 11 SCC 502], the Supreme Court while reversing an order

of the Himachal Pradesh High Court which had quashed the order of punishment passed against the respondent held that the principles of natural justice cannot be put in a straight-jacket formula and its application depends upon the facts and circumstances of each case and that to sustain a complaint of non-compliance of the principles of natural justice, one must establish that he has been prejudiced. A similar contention was raised and negated in *Union of India and Others Vs. Alok Kumar* – [(2010) 5 SCC 349]. In that case, the Supreme Court held that the element of prejudice should exist as a matter of fact or there should be definite inference of likelihood of prejudice flowing from the defects relating to statutory violations.

93. In *Dr. Umrao Singh Choudhary Vs. State of M.P. and Another* – [(1994) 4 SCC 328], the Supreme Court held that the application of the principles of natural justice was expressly excluded by virtue of Section 52 of the M.P. Vishwavidyalaya Adhiniyam and, therefore, the appellant was not entitled to contend that the order of his removal from the post of Vice Chancellor was vitiated due to violation of the principles of natural justice.

94. Lastly, we may notice the judgment of the Supreme Court in *Managing Director, ECIL Hyderabad and other Vs. B. Karunakar and others* (supra) on which strong reliance was placed by Shri Shishodia for contending that the order passed by the Commission should not be set aside because no prejudice has been caused to the appellants. The principal issue considered by the Constitution Bench in that case was whether supply of copy of enquiry report to the delinquent employee and giving of second show cause notice was sine qua non before an order of punishment could be passed. While answering the question in affirmative, the majority of the Court evolved a new procedure and held :

“31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary

proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the

authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law.”

In our view, none of the decision relied upon by the learned senior counsel for the Commission have any bearing on the issue raised in these appeals and do not run counter to the view taken by us. In *Harold Withrow Vs. Duane Larkin* (supra), the U.S. Supreme Court dealt with the issue of bias in investigative hearing and answered the same in negative. Even though in these appeals, one of the grounds taken by the appellants is that the investigation and the inquiry were conducted with pre-determined mind, we have not dealt with and decided the same.

In *Union of India Vs. Jyoti Prakash Mitter's* case, the Supreme Court considered and answered in negative the plea of the respondent, which had found favour with the High Court that the President had decided the issue of his date of birth. The Supreme Court ruled that while determining the dispute as to the age of a Judge, the President is performing judicial function but he is not acting as a court and whether in a given case, the President should give a personal hearing is for him to decide.

In *Madhya Pradesh Industries Ltd. Vs. Union of India's* case, the Supreme Court held that the opportunity to make representation does not necessarily include an opportunity of personal hearing.

In *K.L. Tripathi Vs. State Bank of India's* case (supra), the Supreme Court ruled that denial of opportunity of cross-examination does not per se invalidate and vitiate the decision. Similar view has been expressed in *State of Jammu and Kashmir and Others Vs. Bakshi Gulam Mohammad* (supra), *M/s. Kanungo & Company Vs. Collector of Customs and Others* (supra).

Though the judgements in *General Manager, Eastern Railway and another Vs. Jawala Prasad Singh* (supra), *Ossein and Gelatine Manufacturers Association of India Vs. Modi Alkalies and Chemicals Limited and another* (supra) and *High Court of Judicature at Bombay vs. Shirish Kumar Rangrao Patil and another* (supra) ostensibly support the argument of Shri Shishodia that hearing by one person and decision by another does not violate the principles of natural justice, but a careful reading of three judgements makes it clear that ratio thereof is not what the learned senior counsel want us to believe and accept.

In first of these cases, change in the personnel of Inquiry Committee was held to have made no difference because the Committee did not have the power to punish which is vested in the disciplinary authority. The Supreme Court observed that the members of the Inquiry Committee cannot record their findings separately and it is their duty to record findings on each of the charges together with reasons therefor; that the duty of the Inquiry Committee ends with the making of the report and the disciplinary authority has to consider the record of the inquiry and arrive at its own conclusion on each charge.

In the second case, the Supreme Court did not decide the issue whether the decision could be taken by a person other than who gave hearing to the party. After noticing the rival contentions and precedents, the Supreme Court observed that it is unnecessary to enter into a decision of this issue for the purpose of the present

case because the issue is one of grant of approval by the Government and not by any particular officer statutorily designated. The Supreme Court also noted that on the records, the officer who passed the order has taken full note of all the objections before put forward by the petitioners.

In the third case also, the final punishment order was passed by the Governor, being the competent authority and the Committee constituted by the High Court was only required to make recommendations. The Supreme Court observed that the Government did in fact understand the recommendation as of the High Court i.e. the Chief Justice and his companion Judges and even if there is any irregularity in the procedure i.e. absence of a Judge, it does not vitiate the order of dismissal by any error of law and that the order of the Governor acting upon the recommendation made by the High Court is not vitiated because he had independently considered the record and came to the conclusion that the proposed punishment of the respondent's dismissal from service was warranted on the proved facts.

In *Securities and Exchange Board of India Vs. Askhya Infrastructure Private Limited (supra)*, *K.L. Tripathi Vs. State Bank of India and others (supra)*, *Managing Director, ECIL Hyderabad and other Vs. B. Karunakar and others (supra)* and *DharampalSatyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and Others (supra)*, the Court has emphasized that prejudice must be shown to have been suffered by the aggrieved person before he can seek invalidation of the impugned order.

95. In our view, the prejudice caused to the appellants is writ large on the face of the record. As mentioned above, the Chairperson did not have the opportunity of hearing the arguments of the advocates for the parties, which lasted for three days i.e. 21st, 22nd and 23rd February, 2012 and yet he became party to the decision. Obviously, he did not know what are the nature and contents of the arguments of

the seven Senior Advocates and other advocates, who appeared for the parties. The minutes of the meetings recorded on those dates do not show that the remaining six Members had recorded the arguments advanced by the learned advocates, as was done by the officer who heard the arguments in *Ossein and Gelatine Manufacturers' Association of India Vs. Modi Alkalies and Chemicals Limited and Another* (supra). The Chairperson's participation in the decision-making process had salutary effect on the final verdict. As held by the Supreme Court in *A.K. Kraipak's case*, the views of the Chairperson must have influenced other six Members. His views must have operated in a subtle manner and as mentioned in the earlier part of the order, he appears to have authored both the versions (public and confidential) of order dated 20.06.2012.

96. In *S.L. Kapoor Vs. Jagmohan and Others* – [AIR 1981 SC 136], a three-Judge Bench of the Supreme Court examined the question whether violation of principles of natural justice can be overlooked by accepting the spacious arguments that no prejudice has been caused to the affected person. The facts of that case were that New Delhi Municipal Committee, which consisted of nine non-official and four ex-officio members with one year's tenure was superseded before the expiry of the term. The supersession was unsuccessfully challenged before the Delhi High Court. The Full Bench of the High Court upheld the plea of the writ petitioners that it was necessary for the Government to hear the Committee before an order could be made under Section 238(1) of the Punjab Municipal Act, 1911 as applicable to Delhi but declined to quash the impugned notification on the ground that undisputed facts spoke for themselves and no purpose would have been served by giving formal notice to the Committee and no prejudice can be said to have been caused by failure to observe the natural justice.

The Supreme Court repelled the argument of the Attorney General that the rules of natural justice were not applicable in such matter by making the following observations :

“The old distinction between a judicial act and an administrative act has withered away and we have been liberated from the psittacine incantation of `administrative action'. Now, from the time of the decision of this Court in State of Orissa v. Dr. (Miss) Binapani Devi &Ors. "even an administrative order which involves civil consequences.... must be made consistently with the rules of natural justice". What are civil consequences? The question was posed and answered by this Court in Mohinder Singh Gill &Anr. v. The Chief Election Commissioner, New Delhi &Ors. Krishna Iyer J., speaking for the Constitution Bench said (at p. 308-309):

"But what is a civil consequence, let us ask ourselves, by passing verbal booby-traps? `Civil consequence' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence".

The learned Judge then proceeded to quote from Black's Legal Dictionary and to consider the interest of a candidate at a Parliamentary election. He finally said:

"The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. And so natural justice cannot be stumped out on this score. In the region of public law locus standi and person aggrieved, right and interest have a broader import".

In Schmidt and Another v. Secretary of State for Home Affairs Lord Denning M.R., observed : "The speeches in Ridge v. Baldwin

[1964] AC 40, show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or, I would add, some legitimate expectation, of which it would not be fair to deprive him". It was held in that case that a foreign alien had no right to enter the country except by leave, but, if he was given leave to come for a limited period and his permit was sought to be revoked before the expiry of the time limit, he ought to be given an opportunity of making representation, for he had a legitimate expectation of being allowed to stay for the permitted time.

In Alfred Thangarajah Durayappah v. W. J. Fernando & Ors. the Municipal Council of Jaffna was dissolved and superseded by the Governor-General on the ground that it appeared to him that the Council was not competent to perform the duties imposed upon it. The Mayor sought to question the dissolution and supersession of the Council in the Supreme Court of Ceylon, on the ground that there was a failure to observe the principles of natural justice. One of the questions which arose for consideration was whether, as a matter of interpretation, natural justice was not excluded from action under Sec. 277 of the Municipal Ordinance under which provision the dissolution and supersession had been made. The argument was that words such as "where it appears to" or "if it appears to the satisfaction of" or "if the.....considers it expedient that" or "if theis satisfied that" stood by themselves without other words or circumstances or qualifications, a duty to act judicially was excluded, and so, was natural justice. The argument was accepted

by the Supreme Court of Ceylon but the Privy Council disagreed with the approach. They observed that there were three matters which should always be borne in mind when considering whether the principle Audi Alteram Partem should be applied or not. The three matters were:

"first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined".

The Privy Council then proceeded to examine the facts of the case upon those considerations and said:

`As to the first matter it cannot be doubted that the Council of Jaffna was by statute a public corporation entrusted like all other municipal councils with the administration of a large area and the discharge of important duties. No one would consider that its activities should be lightly interfered with The legislature has enacted a statute setting up municipal authorities with a considerable measure of independence from the central government within defined local areas and fields of government. No Minister should have the right to dissolve such an authority without allowing it the right to be heard upon that matter unless the statute is

so clear that it is plain it has no right of self defence. Upon the second matter it is clear that the Minister can dissolve the council on one of the three grounds : that it (a) is not competent to perform any duty or duties imposed upon it (for brevity their Lordships will refer to this head as incompetency); or

(b) persistently makes default in the performance of any duty or duties imposed upon it; or (c) persistently refuses or neglects to comply with any provision of law.....It seems clear to their Lordships that it is a most serious charge to allege that the council, entrusted with these very important duties, persistently makes default in the performance of any duty or duties imposed upon it. No authority is required to support the view that in such circumstances it is plain and obvious that the principle *audi alteram partem* must apply.

Equally it is clear that if a council is alleged persistently to refuse or neglect to comply with a provision of law it must be entitled (as a matter of the most elementary justice) to be heard in its defence. Again this proposition requires no authority to support it. If, therefore, it is clear that in two of the three-cases, the Minister must act judicially, then it seems to their Lordships, looking at the section as a whole, that it is not possible to single out for different treatment the third case, namely, incompetence..... The third matter can be dealt with quite shortly. The sanction which the Minister can impose and indeed, if he is satisfied of the necessary premise, must impose upon the erring council is as complete as could be imagined; it involves the dissolution of the council and therefore the confiscation of all its

properties. It was at one moment faintly argued that the council was a trustee and that it was not therefore being deprived of any of its property but this argument (soon abandoned) depended upon a complete misconception of the law of corporations.....For the purposes of the application of the principle it seems to their Lordships that this must apply equally to a statutory body having statutory powers, authorities and duties just as it does to an individual. Accordingly on this ground too the Minister should have observed the principle.

For these reasons their Lordships have no doubt that in the circumstances of this case the Minister should have observed the principle *audi alteram partem*: *Sugathadasa v. Jayasinghe* [1958] 59 N.L.R. (457) was wrongly decided".

Another contention urged on behalf of the respondent was that no useful purpose would have been served by giving opportunity to the members of the Committee because the allegations which constituted the foundation of the decision to terminate their tenure were correct and the members had failed to offer any plausible explanation for the same. While dealing with the question, the Supreme Court observed :

“Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non observance of natural justice but because Courts

do not issue futile writs.But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary.

In Ridge v. Baldwin &Ors, one of the arguments was that even if the appellant had been heard by the watch committee nothing that he could have said could have made any difference. The House of Lords observed (at p. 68):

"It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But, even if it could, the respondents would, in my view, fail on the facts. It may well be that no reasonable body of men could have reinstated the appellant. But as between the other two courses open to the watch committee the case is not so clear. Certainly on the facts, as we know them, the watch committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they had in the exercise of their discretion decided to take a more lenient course".

Megarry J. discussed the question in John v. Rees &Ors. He said (at p. 402):

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they

may say, 'why force everybody to go through the tiresome waste of time involved in facing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".

In *Annamunthodo v. Oilfields Workers' Trade Union*, Lord Denning, in his speech said (at p. 625):

"Counsel for the respondent union did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice".

In *Margarita Fuentes et al., v. Tobert L. Shevin*, it was said (at p. 574):

"But even assuming that the appellants had fallen behind in their instalment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protest against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits'".

In Chintepalli Agency Taluk Arrack Sales Cooperative Society Ltd., etc. v. Secretary (Food & Agriculture) Govt. of Andhra Pradesh etc., there was a non-compliance with sec. 77(2) of the Cooperative Societies Act which provided that no order prejudicial to any person shall be passed unless such person had been given an opportunity of making his representation. The argument was that since the facts were clear the non-compliance did not matter. It was also said that the appellant had of his own motion made some representation in the matter. This Court rejected the arguments observing (at p. 567, 569-570):

"It is submitted that the Government did not afford any opportunity to the appellant for making representation before it. The High Court rejected this plea on the ground that from a perusal of the voluntary applications filed by the appellant it was clear that the appellant had any how met with the points urged by the respondents in their revision petition before the Government. We are, however, unable to accept the view of the High Court as correct".

"As mentioned earlier in the judgment the Government did not give any notice communicating to the appellant about entertainment of the application in revision preferred by the respondents. Even though the appellant had filed some representations in respect of the matter, it would not absolve the Government from giving notice to the appellant to make the representation against the claim of the respondents. The minimal requirement under section 77(2) is a notice informing the opponent about the application and affording him an opportunity to make his representation against whatever has been alleged in his petition. It is true that a personal hearing is not obligatory but the minimal requirement of the principles of natural justice which are ingrained in section 77(2) is that the party whose rights are going to be affected and against whom some allegations are made and some prejudicial orders are claimed should have a written notice of the proceedings from the authority disclosing grounds of complaint or other objection preferably by furnishing a copy of the petition on which action is contemplated in order that a proper and effective representation may be made. This minimal requirement can on no account be dispensed with by relying upon the principle of absence of prejudice or imputation of certain knowledge to the party against whom action is sought for.

It is admitted that no notice whatever had been given by the Government to the appellant. There is, therefore, clear violation of section 77(2) which is a mandatory provision. We do not agree with the High Court that this provision can be by-passed by resort to

delving into correspondence between the appellant and the Government. Such non-compliance with a mandatory provision gives rise to unnecessary litigation which must be avoided at all costs".

The observations of this Court in Chintapalli Agency Taluk Arrack Sales Cooperative Society v. Secretary (Supra) are clearly against the submissions of the learned Attorney General.

The matter has also been treated as an application of the general principle that justice should not only be done but should be seen to be done. Jackson's Natural Justice (1980 Edn.) contains a very interesting discussion of the subject. He says:

"The distinction between justice being done and being seen to be done has been emphasised in many cases.

The requirement that justice should be seen to be done may be regarded as a general principle which in some cases can be satisfied only by the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery C.J's judgment in R. V. Home Secretary, Ex. P. Hosenball (1977) 1 W.L.R. 766, 772, whereafter saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as "one of the rules generally accepted in the bundle of the rules making up natural justice".

It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached

had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the Court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice. In *Altco Ltd. v. Sutherland* (1971) 2 Lloyd's Rep. 515 Donaldson J said that the court, in deciding whether to interfere where an arbitrator had not given a party a full hearing was not concerned with whether a further hearing would produce a different or the same result. It was important that the parties should not only be given justice, but, as reasonable men, know that they had justice or "to use the time hallowed phrase" that justice should not only be done but be seen to be done. In *R. V. Thames Magistrates Court, ex.p. Polemis* (1974) 1 W.L.R. 1371, the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defence to the charge.

"It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same'. That is mixing up doing justice with seeing that justice is done (per Lord Widgery C.J. at p. 1375)".

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-

observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will come from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal.”

[Emphasis supplied]

96. In view of the above noted judgements, the arguments of Shri Shishodia that no prejudice has been caused to the appellants due to the participation of the Chairperson in the decision-making process cannot be accepted. It is not possible to make a guesswork of what would have been the fate of the case if the Chairperson had not taken part in the decision-making process. One does not know whether the remaining six Members would have reached a positive conclusion that the appellants are not guilty of violating Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act and/or they would not have imposed the particular penalty under Section 27 of the Act.

97. In view of our conclusion that the impugned order is vitiated due to the violation of one of the facets of the principles of natural justice, we do not consider it necessary to deal with and decide other points argued by the learned counsel for the appellants for assailing the order under challenge.

98. In the result, the appeals are allowed. The impugned order is set aside and the matter is remitted to the Commission for fresh adjudication of the issues relating to alleged violation of Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act by the appellants. The appellant shall be entitled to withdraw the amount deposited by them in compliance of the interim order passed by the Tribunal.

99. The Commission shall hear the advocates/representatives of the appellants and BAI and pass fresh order in accordance with law. We hope and trust that the Commission shall pass fresh order as early as possible but within a period of three months from the date, which may be notified after receipt of this order.

100. The parties shall be free to advance all legally permissible arguments. They may rely upon the documents, which formed part of the record of the Jt. DG or which may have been filed by them before the commencement of hearing on 21.02.2012. The parties shall also be free to press the applications already filed before the Commission. However, no application, which may be filed hereinafter for cross-examination of the persons, whose statements were recorded by the Jt. DG or for any other purpose shall be entertained by the Commission.

101. As a sequel to the above, I.A. No. 36/2013 filed by the appellant in Appeal No.105/2012 for review of order dated 17th May, 2013 is disposed of as infructuous.

102. Before parting with this order, we consider it necessary to mention that we have referred to various provisions of the Act (un-amended and amended) and Regulations and analysed the same to emphasize the proceedings held under the Act and the Regulations should be just and fair and in consonance with the principles of natural justice as engrafted in the Act and the Regulations. We also feel that the time has come for the Commission to evolve a comprehensive protocol and lay down guidelines for conducting investigation/inquiry in consonance with the rules of natural justice. It should be realized that much of the appellate litigation would be obviated if a just and fair procedure is adopted for conducting investigation

and inquiry and passing of orders under Section 27, 28 and the provisions contained in Chapter VI of the Act.

[G.S. Singhvi]
Chairman

[Rajeev Kher]
Member

11thDecember, 2015