COMPETITION APPELLATE TRIBUNAL
NEW DELHI

CORAM

Hon'ble Shri Justice G.S. Singhvi
Chairman

Hon'ble Mr. Rajeev Kher
Member

In the matter of :

Appeal No. 01/2014

[Under Section 53B of the Competition Act, 2002 against the order dated 09.12.2013 passed by the Competition Commission of India in Case Nos. 3,11 and 59 of 2012]

1. Coal India Limited (CIL)

2. Mahanadi Coalfields Limited (MCL)

3. Western Coalfields Limited (WCL)

4. South Eastern Coalfields Limited … Appellants

Versus

1. Competition Commission of India

2. Maharashtra State Power Generation Company Limited (MAHAGENCO)

3. Gujarat State Electricity Corporation Limited (GSECL) …Respondents

Appeal Nos. 44-47/2014

[Under Section 53B of the Competition Act, 2002 against the order dated 15.04.2014 passed by the Competition Commission of India in Case Nos. 05, 07, 37 and 44 of 2013]

1. Coal India Limited

2. South Eastern Coalfields Limited

3. Eastern Coalfields Limited

4. Bharat Coking Coal Limited

5. Mahanadi Coalfields Limited

6. Central Coalfields Limited

7. Western Coalfields Limited

8. Northern Coalfields Limited … Appellants

Versus

1. Competition Commission of India

2. Madhya Pradesh Power Generating Corporation Limited

3. West Bengal Power Development Corporation Limited

4. Sponge Iron Manufacturers Association …Respondents

Appeal No. 49/2014

[Under Section 53B of the Competition Act, 2002 against the order dated 15.04.2014 passed by the Competition Commission of India in Case Nos. 05, 07, 37 and 44 of 2013]

Madhya Pradesh Power
Generating Company Limited,
Block No.6, Shakti Bhawan,
Vidyut Nagar, Rampur, Jabalpur-482008. … Appellant

Versus

1. Competition Commission of India
18-20, The Hindustan Times House,
Kasturba Gandhi Marg Connaught Place,
Barakhamba, New Delhi – 110001.

2. South Eastern Coalfields Limited,
Seepat Road, Bilaspur – 495006 (Chattisgarh)

3. Coal India Limited,
10, Netaji Subhash Road,
Kolkata – 700 001 (West Bengal) …Respondents

Appeal No. 70/2014

[Under Section 53B of the Competition Act, 2002 against the order dated 15.04.2014 passed by the Competition Commission of India in Case Nos. 05, 07, 37 and 44 of 2013]

Sponge Iron Manufacturers Association
Having its registered office at
1501, Hemkunt Tower, 98,
Nehru Place, New Delhi – 110 019. … Appellant

Versus

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

New Delhi – 110001.

2. Coal India Limited,
10, Netaji Subhash Road,
Kolkata – 700 001.

3. Central Coalfields Limited (CCL)
Darbhanga House, Cutchery Road,
Ranchi, Jharkhand – 834 029. …Respondents

Appeal No.52/2015

[Under Section 53B of the Competition Act, 2002 against the order dated 16.02.2015 passed by the Competition Commission of India in Case No.08/2014]

1. Coal India Limited,
10, Netaji Subhash Road,
Kolkata – 700 001.

2. Western Coalfields Limited
Coal Estate, Civil Lines,
Nagpur 440 001, Maharashtra … Appellants

Versus

1. Competition Commission of India
Through Its Secretary
The Hindustan Times house,
18-20, Kasturba Gandhi Marg,
New Delhi – 110001.

2. GHCL Limited,
B-38, Institutional Area,
Sector 1, Noida (Uttar Pradesh)
201 301. … Respondents

Appearance : Shri Ramji Srinivasan, Senior Advocate with Shri Harman Singh Sandhu, Shri Yaman Verma, Shri Toshit Shandilya, Advocates for the Appellants in Appeal Nos. 01/ 2014, 44-47/2014 and for the Respondents in Appeal Nos. 49 and 70/2014

Shri Rajshekhar Rao, Advocate with Shri Harman Singh Sandhu, Shri Yaman Vermaand Ms. Mehrunissa Anand and Shri Toshit Shandilya, Advocates for Appellants in Appeal Nos. 52 of 2015

Shri Akshat Rehani, Advocate for the Appellant in Appeal No.70 of 2014 and for Respondent No.4 in Appeal No.44-47 of 2014.

Shri Pallav Shishodia, Senior Advocate with Shri Rishad A. Chowdhury, Advocate for Respondent No. 1 in Appeal Nos. 01, 44-47,49 , 70 of 2014.

Shri Sanjay Sen, Senior Advocate with Shri Matrugupta Mishra, Advocates for R-2 Maharashtra State Power Generating Company Ltd. in Appeal No. 01/2014.

Shri Vivek K. Tankha, Senior Advocate assisted by Shri Varun K. Chopra, Advocate for Respondent No. 2 in Appeal Nos. 44 – 47 of 2014 and for the Appellant in Appeal No. 49/2014

Shri Rishad A. Chowdhury, Advocate for Respondent No.1 in Appeal No.52 of 2015

Shri Gaurav Mitra and Shri Jayesh Bhairavia, Advocates for Respondent No. 3 in Appeal No.01/2014.

Shri M.A. Venkata Subramanian, Advocate for Respondent No. 2 in Appeal No. 52/2015

Per Chairman

O R D E R

These appeals are being disposed of by one order because the common question of law which arises for consideration in Appeal Nos.1/2014, 44-47/2014 and 52 of 2014 and with reference to which arguments have been addressed by learned counsel for the parties is whether the impugned orders are vitiated due to violation of one of the facets of the principles of natural justice, i.e., one who hears must decide and in the remaining two appeals, i.e., Appeal Nos.49 and 70 of 2014, the appellants have prayed for setting aside order dated 15.04.2014, which is also under challenge in Appeal Nos.44-47/2014.

2. For deciding the aforesaid question, it will be useful to notice the relevant facts.

Appeal No.01 of 2014 – Coal India Ltd. and others vs. Competition Commission of India and others

(A) Maharashtra State Power Generation Company Ltd. (Respondent No. 2 in Appeal No. 01/2014) filed an information dated 16.01.2012 under Section 19(1)(a) of the Competition Act, 2002 (for short, ‘the Act’), which was registered as Case No. 3 of 2012 alleging abuse of dominant position by

Mahanadi Coalfields Ltd. and Coal India Ltd. and made the following substantive prayers :

a. initiate an investigation on the abuse of dominant position by MCL & CIL on the basis of the facts and grounds stated in the petition;

b. declare that MCL has abused its “dominant position” as a producer and supplier of coal and as a result of such abuse has caused loss and injury to MAHAGENCO;

c. restrain MCL from abusing its dominant position particularly in relation to (a) short supply of coal and (b) failure to supply agreed grade of coal;

d. direct CIL/ MCL to allow MAHAGENCO to conduct and participate in joint sampling of coat at the loading and unloading directly or by appointing a reputed expert – agency;

e. impose penalty as may be appropriate keeping in view the wilful and deliberate abuse of dominant position by MCL;

f. direct that the proposed CSA being Annexure M herewith be modified upon detailed negotiation between the parties, inter aila, to cover issues specified in paragraph N above;

g. direct independent investigation of the consistent failure of grade by MCL and the existence of infrastructure to support supply of sized coal of the agreed grade;

h. direct the Opposite Parties to function in a manner as may be specified by the Hon’ble Commission in order to ensure freedom of trade carried on by the participants in the market and to protect the interest of the consumers.”

(B) After five days, Maharashtra State Power Generation Company Ltd. filed another information under Section 19(1)(a), which came to be registered as Case No.11 of 2012 making allegations of abuse of dominant position against Western Coal Ltd. and Coal India Ltd. and prayed as under :

> "a. initiate an investigation on the abuse of dominant position by WCL & CIL on the basis of the facts and grounds stated in this information.
>
> b. declare that WCL has abused its "abuse of dominant position" as a producer and supplier of coal and as a result of such abuse, has caused loss and injury to MAHAGENCO;
>
> c. restrain WCL from abusing its dominant position particularly in relation to denial of independent sampling and analysis of coal by using Augus Sampling for collection of coals and (b) crushing and washing of coal.
>
> d. Direct WCL and CIL to implement the following :
>
> (i) install adequate number of Augur Sampling Machines to ensure that the collection and sampling is adequately mechanised;
>
> (ii) install adequate number of crushers to ensure that the coal is crushed to the size of 250 mm as required under the FSA;
>
> (iii) setup adequate capacity for washing coal at the earliest;
>
> d. impose penalty as may be appropriate keeping in view the wilful and deliberate abuse of dominant position by WCL;
>
> e. direct that FSA being Annexure D herewith be modified to the extent and in the manner specified in paragraph N above;

f. direction for the appointment of an independent agency of international repute for conducting joint sampling at the loading and unloading point, and also to formulate an entire process of sampling by exercise of its statutory power under the Act;

g. direct the Opposite Parties to function in a manner as may be specified by the Hon'ble Commission in order to ensure freedom of trade carried on by the participants in the market and to protect the interest of the consumers including suggest such amendments/ modifications or may be necessary in the existing Fuel Supply Agreement and other agreements regulating supply of coal."

(C) Gujarat State Electricity Corporation Ltd. (Respondent No. 3 in Appeal No. 1 of 2014) filed an information dated 12.09.2012 under Section 19(1)(a), which was registered as Case No.59 of 2012, with the allegation that Coal India Ltd. and its three subsidiaries, namely, Mahanadi Coalfields Ltd., Western Coalfields Ltd. and South Eastern Coalfields Ltd. have abused their position and acted in contravention of Section 4(2) of the Act and prayed as under :

"a. Initiate an investigation on the abuse of dominant position by Opposite Party No.1 & 2 on the basis of the facts, circumstances and grounds stated in this information.

b. Declare that Opposite Party No.1 & 2 have abused its "dominant position" as a producer and supplier of coal and as a result of such abuse, has caused loss and injury to Informant;

c. Restrain Opposite Party No.1 from abusing its dominant position particularly (i) in relation to denial of independent sampling and analysis of coal by using Augus Sampling

(AMS) for collection of coals and (ii) crushing and washing of coal.

d. Direct Opposite Parties to implement the following :

(i) Install adequate number of Augur Sampling Machines (AMS) to ensure that the collection and sampling is adequately mechanized;

(ii) To carry out the collection of sampling and analysis of the supplied coat jointly at unloading end.

(iii) Install adequate number of crushers to ensure that the coal is crushed to the size of 250 mm as required under the FSA;

(iv) setup adequate capacity for working coal at the earliest;

d. Impose penalty as may be appropriate keeping in view the wilful and deliberate abuse of dominant position by Opposite Party No.1;

e. direct that FSA be modified to the extent and in the manner specified herein above;

f. direction for the appointment of an independent agency of international repute for conducting joint sampling at the loading and unloading point, and also to formulate an entire process of sampling by exercise of its statutory power under the Act;

g. direct the Opposite Parties to function in a manner as may be specified by the Hon'ble Commission in order to ensure freedom of trade carried on by the participants in the market and to protect the interest of the consumers including suggest such amendments/ modifications or

may be necessary in the existing Fuel Supply Agreement and other agreements regulating supply of coal."

(D) The Commission considered the allegations contained in the three informations and felt prima-facie satisfied that the same require investigation. Accordingly, orders dated 24.01.2012, 06.03.2012 and 04.12.2012 were passed under Section 26(1) of the Act and the Director General (DG) was directed to conduct an investigation into the matter. In the last order, i.e, order dated 04.12.2012, the Commission also directed the DG to club all the matters for the purpose of investigation.

(E) The DG issued notices to the appellants under Section 41(2) read with Section 36(2) of the Act and called upon them to file their response to the allegations made in the informations and also produce the specified documents. The appellants filed their replies and produced the required documents. The DG also issues summons to several persons and recorded their statements. After completing the investigation, the DG submitted report dated 08.02.2013 with the following findings/ conclusions :

"10.1 The investigation in this case has shown that in the relevant market of production and supply of non-coking coal in India CIL and its subsidiaries are in a dominant position under section 4 read with section 19(4) of the Act.

10.2 It has been found that the terms and conditions of FSA has been drafted by the Ops unilaterally and there is no consultation process with the other parties either at the time of drafting of the FSA or at the time of modifications. The amendments are made only when there is pressure from the MoC or MoP. The conduct of the Ops in this regard has been

found to be independent of the market forces and it has been able to affect the consumers and market in its favour.

10.3 The analysis of the terms and conditions of FSA have shown that the Ops have violated the section 4(2)(a)(i) by imposing unfair or discriminatory conditions in the relevant market. The following terms and conditions have been found to be unfair or discriminatory.

(i) The sampling and testing procedure in clause 5.7 (4.7 for old PPs) FSA are found to be unfair and discriminatory.

(ii) Provisions in clause 5.2 of FSA relating to charging the transportation and other expenses from the buyers on supply of ungraded coal have been found to be unfair.

(iii) The Ops have been found to impose unfair and discriminatory conditions regarding putting capping on compensation for stones in clause 4.6.3(e) of the FSA for new Power Producers.

(iv) The provisions relating to review and termination of the agreement in clause 2.5 to 2.6 of the FSA have been found to be unfair and discriminatory.

(v) The provisions relating to waiver of sellers Condition precedents in clause 2.8.3 have been found to be unfair.

(vi) Discriminatory provisions for new PPs by removing the provisions for review of grade in case of consisting grade slippage for 3 months. Later on during the pendency of investigation these

provisions have been re-inserted in clause 5.5 of the FSA.

(vii) Incorporating the conditions in force majeure clause which are not normally treated as force majeure in clause 17.1 of FSA for new Power producers have been found to be unfair and discriminatory. These conditions have been modified during the pendency of investigation.

10.4 The allegations regarding short supply and restricting the production has not been found to be in violation of the provisions of Competition Act. The OP has been able justify its conduct on account of quantity relating constraints in the market. Similarly no case of unfair or discriminatory pricing has been found against the OP.

10.5 It may be mentioned that CIL has modified some of the provisions which are found to be of unfair or discriminatory in nature, during the course of investigation. However, such modifications during the course of investigation proceedings do not dilute the default of CIL in imposing discriminatory condition in the supply of coal. These unfair and discriminatory terms and conditions are a result of absence of the competitive process in the relevant market.

10.6 The investigation has thus concluded that the Ops have violated the provisions of section 4(2)(a)(i) of the Act, by imposing unfair or discriminatory provisions in the relevant market. The conduct of OPs has been found to be exploitative against the consumers. The investigation has shown that lack of competition in the market has resulted in imposition of unfair terms and condition in sale of the coal in India. The dependency of

consumers in the relevant market on the Ops have been found to be exploited by the Ops by framing the terms and conditions relating to quality of coal, its testing and consequences of failure on quality to the advantage of seller."

(F) The Commission considered the investigation report and directed that copies thereof be made available to the parties to enable them to file their objections/ suggestions. The appellants availed that opportunity and filed detailed objections to contest the findings recorded by the DG on the issue of contravention of Section 4(2)(a)(i) of the Act. Thereafter, the Commission comprising the Chairperson, Mr. Ashok Chawla and three Members namely – Dr. Geeta Gouri, Mr. Justice (Retd.) S.N. Dhingra and Mr. S.L. Bunker heard the arguments on 16th and 17th July, 2013. However, the final order was passed on 09.12.2013 by the Commission comprising the Chairperson, Mr. Ashok Chawla and five Members namely – Dr. Geeta Gouri, Mr. Anurag Goel, Mr. M.L. Tayal, Mr. Justice (Retd.) S.N. Dhingra and Mr. S.L. Bunker (Mr. Anurag Goel and Mr. M.L. Tayal were not party to the hearing held on 16th and 17th July, 2013) whereby penalty @ 3% of the average turnover of last three years total amounting to Rs.1773.05 crores was imposed on Coal India Limited. The relevant portions of order dated 09.12.2013 are reproduced below :

"250. In view of the above discussion, the Commission is of considered opinion that CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant market of production and supply of non-coking coal in India. The Commission also holds the opposite parties to be in contravention of the provisions of section 4(2)(a)(i) of the Act for imposing unfair/ discriminatory conditions and indulging in unfair/ discriminatory conduct in the matter of

supply of non-coking coal to power producers, as detailed in the order.

251. Rawlsian principles for justice postulate equitable enforcement of contracts, where the rights and obligations of the parties are balanced and do not favour one party to the contract. However, there cannot be a watertight compartment in which fairness of all contracts in the world can be defined or listed. The unequal nature of the contract with CIL exercising its market power in setting the terms and conditions has been outlined in the order. The 'unfairness' emanates from the fact that CIL is in a position to influence the terms and conditions of the contract and has inclined them in its favour, and there has been an attempt to formulate the contract with unequal non-benign effect on the buyer.

"252. The Commission holds that CIL in abuse of its dominance did not try to evolve/ draft/ finalize the terms and conditions of FSAs through a mutual bilateral process and the same were sought to be imposed upon the buyers without seeking, much less considering, the inputs of the power producers.

253. In sum, the Commission agrees with the findings returned by the DG and holds the following specific instances *qua* terms and conduct of the opposite parties emanating therefrom, as detailed and elaborated above, to be in contravention of the provisions of section 4(2)(a)(i) of the Act:

(i) Clauses relating to the sampling and testing procedure.

(ii) Clauses relating to charging the transportation and other expenses from the buyers on supply of ungraded coal and the clauses relating to DDQ.

(iii) Clauses relating to capping on compensation for supply of stones for new power producers.

(iv) Clauses relating to review and termination provisions of the agreement.

(v) Discrimination between existing and new power producers with respect to review of grade.

(vi) Clauses relating to force majeure for new power producers.

254. In view of the findings recorded by the Commission, it is ordered as under:

(i) The opposite parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act.

(ii) The fuel supply agreements are ordered to be modified in light of the observations and findings recorded in the present order. For effecting these modifications in the agreements, CIL is further directed to consult all the stakeholders. CIL is also directed to ensure *parity* between old and new power producers as well as between private and PSU power producers, as far as practicable. Though varying needs of different classes of producers may require different treatment, yet to pass muster the embargo placed by section 4 of the Act, the differentiation or classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and the differentia must have a rational nexus with the object sought to be achieved by such classification.

(iii) CIL is further directed to incorporate suitable modifications in the fuel supply agreements to provide for a fair and joint sampling and testing procedure.

(iii) CIL may also consider and examine the feasibility of sampling at the unloading-end in consultation with power producers besides adopting international best practices. CIL may also hasten the process of installing Augur Sampling Machines and washeries to help improve the coal supplied.

255. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. In terms of the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

256. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty as can be noticed from the phraseology employed in the provision noted above.

257. It may be noted that the twin objectives behind imposition of penalties are: to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.

258. The imposition of penalty would depend upon the mitigating and aggravating circumstances of the case.

259. From the submissions made by CIL, it appears that CIL does not enjoy complete commercial freedom in deciding the customers to whom it should supply coal. It may be noted that SLC (LT) comprising representatives of the Ministry of Coal, CEA and the Ministry of Power collectively decide the linkages for each power utility. Similarly, it seems that CIL does not enjoy complete commercial freedom in the quantity of coal it should supply, which is based on the norms laid down by the Ministry of Power/ CEA. Furthermore, price of coal is decided by CIL keeping in mind larger public interest including the directives of the Hon'ble Supreme Court of India given in *Ashoka Smokeless* case. Lastly, it would be pertinent to note that conduct of CIL is affected and constrained by directions received from various stakeholders including the Ministry of Power, the Ministry of Coal, the CEA, the Planning Commission, NTPC *etc*., all of whom exert influence and are involved in making decisions that impact various aspects of CIL's business. Hence, the Commission is not oblivious of the regulated environment in which CIL operates.

260. All such factors were considered by the Commission while determining dominance in the present case. The Commission opined that notwithstanding the overarching policy and regulatory environment, CIL has sufficient flexibility and functional independence in carrying out its commercial and contractual affairs. Such factors, however, were not found to detract from CIL and its subsidiaries operating independently of market forces and enjoying undisputed dominance in the relevant market.

261. However, as noted above, while considering the quantification of penalty, the contention of CIL that its behaviour is constrained by various factors, including countervailing power exercised by above noted stakeholders including the Presidential Directive, significant social costs and obligations, its inability to choose its customers and quantum of coal to be supplied to these customers, pressures faced to roll back price increases *etc*., cannot be altogether ignored.

262. In this regard, the Commission notes the key policy change introduced by Government of India in effecting shift in grading and pricing of coal. From the submissions of the opposite parties, it is apparent that the Ministry of Coal, through its letter dated 18.10.2011, directed CIL to take necessary steps in relation to changing from the UHV system of grading/ pricing coal to the GCV system. This direction was in accordance with the recommendations given in the Integrated Energy Policy (IEP). Further, the letter by the Ministry of Coal was followed by a notification to this effect passed on 30.12.2011, bringing into effect the new system from January 2012. As a result of this policy change, CIL moved from UHV system to the GCV method of grading and pricing coal. From this, it is obvious that this change was brought about through the direction of Government of India and not by CIL on its own motion. CIL has merely implemented the change by amending the FSAs and the price circulars.

263. The Commission has also noted the changes effected by CIL during the course of the investigation and pendency of proceedings in FSAs on certain aspects as mentioned in earlier

part of the order. However, it is made clear that nothing stated in this order shall tantamount to an expression of opinion on the changes so effected and the same are left open to be examined in an appropriate case, if required.

264. On the issue of penalty, the Commission notes that the entire impugned conduct in the present proceedings emanate out of drafting and finalization of FSAs by CIL Board and, as such, CIL is the fountain head of this entire anti-competitive conduct. The Commission further notes that although subsidiaries of CIL have no major role in the drafting and finalization of model FSA and the same is done by CIL Board, they are also liable for contravention as they have contributed to and responsible for the violation by implementing the abusive clauses of FSA without any demur or reservation. Thus, for the purposes of imposition of penalty, the Commission deems it appropriate to proceed against CIL by taking into consideration its consolidated accounts.

265. The Commission has bestowed its thoughtful consideration on the issue of quantum of penalty. It cannot be disputed that CIL during pendency of investigations modified some clauses of the FSAs as noted earlier in the order.

266. Considering the totality of facts and circumstances of the present case as discussed above, the Commission decides to impose penalty on CIL by taking into consideration its consolidated accounts at the rate of 3% of the average turnover of the last three years. The total amount of penalty is worked out as follows:

S.No.	Name	Turnover for 2009-	Turnover for 2010-	Turnover for 2011-	Average Turnover for Three	@3% of average turnover

		10 (in Crores)	11 (in Crores)	12 (in Crores)	Years (in Crores)	(in Crores)
1.	CIL	52,252.09	55,101.42	69,952.33	59101.94	1773.05

267. The directions contained in para 254 above, must be complied within a period of 30 days from the date of receipt of this order. The opposite parties are also directed to file an undertaking to this effect within the said period.

268. The Commission further directs CIL to deposit the penalty amount within 60 days of receipt of this order."

Appeal Nos.44 to 47 of 2014 – Coal India Ltd. and 7 others vs. Competition Commission of India and 3 others

(A) These appeals are directed against order dated 15.04.2014 passed by the Commission in Case Nos. 05 and 07 of 2013 in Madhya Pradesh Pradesh Power Generating Company Limited vs. South Eastern Coalfields Ltd. and Coal India Ltd.'; Case No.37 of 2013, West Bengal Power Development Corporation Ltd. vs. Coal India Ltd and others and Case No.44 of 2013, Sponge Iron Manufacturers Association vs. Coal India Ltd. and others. In the first two cases, the informations were filed by Madhya Pradesh Power Generating Company Ltd. against South Eastern Coalfields Ltd. and Coal India Ltd. alleging abuse of dominant position in the matter of supply of coal. Case No.37 of 2013 was registered on the basis of information filed by West Bengal Power Development Corporation Ltd. against Coal India Ltd., Eastern Coalfields Ltd., Bharat Coking Coal Ltd. and Mahanadi Coalfields Ltd. The main allegation levelled in that information was that by taking advantage of their dominant position, the four entities had compelled the informant to enter into FSAs, which were one sided and were violative of Section 4(2)(a) of the Act. The third case being Case No.44 of 2013 was registered on the basis of

information filed by Sponge Iron Manufacturers Association against Coal India Ltd., Central Coalfields Ltd., Eastern Coalfields Ltd., Western Coalfields Ltd., South Eastern Coalfields Ltd., Northern Coalfields Ltd. and Mahanadi Coalfields Ltd. with the allegations that Coal India Ltd. and its subsidiaries have indulged in various anti-competitive practices and that the conditions of FSAs and MoUs were one sided and were clearly violative of Section 4 of the Act.

(B) The Commission passed an order dated 21.03.2013 under Section 26(1) of the Act in Case Nos.5 and 7 of 2013 and directed the DG to cause an investigation to be made into the matter. Similar orders dated 05.03.2013 and 23.07.2013 were passed in Cases Nos. 37 of 2013 and 44 of 2013 respectively and the DG was directed to get the matter investigated. In its order dated 23.07.2013, the Commission also directed the DG to club all the cases for the purpose of investigation.

(C) The DG conducted investigation and submitted report dated 23.12.2013. He determined the relevant product market as 'market for supply of non-coking coal to the consumers including the thermal power producers and sponge iron manufacturers'. He also opined that whole of India was the relevant geographic market. The DG then examined whether Coal India Limited and its subsidiaries were in a dominant position and returned an affirmative finding on that issue. After analysing the terms of FSAs, the DG held that by imposing unfair and discriminatory conditions on the purchasers, Coal India Ltd. and its subsidiaries had acted in contravention of Section 4(2)(a)(i) of the Act. The findings and conclusions recorded by the DG are extracted below :

> "(i) CIL by virtue of its dominance and on account of lack of competitive process in the relevant market has not tried to evolve/draft/finalize the terms and conditions of FSA by way of mutual or bilateral process. The FSA was drafted by CIL for all

the consumers according to its own priorities and convenience without giving consideration to the interest of all the stakeholders.

(ii) The terms and conditions relating to review of declared grade are found to be discriminatory. There is no provision for non-power sector for review of grade and the terms and conditions in this regard are discriminatory in nature.

(iii) The investigation revealed that the procedure for sampling and analysis of quality of coal in FSA on one side does not obligate the seller to provide for the best and fair sampling methods and on the other side it also dilutes the consequences of poor quality supply. The opposite parties have also discriminated between consumers on the issue of sampling and analysis of coal without any satisfactory reason and hence opposite parties are found to be imposing discriminatory terms and conditions.

(iv) The provisions in FSA relating to oversized coal and stones are found to be unfair as the opposite parties are not obligated to ensure the quality of coal supplied to its buyer. Further in the event of supply of oversized coal or stones the provisions relating to compensation are also found to be unfair and discriminatory.

(v) The terms and conditions of MoU which are meant for the new consumers are found to be tilted in favour of the coal companies and indicate exploitative conduct of the opposite parties. The conduct of the opposite parties regarding MoU is found to be unfair in violation of the provisions of section 4(2)(a)(i) of the Act.

(vi) The clauses relating to compensation for short supply and performance incentive are found to be unfair to the extent that

while calculating the Delivered Quantity (DQ) for this purpose the ungraded coal and stones are included in DQ *i.e.* Actual Delivered Quantity and therefore, the terms and conditions of FSA in this regard are found to be in contravention of the section 4(2)(a)(i) of the Act."

(D) The report of the DG was considered by the Commission in its ordinary meeting held on 10.01.2014 and it was decided to supply copies thereof to Coal India Limited and others to enable them to file replies/ objections. On receipt of the order passed by the Commission, Coal India Ltd. and its subsidiaries filed detailed replies to controvert the findings and conclusions recorded by the DG on various issues including the alleged abuse of dominant position by them in the matter of supply of coal.

(E) Thereafter, the Commission comprising its Chairman, Mr. Ashok Chawla and three Members namely – Mr. Anurag Goel, Mr. M.L. Tayal and Mr. S.L. Bunker participated in the hearing held on 19.02.2014. However, final order dated 15.04.2014 was passed by the Commission comprising Mr. Ashok Chawla and four members including Dr. Geeta Gouri, who was not a part of the combination which had heard the arguments of the parties. In paragraphs 62 and 63 of the final order, the Commission relied upon order dated 09.12.2013 passed in Cases Nos. 3, 11 and 59 of 2012 and approved the finding recorded by the DG that the relevant market is 'supply of non-coking coal to the sponge iron manufacturers in India'. The Commission then considered whether the opposite parties are dominant in the relevant market and abused their position and recorded an affirmative conclusion by placing reliance on order dated 09.12.2013 passed in Case Nos.3, 11 and 59 of 2012. All this is evident from paragraphs 62, 63 and 73 to 77 of order dated 15.04.2014, which are extracted below :

"62. It may be pointed out that the issue of determination of relevant market in the almost similar set of factual matrix arose before the Commission in Case Nos. 03, 11 & 59 of 2012 wherein similar pleas including the suggestion to take the relevant geographic market as global, were advanced by the opposite parties. All such pleas were considered in detail by the Commission in its common order passed on 09.12.2013 deciding those set of informations. As such, it is not necessary to revisit the same herein again in this order.

63. Accordingly, in light of the order passed by the Commission in M/s Maharashtra State *Power Generation Company Ltd. etc.* v. *M/s Mahanadi Coalfields Ltd. & Ors. etc.* in Case Nos. 03, 11 & 59 of 2012 decided on 09.12.2013, it is held that in respect of Case Nos. 05, 07 and 37 of 2013 where the consumers of non-coking coal are thermal power producers, 'supply of non-coking coal to the thermal power producers in India' is the relevant market. Further, it may be noted that the DG has categorically returned a finding of lack of demand side substitutability of the product under consideration by sponge iron manufacturers as well. Accordingly and in light of the discussion noted above, the Commission is of opinion that in respect of Case No. 44 of 2013 where the consumers (members of the association) of non-coking coal are sponge iron manufacturers, '*supply of non-coking coal to the sponge iron manufacturers in India'* is the relevant market.

73. In the present case, the allegations relating to abuse of dominant position by the opposite parties essentially centre around the terms and condition of FSAs as well as the conduct

arising therefrom, which are stated to contain unfair and discriminatory conditions.

74. At the outset, it may be pointed out that most of the instances of abuse by the opposite parties stand covered by the order of the Commission passed in M/s Maharashtra State Power Generation Company Ltd. *etc*. v. M/s Mahanadi Coalfields Ltd. & Ors. *etc*. in Case Nos. 03, 11 & 59 of 2012 decided on 09.12.2013. Further, it may be pointed out that in the present case, informations have been filed against CIL and all seven of its production subsidiaries (SECL, ECL, BCCL, MCL, CCL, WCL, NCL) whereas in the previous case informations were directed against CIL and its three production subsidiaries *viz*. MCL, WCL and SECL.

75. Now, a seriatim analysis of the allegations made in the informations in light of the conclusions of the DG may be undertaken.

76. To begin with, it may be noted that in the present batch of informations, it has been found by the DG that CIL by virtue of its dominance and on account of lack of competitive process in the relevant market has not tried to finalize the terms and conditions of FSA by way of bilateral process. Further, it was noted by the DG that the FSAs were drafted by CIL for all the consumers according to its own priorities and convenience without giving consideration to the interest of all the stakeholders.

77. In this regard, it may be pointed out that in the previous cases, the Commission has already held that CIL in abuse of its dominance did not try to evolve/ draft/ finalize the terms and conditions of FSAs through a mutual bilateral process and the

same were sought to be imposed upon the buyers without seeking, much less considering, the inputs of the power producers."

(F) The operative portion of the final order passed by the Commission reads as under :

"113. In view of the above discussion, the Commission is of considered opinion that CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant markets of supply of non-coking coal to the thermal power producers and sponge iron manufacturers in India. The Commission also holds the opposite parties to be in contravention of the provisions of section 4(2)(a)(i) of the Act for imposing unfair/ discriminatory conditions and indulging in unfair/ discriminatory conduct in the matter of supply of non-coking coal, as detailed in the order.

ORDER

114. In view of the findings recorded by the Commission, it is ordered as under:

(i) The opposite parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order.

(ii) The fuel supply agreements are ordered to be modified in light of the observations and findings recorded in the present order. For effecting these modifications in the agreements, CIL is further directed to consult all the stakeholders including the informants herein.

115. The above directions must be complied within a period of 60 days from the date of receipt of this order. The opposite parties are also directed to file an undertaking to this effect within the said period.

116. It is, however, made clear that the above direction shall not be applicable *qua* the clauses and conduct which were also subject matter of order passed by the Commission in Case Nos. 03, 11 and 59 of 2012. It may be pointed out that the opposite parties preferred an appeal before the Appellate Tribunal being Appeal No. 01 of 2014 wherein the Hon'ble Tribunal ordered *status quo vide* its order dated 13.01.2014 which has been continued from time to time. In these circumstances, the directions relatable to the clauses and conduct which were also subject matter of order passed by the Commission in earlier case would abide by the further orders of the Hon'ble Tribunal.

117. In view of the directions contained in this order, no further or other orders are required to be passed in the application of SIMA seeking interim relief in Case No. 44 of 2013 and the same stands disposed of accordingly.

118. Before concluding, it is made clear that in the facts and circumstances of the present case, the Commission refrains from imposing any penalty upon the opposite parties as a penalty of Rs.1773.05 Crores was already imposed upon them in the previous batch of informations with respect to the substantially similar conduct. It is not the case of the informants that the opposite parties have indulged in the abusive conduct post the passing of the order by the Commission in the earlier cases.

119. It is ordered accordingly.

120. The Secretary is directed to inform the parties accordingly."

Appeal No.52 of 2015 – Coal India Ltd. and another vs. Competition Commission of India and another.

(A) This case arises out of an information filed by GHCL Ltd. against Coal India Ltd. and its subsidiary namely, Western Coalfields Ltd. under Section 19(1) of the Act with the allegation of abuse of dominant positon. The same was registered as Case No.8 of 2014. The Commission felt prima-facie satisfied that the allegations contained in the information require an investigation. Accordingly, order dated 11.03.2014 was passed and the DG was directed to conduct an investigation.

(B) The DG issued notices to Coal India Ltd. and Western Coalfields Ltd. under Section 41(2) read with Section 36(2) requiring them to submit their response and documents in the context of the allegations contained in the information. Coal India Ltd. filed reply dated 27.05.2014 and Western Coalfields Ltd. filed reply dated 02.06.2014. Both of them denied the allegations of abuse of dominant positon. The DG then adverted to the relevant facts, the order passed by the Commission under Section 26(1) by taking into cognizance of similar allegations contained in the informations filed by Maharashtra State Power Generation Company Ltd and Gujarat State Electricity Corporation Ltd. (Case Nos.3, 11, and 59 of 2012) and determined the relevant market as was done in previous cases. The next issue considered by the DG was whether Coal India Ltd. and its subsidiary are in a dominant position in the relevant market and returned an affirmative finding against the appellants. For this purpose, the DG relied upon order dated 09.12.2013 passed by the Commission in Case Nos.3, 11 and 59 of 2012, as is evident from paragraph 5.7 of the Investigation report dated 19.09.2014.

(C) After completing the investigation, the DG submitted his report with the following conclusions :

"7.1 The relevant market in this case has been determined as "production and supply of non-coking coal to thermal power producers including the Captive Power Plants in India". It is further found that OPs are in a dominant position under Section 4 read with Section 19(4) of the Act.

7.2 It is held that the terms and conditions of LOA, FSA and MOU have been drafted by the OPs unilaterally and there is no consultation process with the customers/ other parties either at the time of drafting of the FSA or at the time of modifications. The conduct of the OPs in this regard has been found to be independent of the market forces and in the process it has been able to affect the consumers and market in its favour.

7.3 The dependency of consumers on OPs are their ability to act independent of market forces allowed the OPs to decide the one sided terms and conditions of LOA, FSA and MOU without any obligations cast on the OPs in the agreements. It is held, therefore, that the conditions imposed by OP in the LOA, FSA and MOU are unfair and in violation of the provisions of Section 4(2)(a)(i) of the Act.

7.4 The investigation has further revealed that the OPs have imposed unfair and discriminatory conditions by reducing the quantity of supply and also reducing the trigger level for penalty for short delivery. The clauses of MOU relating to reduction in quantity, trigger level for penalty and DDQ are found to be unfair. It is, therefore, held that the conditions imposed in MOU are in violation of provisions of Section 4(2)(a)(i) of the Act.

7.5 The conduct of WCL by issuing letter dated 12/09/2012 to the Informant for extending the Commitment Guarantee or to face consequence of encashment, even when there was delay in execution

of FSA on account of OPs failure only, has been found to be exploitative and in violation of the provisions of Section 4(2)(a)(i) of the Act.

7.6 The provisions in FSA relating to Security deposit have been found to be discriminatory. It is observed that in few cases the Security Deposit is refunded to the consumers while in the case of the Informant the amount of SD was further increased. It shows differential treatment against the informant without any justification.

7.7 The provisions relating to quality, sampling & analysis, grading, Over size coal and compensation of stones have been found to be lacking in the FSA for small and medium quantity buyers like the informant. The conduct of OPs are therefore, found to be unfair and discriminatory in violation of the provisions of Section 4(2)(a)(i) of the Act.

7.8 The investigation has thus concluded that the OPs have violated the provisions of Section 4(2)(a)(i) of the Act, by imposing unfair and discriminatory provisions in the relevant market. The conduct of OPs has been found to be exploitative against the consumers."

(D) The Commission considered the investigation report and directed that copies thereof be supplied to the parties to enable them to file their objections/ suggestions. Coal India Ltd. and Western Coalfields Ltd. filed detailed objections to contest the findings recorded by the DG. Thereafter, the Commission comprising the Chairperson, Mr. Ashok Chawla and two members namely, Mr. Sudhir Mital and Mr. U.C. Nahata heard the parties on 25.11.2014. However, in the final order passed on 16.02.2015, two members namely Mr. S.L. Bunker and Mr. Augustine Peter, who were not party to the hearing held on 25.11.2014, joined the Chairperson and the other two members. In paragraph 117 of the final order, the Commission referred to the order passed by it in Case Nos.3, 11 and 59 of 2012 and also took cognizance of order dated 13.01.2014 passed by the Tribunal in Appeal No. 01 of 2014

and observed that the directions relatable to the clauses and conduct of Coal India Ltd. and its subsidiaries would be subject to the decision of the Tribunal. For the sake of reference, paragraphs 115 to 118 of order dated 16.02.2015 passed by the Commission are reproduced below :

> "115. In view of the above discussion, the Commission is of considered opinion that CIL and its subsidiaries operate independent of market forces and enjoy undisputed dominance in the relevant market. The Commission also holds the Opposite Parties to be in contravention of the provisions of section 4(2)(a)(i) of the Act, as detailed in the order.
>
> ORDER
>
> 116. In view of the findings recorded by the Commission, it is ordered as under :
>
> (i) The Opposite Parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order; and
>
> (ii) The Opposite Parties are further ordered to take remedial steps in light of the observations and findings recorded in the present order within a period of 60 days from the receipt of this order.
>
> 117. It is, however, made clear that the above direction shall not be applicable *qua* the clauses and conduct which were also subject matter of order passed by the Commission in Case Nos. 03, 11 and 59 of 2012. It may be pointed out that the Opposite Parties preferred an appeal before the Appellate Tribunal being Appeal No. 01 of 2014 wherein the Hon'ble Tribunal ordered *status quo vide* its order dated 13.01.2014 which has been

continued from time to time. In these circumstances, the directions relatable to the clauses and conduct which were also subject matter of order passed by the Commission in earlier case would be subject to the decision of COMPAT.

118. Before concluding, it is made clear that in the facts and circumstances of the present case, the Commission refrains from imposing any penalty upon the Opposite Parties as a penalty of Rs. 1773.05 Crores was already imposed upon them in the previous batch of informations with respect to inter alia similar issues."

Appeal 49 of 2014 – Madhya Pradesh Power Generating Company Ltd. vs. Competition Commission of India and 2 others.

(A) Madhya Pradesh Power Generating Company Ltd. has filed this appeal against order dated 15.04.2014 passed by the Commission, which is subject-matter of challenge in Appeals Nos. 44-47 of 2014. The appellant has questioned the order of the Commission only to the extent of non-consideration of its challenge to various clauses and schedule of the Coal Supply Agreement (CSA) and prayed as under :

"a Direct Respondent Nos. 2 & 3 to limit supply to 'G3 to G5 Band' coal not more than 20% and in place supply 'G6 to G12 Band' coal.

b. Direct Respondent No. 2 & 3 to furnish information qua total production of higher grade i.e. A&B grade (G3 to G5 band from 1-1-2012 onwards) coal and its distribution thereof since 2007-08 till date; to the Appellant and other consumers.

c. Direct Respondent No. 2 & 3 to furnish information qua total production of lower than A&B grade coal and its distribution since 2007-08 till date to the Appellant and other consumers.

d. Direct the Respondent No. 1 to further investigate on abuse of dominant position by Respondent No. 2 & 3 qua supply of excessive higher grade i.e. G3 to G5 Band of coal on the basis of the facts, circumstances and grounds stated in this Appeal;

e. Declare that Respondent No. 2 & 3 have abused its "dominant position" as a producer and supplier of coal by unfair and discriminatory supply of higher grade i.e. G3 to G5 Band of coal to the Appellant and as a result of such abuse, has caused loss and injury to the Appellant;

f. Impose penalty as ay be appropriate keeping in view the willful and deliberate abuse of dominant position by Respondent No. 2 & 3;

Appeal No.70 of 2014 – Sponge Iron Manufacturers Association vs. Competition Commission of India and another.

(A) This appeal is directed against order dated 15.04.2014 passed by the Commission in Case Nos.5, 7, 37 and 44 of 2013, which is also under challenge in Appeal Nos.44-47 of 2014. The appellant has prayed that the findings recorded by the Commission on the following issues be quashed :

"a) Diversion of coal to E-auction.

b) Excessive pricing by the Respondent.

c) Differential pricing adopted by the Respondent No.2 to 8.

d) Excessive pricing by the Respondent No.5.

e) Discriminatory behaviour of the Respondent No.2 and 8 and unwarranted classification of consumers of the same class.

f) Discriminatory provision and practice pertaining to differential trigger level for different consumers on penalties for short supply be set aside."

The appellant has also prayed that Respondent No.2 to 8 be directed to comply with the provisions envisioned in the NCDP, FSAs and the regulations of Central Government.

3. The arguments in these appeals were initially heard between May and August 2015. On the first date, i.e., 01.05.2015, the Tribunal heard the arguments of Shri Gopal Subramaniam and Shri Ramji Srinivasan, Senior Advocates appearing for the appellants and recorded a detailed order, the relevant portions of which are extracted below :

> "At the threshold of hearing, Shri Gopal Subramaniam and Shri Ramji Srinivasan, learned Senior Counsel appearing for appellants invited the Tribunal's attention to the statements contained in paragraphs 460 and 461 of the paper book of Appeal No. 01/2014 and argued that the impugned order is liable to be set aside only on the ground of violation of the rules of natural justice. Both Shri Subramaniam and Shri Srinivasan pointed out that arguments on the complaint made by the respondents were heard by the Commission comprising Chairperson and three members but the order under challenge has been passed by the Commission comprising six persons including Chairperson and it has been erroneously recorded that all of them had heard the arguments. Learned counsel argued that in exercise of its adjudicatory functions under the Competition Act 2002, the Commission acts as quasi judiciary body and it is bound by the rules of natural justice. They also referred to Section 36(1) of the Act in support of this argument.

Shri Pallav Shishodia, learned Senior Counsel appearing for the Competition Commission of India made a request for an adjournment for two weeks to enable him to go through the original records of the Commission and also to enable his colleagues to seek instructions from the competent authority.

Shri Gopal Subramanium and Shri Ramji Srinivasan and other learned counsel appearing for the appellants say that they do not have any objection.

The request made by Shri Shishodia is accepted and the case is adjourned to 22.05.2015 for further arguments. To be shown as the first case.

While adjourning the case I deem it appropriate to take cognizance of the judgements of the Supreme Court in Gullapalli Nageswara Rao and others Versus Andhra Pradesh State Road Transport Corporation and anr., AIR 1959 SC 308 and Union of India Versus Shiv Raj and others (2014) 6SCC 564 . The ratio of these judgements is that one who hears must decide and violation of this rule will make the final order non-est."

4. On the next date, i.e., 22.05.2015, the case was adjourned at the request of Shri Pallav Shishodia, Senior Counsel appearing for the Commission. Thereafter, Smt. Smita Jhingran, Secretary of the Commission filed affidavit dated 15.07.2015 along with copy of interim order dated 17th May, 2013 passed by the Tribunal in Appeal No.105 of 2012 with I.A. Nos.224 and 270 of 2012 – Lafarge India Limited vs. Competition Commission of India and others, order dated 24th January, 2012 passed by the Commission under Section 26(1) of the Act in Case No.03 of 2012 Maharashtra State Power Generation Company Limited vs. Mahanadi Coalfield Limited and another, order dated 06.03.2012 passed by the Commission in Case No.03 of 2012 dismissing an application filed by the informant under Section 33 of

the Act and minutes of the ordinary meetings of the Commission held on 21.03.2012, 01.05.2012, 05.07.2012, 29.08.2012, 06.11.2012, 01.01.2013, 31.01.2013, 28.02.2013, 07.03.2013, 17.04.2013, 23.04.2013, 15.05.2013, 16.07.2013, 17.07.2013, 13.08.2013, 11.09.2013, 09.10.2013 and 14.11.2013. In reply Mr. Snehatosh Majumder filed affidavit dated 28.07.2015 on behalf of Coal India Ltd.

5. On 14.09.2015, Shri Sanjay Sen, learned Senior Counsel appearing for Maharashtra State Power Generation Company Ltd. made his submissions. In the midst of hearing, it was felt that the parties should make an endeavour to amicably resolve the outstanding issues. Thereupon, learned counsel for the parties sought instructions from their respective clients and stated that they are willing to sit across the table and discuss the remaining issues. The discussions between the parties continued for quite some time and the appeals were adjourned from time to time to enable them to explore the possibility of a settlement. However, even after detailed deliberations, no settlement could be reached between the parties. On 15th February, 2016, the Tribunal perused the Minutes of the Meetings held on 04.01.2016 and 19.01.2016 and passed the following order :

> "The appellants have filed a compilation of the Minutes of the Meetings held on 4thJanuary, 2016 and 19thJanuary, 2016.
>
> After going through the Minutes, the Tribunal enquired from Shri Ramji Srinivasan, learned Senior Counsel for the appellants as to how paragraph viii came tobe incorporated in the Minutes of the meeting held on 19thJanuary, 2016, because areference in that paragraph has been made to some telephonic discussion held on 28thJanuary, 2016.
>
> In reply, Shri Ramji Srinivasan placed before the Tribunal a copy of letter dated3rdFebruary, 2016 sent by the General Manager (S&M), Coal India Limited to the AGM (FM), NTPC Limited. A perusal of that letter shows that the parties have not been able to amicably resolve the controversy relating to sampling at unloading end.

The letter made available by Shri Ramji Srinivasan is taken on record. The same be inserted in the volume containing the Minutes of the two meetings.

Keeping in view of the fact that the arguments have been partly heard with long intervals, it is considered appropriate that the case shall be re-heard. It shall no longer be treated as part heard and be listed before the regular Bench. Learned counsel for the parties say that the matter may be taken up on 18th April, 2016. Ordered accordingly."

6. Shri Ramji Srinivasan, learned Senior Counsel appearing for the appellant in Appeal No.01 of 2014, which is directed against order dated 09.12.2013 passed by the Commission in Case Nos.3, 11 and 59 of 2012 argued that the impugned order is liable to be set-aside on the ground of violation of the principles of natural justice because arguments were heard on 16th and 17th July, 2013 by one combination of the Commission comprising the Chairperson Shri Ashok Chawla and three members, namely, Dr. Geeta Gouri, Shri S.L. Bunker and Shri Justice (Retd.) S.L. Dhingra, but the final order was passed by another combination comprising the Chairperson Shri Ashok Chawla and five members, namely, Dr. Geeta Gouri, Shri Anurag Goel, Shri M.L. Tayal, Shri Justice (Retd.) S.L. Dhingra and Shri S.L. Bunker. Shri Ramji Srinivasan also pointed out that the arguments in Case Nos.5, 7, 37 and 44 of 2013, which were decided on 15.04.2014 were heard on 19th February, 2014 by the Commission comprising the Chairperson, Shri Ashok Chawla and three members namely – Shri Anurag Goel, Shri M.L. Tayal and Shri S.L. Bunker, but the final order was passed on 15.04.2014 by the Commission comprising the Chairperson, Shri Ashok Chawla and four members namely – Dr. Geeta Gouri, Shri Anurag Goel, Shri M.L. Tayal and Shri S.L. Bunker despite the fact that Dr. Geeta Gouri did not have the benefit of hearing arguments of the counsel for the parties. Shri Rajshekhar Rao, learned counsel appearing for the appellant in Appeal No.52 of 2015 made similar submission and pointed out that the arguments in Case No.8 of 2014 were heard on

25th November, 2014 by the Commission comprising the Chairperson, Shri Ashok Chawla and two members, namely, Shri Sudhir Mital and Shri U.C. Nahata, but the final order was passed by another combination of the Commission comprising the Chairperson, Shri Ashok Chawla and four members namely – Shri S.L. Bunker, Shri Sudhir Mital, Augustine Peter and Shri U.C. Nahata.

7. Shri Ramji Srinivasan and Shri Rajshekhar Rao emphasised that those who were not present at the hearings held on 16th and 17th July, 2013 in Case Nos.3, 11 and 59 of 2012, 19.02.2014 in Case No.5, 7, 37 and 44 and 25.11.2014 in Case No.8 of 2014 had no inkling about the arguments advanced by the Advocate representing to the parties and yet they mechanically signed the orders, which has serious adverse implication on the rights of the appellants and their rights have been seriously prejudiced on account of flagrant violation of the principles of natural justice. In support of their arguments Shri Ramji Srinivasan and Shri Rajshekhar Rao relied upon order dated 11.12.2015 passed by the Tribunal in Appeal No.105 of 2012 Lafarge India Ltd. vs. Competition Commission of India and another and connected matters.

8. As regards interim order dated 17.05.2013 passed by the Tribunal in Appeal No.105/2012 and connected matters on which reliance has been placed in the affidavit filed by the Secretary of the Commission, Shri Ramji Srinivasan submitted that the same has lost its significance in view of the final order passed on 11.12.2015 more so because at that stage the attention of the Tribunal was not drawn to the judgments of the Supreme Court in State of Orissa Vs. Dr. (Miss) Binapani Dei and others - AIR 1967 SC 1269, A. Kraipak Vs. Union of India and others (1969) 2 SCC 262, Sayeedur Rehman Vs. State of Bihar (1973) 3 SCC 333, Mohinder Singh Gill Vs. Chief Election Commissioner (1978) 1 SCC 405, Mahipal Singh Tomar Vs. State of Uttar Pradesh (2013) 16 SCC 771.

9. Shri Pallav Shishodia, Senior Counsel appearing for the Commission invoked the principle of institutional continuity and argued that the impugned order should not

be quashed on the ground of violation of principles of natural justice because some member/ members who was/ were not present at the hearing held with reference to the particular case/cases was/ were present in the hearing held qua other case or cases and no prejudice was caused to the appellants due to the absence of any particular member on a particular day. Shri Shishodia pointed out that even though Shri Anurag Goel and Shri M.L. Tayal were not present at the hearing held on 16th and 17th July, 2013 in Case Nos.3, 11, 59 of 2012 registered on the basis of the informations filed by Maharashtra State Power Generation Company Ltd. and Gujarat State Electricity Corporation Ltd., they had the benefit of hearing similar arguments made on 19th February, 2014 in Case Nos.5, 7, 37 and 44 of 2013 registered on the basis of informations filed by Madhya Pradesh Power Generating Company Ltd. and Sponge Iron Manufacturers Association respectively. Shri Shishodia further pointed out that even though Dr. Geet Gouri was not a party to the hearing held on 19th February, 2014 in Case Nos.5, 7, 37 and 44 of 2013, she was a part of the combination which heard the arguments on 16th and 17th July, 2013 in Case Nos.3, 11 and 59 of 2012. As regards the absence of Shri S.L. Bunker and Shri Augustine Peter at the hearing held on 25th November, 2014 in connection with Case No.8 of 2014 registered on the basis of information filed by GHCL Ltd., Shri Shishodia pointed out that Shri Bunker was present at the hearings held on 16th and 17th July, 2013 in connection with Case Nos.3, 11 and 59 of 2012 and on 19th February, 2014 in connection with Case Nos.5, 7, 37 and 44 of 2013 and Shri Augustine Peter was present in the hearing held on 27.10.2014 in connection with another case out of which Appeal No.81 of 2014 has been filed. Shri Shishodia emphasised that in each case the Commission has independently recorded findings on the issue of abuse of dominant position by Coal India Ltd. and its subsidiaries and, therefore, reference to the findings recorded in order dated 09.12.2013 passed in Case Nos.3, 11 and 59 of 2012 in other cases should be treated as inconsequential. In the end, Shri Shishodia submitted that if the Tribunal is not inclined to accept his argument based on the principle of institutional continuity and is inclined to set-aside the impugned order by

applying the ratio of order dated 11.12.2015 passed in Appeal No.105 of 2015 and connected matters, then it may be made clear that no opinion is being expressed by the Tribunal on the merits of the case and Coal India should be restrained from withdrawing the concessions already made before the Commission.

10. Shri Sanjay Sen and Shri Vivek Tankha, Senior Advocates appearing for the respondent in Appeal Nos.1 and 44-47 of 2014 respectively, fairly stated that the issue raised in these appeals about violation of the principles of natural justice is identical to the one considered by the Tribunal in Appeal No.105 of 2012 and connected matters, but submitted that if the Tribunal is inclined to set-aside the impugned order and remit the case to the Commission for re-consideration, then a time bound direction may be given for final disposal of the cases.

11. We have given thoughtful consideration to the arguments of the learned counsel for the parties and carefully scrutinised the record. We have also gone through the order dated 11.12.2015 passed in Appeal No.105 of 2012 and connected matters and affidavits filed by the parties during the course of hearing.

12. The question whether a person, who is a member of an adjudicatory body and has not heard the parties, can adjudicate upon their rights and/or pass an order adversely affecting either party is no longer *res-integra* and must be answered in negative in view of the judgements of the Supreme Court. That question was first considered in Gullapalli Nageswar Rao Vs. Andhra Pradesh State Road Transport Corporation and another, AIR 1959 SC 1376. 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]

13. The same question was again considered in Rasid Javed Vs. State of U.P. (2010) 7 SCC 781. The Supreme Court relied upon the earlier judgment in Gullapalli Nageswara 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."

14. In Swadeshi Cotton Mills Vs. Union of India (1981) 1 SCC 664, the Supreme Court took cognizance of the fact that the opportunity to file objections and adduce evidence as also opportunity of personal hearing was given 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."

15. In Union of India Vs. Shiv Raj – (2014) 6 SCC 564, a three-Judge Bench of the Supreme Court relied upon the principle laid down in Gullapalli Nageswara Rao Vs. Andhra Pradesh State Road Transport Corporation (supra), Rasid Javed Vs. State of U.P. (supra), Automotive Tyre Manufacturers Association Vs. Designated Authority and others (2011) 2 SCC 258 and observed :

> "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."

16. In Appeal No.105 of 2012 Lafarge India Ltd. Vs. Competition Commission of India and connected matters, this Tribunal considered the question whether the Chairperson of the Commission, who did not hear the arguments of the counsel for the parties, could join other Members in passing the final order whereby the appellants were held to have contravened Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act and total penalty of Rs. 6,316.59 Crores was imposed under Section 27. After taking cognisance of the factual matrix of the cases, the findings recorded in the investigation report, the order passed by the Commission and noticing the rival contentions, the Tribunal referred to the Statement of Objects and Reasons contained in the Bill introduced in Parliament on the recommendation of High Level Committee constituted by the Central Government and analysed the provisions contained in the Act and the Regulations and made the following observations :

“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 during the 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 confirm to the objective standard of fairness."

(Emphasis supplied)

17. In support of its conclusion that the Commission is bound to comply with various facets of the principles of natural justice, the Tribunal relied upon and extensively quoted from the judgments of the Supreme Court in State of Orissa Vs. Dr.(Miss) Binapani Dei and others (supra), A.K. Kraipak Vs. Union of India and others (supra), Sayeedur Rehman vs. State of Bihar (supra), Menka Gandhi Vs. Union of India (1978) 1 SCC 248, Mohindir Singh Gill Vs. Chief Election Commissioner (supra), Manohar Vs. State of Maharashtra and another (2012) 13 SCC 14, Institute of Chartered Accountant of India Vs. L.K. Ratna (1986) 4 SCC 537, BCCI vs. Cricket Association of Bihar (MANU/SCOR/00491/2015) decided on 22.01.2015.

18. The Tribunal then referred to the judgment in Gullapalli Nageswara Rao and Others Versus Andhra Pradesh State Road Transport Corporation and another (supra) and similar other judgements to which reference has been made hereinabove, and observed :

> "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, AnantHaksar, Parag Tripathi, Ramji Srinivasan, AspiChinoy 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."

[Emphasis supplied]

19. In paragraph 71 of the order passed in Appeal No. 105 of 2012 and other connected matters, the Tribunal noted the submission made by Shri Pallav Shishodia, learned senior counsel for the Commission that the participation of Chairperson in the final order was a trivial and insignificant irregularity which ought to be ignored in view of Section 15 of the Act and rejected the same by making the following observations :

> "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 was has been reiterated in Automative 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."

20. The Tribunal also rejected no-prejudice theory advanced by the learned senior counsel for the Commission, relied upon the judgement of the Supreme Court in S.L.

Kapoor Vs. Jagmohan and others- AIR 1981 SC 136 and made the following observations :

> "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 the .....is 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. <u>But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary</u>.

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 faming 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 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 comes 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."
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> [Emphasis supplied]

21. The argument of Shri Shishodia that the participation of Shri Anurag Goel and Shri M.L. Tayal in deciding Case Nos. 3, 11 and 59 of 2012, that of Dr. Geeta Gouri in deciding Cases Nos. 5, 7, 37 and 44 of 2012 and of Shri S.L. Bunker and Shri Augustine Peter in deciding Case No. 8 of 2014 despite the fact that they had not heard the arguments of the advocates/representatives of the parties should not be treated as having the effect of vitiating the orders under challenge because they had the benefit of hearing the parties in other similar cases, sounds attractive but on a closer scrutiny, we do not find any substance in it. At the cost of repetition, we would like to mention that Shri Anurag Goel and Shri M.L. Tayal did not hear the arguments on 16th and 17th July, 2013 in Cases Nos. 3, 11, 59 of 2012. Though, they were party to the hearing held on 19.02.2014 in Cases Nos. 5, 7, 37 and 44 of 2013 but that hearing cannot be relied upon to justify their becoming party in order dated 09.12.2013 passed in Cases Nos. 3, 11 and 59 of 2012. Neither Shri Anurag Goel nor Shri M.L. Tayal has filed affidavit to the effect that even though they had not heard

the arguments of the parties on 16th and 17th July, 2013, they had deliberated upon the matter with other Members, who shared the arguments made by the advocates/representatives of the parties on the two dates, personally examined the entire record and were in agreement that the Chairperson and three other Members who had heard the arguments of the parties on two dates. None of those, who was party to the hearing held on 16th and 17th July, 2013 has filed affidavit to the effect that during the hearing, they had noted the arguments made on behalf of the informant and the opposite parties and shared the same with Shri Anurag Goel and Shri M.L. Tayal or that they had met on the particular date/dates to deliberate upon the matter, scrutinised the records, considered the arguments of the parties and both Shri Anurag Goel and Shri M.L. Tayal agreed with their opinion that Coal India Limited and its subsidiaries have acted in contravention of Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act and they should be visited with penalty to the tune of Rs.1773.05 crores. Dr. Geeta Gouri did not take part in the hearing held on 19.02.2014 in Cases Nos. 5, 7, 37 and 44 of 2013 and, as such, she did not have the benefit of hearing the arguments made by the counsel for the parties and yet she joined the Chairperson and other Members in deciding those cases. Neither Dr. Geeta Gouri has filed affidavit asserting therein that she had agreed with the Chairperson and other Members that Coal India Limited and its subsidiaries should be held guilty of acting in contravention of Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act because she remembered the arguments made by the parties on 16th and 17th July, 2013 in Cases Nos. 3, 11 and 59 of 2012. The participation of Shri S.L. Bunker and Shri Augustine Peter in deciding of Case No. 8 of 2014 was likewise faulty. They too have not filed affidavits to the effect that the Chairperson and two Members who had heard the arguments on 25.11.2014 had discussed the matter with them, shared the arguments made by the parties and that after independently going through the record including written submissions filed by the parties, they agreed with the Chairperson and two Members that the Coal India Limited and its subsidiaries have acted in contravention of Sections 3(3)(a) and

3(3)(b) read with Section 3(1) of the Act. Shri S.L. Bunker has also not filed an affidavit that he had maintained the note of arguments heard on 16th and 17th July, 2013 and 19.02.2014 in the related cases and, therefore, notwithstanding the fact that he did not get the benefit of hearing the arguments of the parties on 25.11.2014, he had no difficulty in recording his concurrence with the views of the Chairperson and other Members. It will be rather naïve to presume that Dr. Geeta Gouri remembered the arguments heard on 16th and 17th July, 2013 and, therefore, she had no difficulty in becoming a party to the order passed on 19.02.2014 in Cases Nos. 5, 7, 37 and 44 of 2012. The same will be true qua Shri S.L. Bunker who did not hear the arguments on 25.11.2014 in Case No. 8 of 2014.

22. In her affidavit dated 15.07.2015, the Secretary of the Commission has placed reliance on interim order dated 15.05.2013 passed by the Tribunal in Appeal No. 105 of 2012 and connected matters. In that regard, it is sufficient to observe that the considerations which may have weighed with any adjudicatory body, while deciding the interlocutory applications are substantially different than the factors required to be analysed and considered at the time of final decision of the case and, as already mentioned above, while deciding interlocutory applications in Appeal No. 105 of 2012 and other connected matters, the Tribunal did not have the benefit of considering the ratio of the judgements of the Supreme Court which were relied upon in the final order passed on 09.12.2015. The Secretary of the Commission has also tried to project the Commission as an expert inquisitorial body, which primarily deals with the economic issues and have no judicially manageable standards. The statements made in that regard are liable to be rejected because the same are based on total misunderstanding of the scheme of the Act and the Regulations, in particular, the provisions of Section 16 of the Act, which envisages appointment of a Director General for the purpose of assisting the Commission in conducting inquiry into contravention of the provisions of the Act, Section 18 which enumerates the duties of the Commission which are in consonance with the preamble of the Act, Section 19 which provides for inquiry by the Commission into any alleged contravention of the

provisions of sub-section (1) of Section 3 or sub-section (1) of Section 4. Sub-sections (3) to (7) of the Section 19 specify the factors which the Commission is bound to take into consideration while determining whether an agreement has appreciable adverse effect on competition or whether an enterprise enjoys dominant position under Section 4, whether a market constitutes relevant market, what is relevant geographic market and the relevant product market, Section 20 which provides for inquiry into combination by the Commission, Section 26 which lays down the procedure for conduct of inquiry under Section 19, Section 27 which empowers the Commission to pass different orders where it comes to the conclusion that any agreement referred to in Section 3 or action of an enterprise in a dominant position is contrary to Section 3 or 4, Section 28 which confers power upon the Commission to direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse that position, Section 29 which lays down the procedure for combination, Section 31 which enumerates the orders which can be passed in certain combinations, Section 33 which empowers the Commission to issue interim orders, Section 36 which enables the Commission to regulate its own procedure and exercise powers of the Civil Court in matters relating to summoning and enforcing of attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavit; issuing commissions for examination of witnesses or documents and requisitioning of any public record or document or copy of such record or document from any office, Section 38 which empowers the Commission to rectify any mistake apparent on the record, Section 41 which specifies the role of the Director General in investigation on contraventions, Chapter VI (Section 42 to 48) which provide for imposition for penalty and taking of other punitive actions including prosecution of those who failed to comply with the orders or directions of the Commission issued under Sections 27, 28, 31, 32, 33, 42A and 43A and corresponding provisions contained in Regulations 20, 21, 22, 24, 25, 26, 27, 29, 30, 31, 32, 39, 41, 42, 43, 44, 45, 46 and 48. All these provisions unmistakably show that while performing its duties to eliminate practices having

adverse effect on competition, to promote and sustain competition, to protect the interest of consumers and ensures freedom of trade carried on by other participants in markets in India, the Commission performs an important function as an adjudicator of the rights of the parties. The very fact that Parliament has in its wisdom conferred powers upon the Commission and the Director General which are vested in the regular civil courts and enacted several provisions making compliance of the principles of natural justice mandatory is sufficient to demolish the argument which is implicit in the statement contained in paragraph 22 of the affidavit of the Secretary. To put it differently, it is wholly misconceived to say that the Commission essentially functions as an executive/administrative body and is not required to adhere to the principles of natural justice and fairness. It has been repeatedly held by the Supreme Court that the functions performed by the bodies like the Commission which are clothed with the power to decide the rights of the parties or pass order adversely affecting a person are quasi-judicial in nature and are bound to comply with different facets of the principles of natural justice. Therefore, even if we were to agree with the Secretary that the Commission is not a quasi-judicial body in traditional sense inasmuch as the Act has entrusted it with multifarious functions but the suggestive submission made in her affidavit that the Commission can ignore the fundamentals of the principles of natural justice and fairness deserves nothing but rejection.

23. Majority of the judgements to which reference has been made in Part IV of the affidavit of the Secretary of the Commission have already been dealt with in Appeal No. 105 of 2012. Even if some judgements have not been referred to in order dated 11.12.2015, that cannot justify a re-consideration of a well-considered decision rendered by the Tribunal.

24. Although, in Appeal Nos. 49 of 2014, Madhya Pradesh Power Generating Company Limited Vs. Competition Commission of India and others and Appeal No.70 of 2014 Sponge Iron Manufacturers' Association Vs. Competition Commission of India and others, order dated 15.04.2014 has been challenged on different grounds,

in view of the conclusion reached by us that the said order is vitiated due to violation of the principles of natural justice, the same will have to be set aside in its entirety and the appellants in these two cases shall be free to advance their arguments afresh before the Commission.

25. In the result, the appeals are allowed. The impugned orders are set aside and the matters be remitted to the Commission for deciding the issues arising out of the informations filed by Maharashtra State Power Generation Company Limited, Gujarat State Electricity Corporation Limited, Madhya Pradesh Power Generating Corporation Limited, West Bengal Power Development Corporation Limited, Sponge Iron Manufacturers Association and GHCL Ltd. afresh.

26. We hope and trust that the Commission will make an endeavour to hear the parties and pass appropriate orders as early as possible not later than 2 months of the receipt of this order.

27. It is made clear that neither of the parties shall be entitled to adduce any additional evidence before the Commission nor the Coal India Ltd. and its subsidiaries shall be allowed to withdraw the amendments / modifications made in the fuel supply agreements or concessions granted during the pendency of the cases before the Commission.

[G.S. Singhvi]
Chairman

[Rajeev Kher]
Member

17th May, 2016