

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 16 of 2021

(Arising out of the judgement/order dated 24.09.2021 passed by the Competition Commission of India, New Delhi in Suo Motu Case No.06/2017 titled Re: Alleged anti-competitive conduct in the Beer Market in India)

IN THE MATTER OF:

Pawan Jagetia
Versus

...Appellant

CCI & Ors.

...Respondents

Present:

For Appellant	: Mr. Abir Roy, Mr. Vivek Pandey, Ms. Sukanya Vishwanathan, Advocates.
For Respondents	: Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, with Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI. Mr. Davander Prasad, Dy. Director (Law) CCI. Mr. Manas Kumar Chaudhuri, Mr. Sagardeep Rathi, Mr. Aman Singh Baroka, Mr. Pranjal Prateek, Advocates for R-3 & 4. Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates for R-5 & 19. Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.

With

Competition Appeal (AT) No. 21 of 2021

IN THE MATTER OF:

Sovan Roy

...Appellant

**Director General, All India Brewers
Association
Versus**

CCI

...Respondent

Present:

For Appellant : Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates.
For Respondent : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI.
Mr. Davander Prasad, Dy. Director (Law) CCI.
Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.

With

Competition Appeal (AT) No. 22 of 2021

IN THE MATTER OF:

**All India Brewers Association
Versus**

...Appellant

CCI

...Respondent

Present:

For Appellant : Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates.
For Respondent : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI/R-1.
Mr. Davander Prasad, Dy. Director (Law) CCI.
Dr. Aditya Sondhi, Sr. Advocate with Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Ms. Rahat

Dhawan, Ms. Shivangi Chawla, Ms. Aditi Khemani, Ms. Prerana De, Mr. Samriddha Gooptu, Mr. Ishan Arora, Advocates for R-2.
 Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.
 Mr. Manas Kumar Chaudhuri, Mr. Sagardeep Rathi, Mr. Pranjal Prateek, Mr. Aman Singh Baroka, Advocates for R-3 & 4.

With

Competition Appeal (AT) No. 23 of 2021

IN THE MATTER OF:

**United Breweries Ltd.
 Versus**

...Appellant

CCI & Ors.

...Respondents

Present:

For Appellant : Mr Gopal Subramaniam, Sr Advocate, Dr. Aditya Sondhi, Sr. Advocate with Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Ms. Rahat Dhawan, Ms. Shivangi Chawla, Ms. Aditi Khemani, Ms. Prerana De, Mr. Samriddha Gooptu, Mr. Ishan Arora, Advocates.

For Respondents : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI.
 Mr. Davander Prasad, Dy. Director (Law) CCI.
 Mr. Manas Kumar Chaudhuri, Mr. Sagardeep Rathi, Mr. Pranjal Prateek, Mr. Aman Singh Baroka, Advocates for R-2 & 3.
 Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.
 Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates for R-5.

With
Competition Appeal (AT) No. 24 of 2021

IN THE MATTER OF:

Perry Goes
Versus
CCI & Ors.

...Appellant

...Respondents

Present:

For Appellant : Dr. Aditya Sondhi, Sr. Advocate with Mr. Ravisekhar Nair, Mr. Abhay Joshi, Mr. Param Tandon, Mr. Sahil Khanna, Advocates.

For Respondents : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI.

Mr. Davander Prasad, Dy. Director (Law) CCI.

Mr. Manas Kumar Chaudhuri, Mr. Sagardeep Rathi, Mr. Pranjal Prateek, Mr. Aman Singh Baroka, Advocates for R-2 & 3.

Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates for R-5.

Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Ms. Rahat Dhawan, Ms. Shivangi Chawla, Ms. Aditi Khemani, Ms. Prerana De, Mr. Samriddha Gooptu, Mr. Ishan Arora, Advocates for R-6.

Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.

With
Competition Appeal (AT) No. 25 of 2021

IN THE MATTER OF:

Shekhar Ramamurthy
Versus
CCI & Ors.

...Appellant

...Respondents

Present:

For Appellant : Dr. Aditya Sondhi, Sr. Advocate with Mr. Ravisekhar Nair, Mr. Abhay Joshi, Mr. Param Tandon, Mr. Sahil Khanna, Advocates.

For Respondents : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI.
 Mr. Davander Prasad, Dy. Director (Law) CCI.
 Mr. Manas Kumar Chaudhuri, Mr. Sagardeep Rathi, Mr. Pranjal Prateek, Mr. Aman Singh Baroka, Advocates for R-2 & 3.
 Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates for R-3.
 Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Ms. Rahat Dhawan, Ms. Shivangi Chawla, Ms. Aditi Khemani, Ms. Prerana De, Mr. Samriddha Gooptu, Mr. Ishan Arora, Advocates for R-6.
 Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL

With
Competition Appeal (AT) No. 26 of 2021

IN THE MATTER OF:

Kiran Kumar
Versus
CCI & Ors.

...Appellant

...Respondents

Present:

For Appellant : Dr. Aditya Sondhi, Sr. Advocate with Mr. Ravisekhar Nair, Mr. Abhay Joshi, Mr. Param Tandon, Mr. Sahil Khanna, Advocates.

For Respondents : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI.
 Mr. Davander Prasad, Dy. Director (Law) CCI.
 Mr. Manas Kumar Chaudhuri, Mr. Sagardeep Rathi, Mr. Pranjal Prateek, Mr. Aman Singh Baroka, Advocates for R-2 & 3.

Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates for R-5.

Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Ms. Rahat Dhawan, Ms. Shivangi Chawla, Ms. Aditi Khemani, Ms. Prerana De, Mr. Samriddha Gooptu, Mr. Ishan Arora, Advocates for R-6.

Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.

With
Competition Appeal (AT) No. 27 of 2021

IN THE MATTER OF:

Kalyan Ganguly
Versus
CCI & Ors.

...Appellant

...Respondents

Present:

For Appellant : Dr. Aditya Sondhi, Sr. Advocate with Mr. Ravisekhar Nair, Mr. Abhay Joshi, Mr. Param Tandon, Mr. Sahil Khanna, Advocates.

For Respondents : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Vanshay Kaul, Advocates for CCI.

Mr. Davander Prasad, Dy. Director (Law) CCI.
Mr. Manas Kumar Chaudhuri, Mr. Sagardeep Rathi, Mr. Pranjal Prateek, Mr. Aman Singh Baroka, Advocates for R-2 & 3.

Mr. Subodh Prasad Deo, Mr. Swarnim Shrivastava, Ms. Rinki Singh, Advocates for R-5.

Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Ms. Rahat Dhawan, Ms. Shivangi Chawla, Ms. Aditi Khemani, Ms. Prerana De, Mr. Samriddha Gooptu, Mr. Ishan Arora, Advocates for R-6.

Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.

With

Competition Appeal (AT) No. 18 of 2021
&
I.A. No. 257 of 2022

IN THE MATTER OF:

Nilesh Patel
Versus

...Appellant

CCI

...Respondents

Present:

For Appellant : Mr. Rajshekhar Rao, Sr. Advocate, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Rajat Moudgil, Mr. Swapnil Singh Shekhawat, Ms. Aashna Manocha, Advocates.

For Respondents : Mr. Manish Vashisht, Sr. Advocate with Mr. Balaji Subramanian, Mr. Arav Kapoor, Mr. Akash Kundu, Mr. Mridul Vats, Mr. Vanshay Kaul, Advocates for CCI.
 Mr. Davander Prasad, Dy. Director (Law) CCI.
 Mr. Aakash Kumbhat, Ms. Manika Brar, Ms. Atreyee Sarkar, Advocates for CIPL.

JUDGEMENT

(23rd DECEMBER, 2022)

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

Since all the aforesaid appeals have been preferred against the same impugned order all the appeals were heard together on number of dates and finally after conclusion of hearing on 21.10.2022, judgement was reserved. While reserving the judgement, liberty was granted to the parties for filing written submissions with citation, if any, by 7.11.2022. Permission was

granted for filing fresh Notes of Written submission with indication that written submissions filed earlier may not be taken note of.

2. After judgement was reserved, Notes of written submission was filed only on behalf of Respondent No.1, Competition Commission of India (hereinafter referred to as CCI) which was filed on 07.11.2022.

3. The aforesaid appeals have been preferred under Section 53B of the Competition Act, 2002 (hereinafter referred to as the 'Act') against an order passed under Section 27 of the Act in Suo Moto Case No.6/2017 by three Member Bench of the CCI. The impugned order is in about 231 pages. The order impugned was passed on 24.09.2021 and it was rectified on minor issue on dated 4.11.2021 in Suo Moto Case No.6/2017. Both the order are assailed in aforesaid appeals.

4. While the aforesaid appeals were listed for hearing, learned counsel in all the appeals agreed that Competition Appeal (AT) No.23/2021 may be treated as lead case and as such for proper adjudication in the matter reference to facts as stated in Competition Appeal (AT) No.23/2021 may serve the purpose.

5. On 10.10.2022 final hearing in all the aforesaid appeals commenced. Mr. Gopal Subramaniam, learned senior counsel appeared in lead Appeal i.e. Competition Appeal (AT) No.23/2021. Thereafter, hearing in the appeal continued on 17.10.2022, 18.10.2022, 19.10.2022, 20.10.2022 and finally on 21.10.2022 hearing concluded and judgement was reserved.

6. The short fact of the case is that on the basis of an application dated 26.07.2017 filed under Section 46 of the Act read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter referred to as 'LPR') by Crown Beers India Ltd, Respondent No.2 herein, and SABMiller India Pvt Ltd, Respondent No.3, against all the Respondents alleging cartelisation in relation to the production, marketing, distribution and sale of Beer in India, suo moto proceeding was initiated which was numbered as Suo Moto Case No.6/2017.

7. The CCI on the basis of materials available on record by its order dated 31.10.2017 formed an opinion that prima facie the conduct of appellants and private respondents in contravention of provisions of Section 3(1) read with Section 3(3)(a) of the Act and by its order dated 31.10.2017 under Section 26(1) of the Act

directed the Director General (hereinafter referred to as 'DG') to conduct investigation and submit report.

8. During investigation by the DG on 10/11.10.2018 premises of Appellants/Respondents were searched and seizure was also made by the DG. After the search and seizure was conducted by the DG on 12.10.2018 the appellant/United Breweries Ltd, in Competition Appeal (AT) No.23/2021 and its officers/employees who are appellants in connected appeals filed an application under Section 46 of the Act read with Regulation 5 of LPR, similar application was filed on 5.10.2018 by Respondent No.4, Calsberg India Pvt Ltd. Similar petition was filed by CFO and Executive Director of Appellant on 17.10.2018 and Mr. Shalabh Seth, Chief Supply Officer, former Managing Director of Respondent No.3 and former Chairman of Respondent No.5 on 8.1.2019 filed the same petition i.e. petition under Section 46 of the Act. It may be called as leniency application.

9. The DG during its detailed investigation on the basis of evidences collected as well as admission of Respondents/appellants submitted its report. During investigation it was established that the Appellants and private Respondents herein formed a cartel across the India which caused

and likely to cause an appreciable of adverse effect on the competition. The CCI after examining report and granting full opportunity of hearing to all concerned, passed a detailed order (impugned order) referring to all the evidences and held Appellant/United Breweries Ltd and Respondent No.3 SAB Miller India Ltd guilty of contravention of provisions 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act from 2009 to October, 2018. The CCI further held Opposite Respondent No.4/Corberg India Ltd guilty in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) reading with Section 3(1) of the Act from 2012 to 2018 and Respondent No.5/all India Brewers Association/Appellant in Competition Appeal (AT) No.22/2021 was held guilty of contravention of provisions of Section 3(3)(a), 3(3)(b) read with Section 3(1) from 2013 to October 20. Besides holding aforesaid parties guilty, the company/association, individuals of aforesaid all the parties were also held liable. In respect of opposite party No.1 Four officers were held guilty. In respect of Opposite Party No.2 four individuals were held liable whereas six individuals were held liable in respect of Opposite Party No.4 and one Mr. Sonam Roy, director General of Opposite Party No.5 was held liable. The

individual were held liable for contravention of Section 48(1), 48(2) of the Competition Act. Thereafter, penalties/lesser penalty was imposed in view of Section 27(b) of the Act.

10. Based on revenue and profit details arising from the sale of beer in India, certified by a Chartered Accountant as provided by appellant/United Breweries Ltd and Respondent No.4/Carlsberg India Pvt Ltd and based on financial statement provided by Respondent No.3 SABMiller India Pvt Ltd (as it stated that its entire turnover and profit as stated in financial statement arises from the sale of beer in India) and considering the mitigating factors put forth, the CCI proceeded to determine the quantum of penalty imposed on the parties @ 0.5 times profit of its all the continuance of cartelisation and 2% of the turnover for each year of continuance of the cartelisation, whichever was higher. The calculation in respect of Appellant/United Breweries Ltd, Respondent No.3/SABMiller India Pvt Ltd and Respondent No.4 Carlsberg India Pvt Ltd has been detailed under the table. It would be profitable to reproduce relevant portion of the impugned order which is from internal page 220 to 231 of the impugned order:

OP-1/Appellant/United Breweries Ltd

Financial Year	Relevant Turnover	Relevant Profit	2% of Relevant Turnover	0.5 times of relevant profit
2009-10 ¹	15,59,22,51,452	65,89,10,959	31,18,45,029	32,94,55,479
2010-11	28,07,86,55,000	1,44,10,99,000	56,15,73,100	72,05,49,500
2011-12	33,56,19,86,000	1,22,13,03,000	67,12,39,720	61,06,51,500
2012-13	34,92,68,82,000	1,92,37,53,000	69,85,37,640	96,18,76,500
2013-14	37,26,79,83,000	2,58,63,29,000	74,53,59,660	1,29,31,64,500
2014-15	41,13,82,10,000	2,77,46,09,000	82,27,64,200	1,38,73,04,500
2015-16	44,95,98,92,000	3,53,46,63,000	89,91,97,840	1,76,73,31,500
2016-17	41,78,64,83,000	2,17,86,18,000	83,57,29,660	1,08,93,09,000
2017-18	50,35,81,19,000	4,77,54,39,000	1,00,71,62,380	2,38,77,19,500
2018-19 ²	30,98,02,49,425	3,96,63,71,770	61,96,04,988	1,98,31,85,885
Total	3,58,65,07,10,877	25,06,10,95,729	7,17,30,14,218	12,53,05,47,864

OP-3/R-3/SAB Miller India Pvt Ltd

(In Rs.)

Financial Year	Relevant Turnover	Relevant Profit	2% of Relevant Turnover	0.5 times of relevant profit
2009-10 ³	10,93,35,25,320	-1,22,75,76,970	21,86,70,506.41	- 61,37,88,484.87
2010-11	14,61,53,80,778	-60,36,39,271	29,23,07,616	-30,18,19,636
2011-12	16,66,28,51,733	-1,19,25,85,323	33,32,57,035	-59,62,92,662
2012-13	19,96,52,54,036	-88,34,95,656	39,93,05,081	-44,17,47,828
2013-14	19,20,22,97,023	-99,73,11,593	38,40,45,940	-49,86,55,797
2014-15	19,39,69,87,494	-1,27,35,88,070	38,79,39,750	-63,67,94,035
2015-16	20,87,70,95,681	-47,36,52,285	41,75,41,914	-23,68,26,143
2016-17	16,17,95,10,000	-3,72,18,70,000	32,35,90,200	-1,86,09,35,000
2017-18	13,58,46,20,000	-98,68,80,000	27,16,92,400	-49,34,40,000
2018-19 ⁴	7,15,10,32,110	-1,60,20,69,041	14,30,20,642	-80,10,34,521
Total	1,58,56,85,54,175	- 12,96,26,68,209	3,17,13,71,084	- 6,48,13,34,104

OP-4/R-4/Carlsberg India Pvt Ltd

(In Rs.)

Financial Year	Relevant Turnover	Relevant Profit	2% of Relevant Turnover	0.5 times of relevant profit
2009 ⁵	79,77,27,273	-73,88,18,182	1,59,54,545.45	-36,94,09,091
2010	1,91,10,00,000	-1,23,70,00,000	3,82,20,000	-61,85,00,000

¹ For 315 out of 365 days. Relevant turnover for FY 2009-10 is ₹18,06,72,12,000 and relevant profit is ₹76,35,00,000.

² For 192 out of 365 days. Relevant turnover for FY 2018-19 is ₹58,89,47,45,000 and relevant profit is ₹7,54,02,38,000.

³ For 315 out of 365 days. Relevant turnover for FY 2009-10 is ₹ 12,66,90,05,530 and relevant profit is ₹- 1,42,24,30,457.

⁴ For 192 out of 365 days. Relevant turnover for FY 2018-19 is ₹13,59,44,10,000 and relevant profit is ₹- 3,04,56,00,000.

⁵ For 225 out of 275 days. Relevant turnover for April to December 2009 is ₹97,50,00,000 and relevant profit is ₹-90,30,00,000.

2011	3,02,80,00,000	-1,86,20,00,000	6,05,60,000	-93,10,00,000
2012	4,31,60,00,000	-1,73,40,00,000	8,63,20,000	-86,70,00,000
Jan 2013 to March 14	6,98,30,00,000	-2,13,10,00,000	13,96,60,000	-1,06,55,00,000
2014-15	8,37,30,00,000	-2,32,90,00,000	16,74,60,000	-1,16,45,00,000
2015-16	11,82,70,00,000	-1,48,50,00,000	23,65,40,000	-74,25,00,000
2016-17	13,42,20,00,000	-1,67,00,00,000	26,84,40,000	-83,50,00,000
2017-18	14,84,80,00,000	1,06,60,00,000	29,69,60,000	53,30,00,000
2018-19 ⁶	9,84,72,32,877	96,36,82,192	19,69,44,658	48,18,41,096
Total	75,35,29,60,149	- 11,15,71,35,990	1,50,70,59,203	-5,57,85,67,995

297. As can be seen from the above tables, for OP-1, 0.5 times profit for each year of the continuance of cartel is higher than 2% of turnover for each year of continuance of cartel; while for OP-3 and OP-4, 2% of turnover for each year of continuance of cartel is higher than 0.5 times profit for each year of continuance of cartel. As such, the Commission decides to impose upon OP-1 penalty @ 0.5 times of the profit for each year of continuance of the cartel, i.e., ₹12,53,05,47,864/- (Rupees One Thousand Two Hundred and Fifty Three Crores Five Lacs Forty Seven Thousand Eight Hundred and Sixty Four Only) and upon OP-3 and OP-4, penalty @ 2% of their turnover for each year of continuance of cartel, i.e., ₹3,17,13,71,084/- (Rupees Three Hundred and Seventeen Crores Thirteen Lacs Seventy One Thousand Eighty Four Only) and ₹1,50,70,59,203/- (Rupees One Hundred and Fifty Crores

⁶ For 192 out of 365 days. Relevant turnover for FY 2018-19 is ₹18,72,00,00,000 and relevant profit is ₹1,83,20,00,000.

Seventy Lacs Fifty Nine Thousand Two Hundred and Three Only), respectively.

298.As far as OP-5 is concerned, considering the role and conduct of OP-5 in the cartel conduct, the Commission decides to impose upon it, penalty @ 3% of the average of its turnover for the last three preceding financial years of the cartel, which is calculated on the basis of the income and expenditure accounts provided by OP-5, as follows:

OP-5

(In ₹)

Financial Year	Income
2016-17	3,62,84,983
2017-18	1,68,09,500
2018-19	94,18,155
Total	6,25,12,638
Average	2,08,37,546
Penalty @ 3%	6,25,126

299.With regard to the individuals of the OPs also, the Commission decides to impose penalty @ 3% of the average of their incomes, for the last three preceding financial years of the cartel.

300.Though certain individuals who have left the employment of the OPs have submitted that penalty, if any, should be calculated

for them, on the basis of the incomes derived by them from the respective OPs at the relevant time of the cartel conduct, the Commission is of the view that the intention behind imposition of penalty is only to punish the individuals for their cartel so as to create a deterrent effect. As such, the Commission imposes penalty uniformly on the individuals by taking their income details for the preceding three financial years, rather than relating the same to their respective period of cartel.

301. Regarding lesser penalty, it is noted by the Commission that OP-3 was the first lesser penalty applicant to approach the Commission. As such, it is eligible for up to 100% reduction in the penalty amount imposed upon it. It is noted by the Commission that the order passed under Section 26(1) of the Act by the Commission was based on the disclosures made by OP-3 in its lesser penalty application. At that stage, the Commission and/or the DG had no evidence in their possession regarding cartelisation between the OPs. In its lesser penalty application, OP-3 explained the nature and modus operandi of the cartel and explained the market structure of Beer industry and the different models being followed in various States apart from submitting evidences with regard to exchange of e-mail communications between the key managerial personnel of the OPs. The information and co-operation extended by OP-3 enabled the DG to conduct search and seizure operation at the premises of the OPs and seize quality

evidence. Full and true disclosures of information and evidence and continuous co-operation provided by OP-3 and its individuals, not only enabled the Commission to order investigation into the matter, but also helped the Commission in establishing contravention of the provisions of Section 3(3) of the Act by the OPs. OP-3 and its individuals extended genuine, full, continuous and expeditious co-operation not only during the course of investigation before the DG, but also during the subsequent proceedings before the Commission. Mr. Shalabh Seth also approached the Commission independently as a lesser penalty applicant, and was granted the same marker status as afforded to OP-3. As such, the Commission decides to grant to OP-3 and its individuals found liable in terms of Section 48 of the Act viz. Mr. Shalabh Seth, Mr. Nilojit Guha, Mr. Suryanarayana Diwakaran and Mr. Anil Arya, 100% reduction in the penalty amount imposed upon them.

302. The second lesser penalty applicant before the Commission was OP-1. As the second applicant, OP-1 is eligible for up to 50% reduction in the penalty amount imposed upon it. The Commission notes that OP-1 had filed the lesser penalty application on behalf of itself and its individuals viz. Mr. Shekhar Ramamurthy, Mr. Kiran Kumar, Mr. Shalabh Seth and Mr. Perry Goes. Being the second lesser penalty applicant in the matter, OP-1 and its 3 individuals (excluding Mr. Shalabh Seth who has been found

liable for the conduct of OP-3) are eligible for reduction in penalty up to 50% of the full penalty leviable.

303. The Commission notes that OP-1 and its individuals had filed the lesser penalty application after the DG had conducted the search and seizure operations on 10- 11.10.2018. By this time, from the lesser penalty application filed by OP-3, and from the Dawn Raid, the DG already had the bulk of evidence on the basis of which cartelisation in the present matter has been established. In its lesser penalty application, OP-1 made disclosures about discussions and co-ordination between OP-1 and its competitors, inter alia, in relation to (i) prospective price increases applied for by the OPs before various State/UTs Authorities like Madhya Pradesh, Chhattisgarh, Andhra Pradesh, Telangana, Rajasthan, Delhi, Maharashtra, Odisha, Karnataka and Puducherry; (ii) basic prices for procuring old/used patent bottles; (iii) limiting/ stopping the supply of Beer for limited period in certain States like Odisha, Maharashtra, Rajasthan, West Bengal and Andhra Pradesh; and (iv) discussions on proposed financial and other incentives to premium institutions. Though much of such evidence was already in possession of the DG by the time OP-1 came forward with the same, some evidence submitted by OP-1 has been used by the Commission above to form a complete trail evidencing anti-competitive conduct of the OPs, especially in relating to co-ordination in respect of premium institutions in Bengaluru,

Karnataka and with respect to purchase of old/used bottles. Further, the pricing data furnished by OP-1 during the course of investigation enabled the DG and the Commission to tabulate the MRP and EBP revisions effected by the OPs over a number of years, which has helped in mapping price parallelism in respect of Beer sold by the OPs. Moreover, from the lesser penalty application filed by Mr. Steven Bosch, it is noted that OP-1 was contemplating to file a lesser penalty application even before the Dawn Raid was conducted.

304.As such, given the stage at which OP-1 came forward with the disclosures, the quality of information provided by OP-1, the evidence already in possession of the DG at that time, and the entire facts and circumstances of the present case, the Commission decides to grant to OP-1, Mr. Shekhar Ramamurthy, Mr. Kiran Kumar and Mr. Perry Goes, reduction in penalty to the tune of 40% of the total penalty leviable.

305.The third lesser penalty applicant before the Commission was OP-4. OP-4 has requested lesser penalty for itself and its individuals viz. Mr. Nilesh Patel, Mr. Michael Jensen, Mr. Dhiraj Kapur and Mr. Anil Bahl. The Commission notes that OP-4 had filed the lesser penalty application after the DG had conducted the search and seizure operations on 10- 11.10.2018. By this time, from the lesser penalty applications filed by OP-3 and OP-1, and from the Dawn Raid, the DG already had most of the evidence on

the basis of which cartelisation in the present matter has been established. In its lesser penalty application, OP-4, while giving details of the cartel in the domestic Beer market, inter alia, explained the background of the Beer market in India and the market scenario. It explained the operation of the cartel and provided a list of the key persons of the OPs who were involved in the cartel. As evidence, it submitted printouts of e-mail communications between the OPs. Thereafter, during investigation, OP-4 also gave further evidence in the form of e-mail communications and WhatsApp communications between the employees of the OPs. Though most of the evidence submitted by OP-4 was already in possession of the DG by the time OP-4 came forward with the same, some evidence submitted by OP-4 has been used by the Commission above to form a complete trail evidencing anticompetitive conduct of the OPs, as such providing value addition to the investigation of the DG. Further, the pricing data furnished by OP-4 during the course of investigation enabled the DG and the Commission to tabulate the MRP and EBP revisions effected by the OPs over a number of years, which has helped in mapping price parallelism in respect of Beer sold by the OPs.

306.As such, given the stage at which OP-4 came forward with the disclosures, the quality of information provided by OP-4, the evidence already in possession of the DG at that time, and the

entire facts and circumstances of the present case, the Commission decides to grant to OP-4, Mr. Nilesh Patel, Mr. Michael Jensen, Mr. Dhiraj Kapur and Mr. Anil Bahl, reduction in penalty to the tune of 20% of the total penalty leviable.

307. Consequently, the penalty amounts imposed upon and payable by the OPs are as follows:

(In ₹)

OP	Penalty imposed	Penalty payable after reduction
OP-1	12,53,05,47,864	7,51,83,28,719
OP-3	3,17,13,71,084	Nil
OP-4	1,50,70,59,203	1,20,56,47,362
OP-5	6,25,126	6,25,126

308. As far as the individuals of the OPs are concerned, the penalty amounts calculated for them and payable by them are as follows:

OP-1/ Officers/ Employees of United Breweries Ltd

S.No.	Person	Year	Income
1	Mr Shekhar Ramamurthy	2016-17	7,94,84,516
		2017-18	8,06,32,449
		2018-19	12,32,92,801
		Total	28,34,09,766

		Average	9,44,69,922
		Penalty imposed	28,34,098
		Penalty payable	17,00,459
2	Mr.Kalyan Ganguly	2016-17	61,98,067
		2017-18	1,66,25,453
		2018-19	2,67,62,253
		Total	4,95,85,773
		Average	1,65,28,591
		Penalty imposed	4,95,858
		Penalty payable	4,95,858
3	Mr Kiran Kumar	2016-17	2,27,87,868
		2017-18	2,22,19,726
		2018-19	3,48,61,518
		Total	7,98,69,112
		Average	2,66,23,037
		Penalty Imposed	7,98,691
		Penalty payable	4,79,215
		2016-17	1,51,89,911

4	Mr Perry Goes	2017-18	1,40,80,765
		2018-19	2,22,93,770
		Total	5,15,64,446
		Average	1,71,88,149
		Penalty Imposed	5,15,644
		Penalty payable	3,09,387

OP-3/Officer/Employees of SAB Miller India Pvt Ltd

(In ₹)

S.No.	Person	Year	Income
1	Mr Shalabh Seth	2016-17	19,90,50,236
		2017-18	3,46,13,322
		2018-19	3,85,83,506
		Total	27,22,47,064
		Average	9,07,49,021
		Penalty imposed	27,22,471
		Penalty payable	Nil
		2016-17	1,85,14,881

2	Mr.Anil Arya	2017-18	97,08,974
		2018-19	1,52,39,279
		Total	4,34,63,134
		Average	1,44,87,711
		Penalty imposed	4,34,631
		Penalty payable	Nil
3	Mr Nilojit Guha	2016-17	4,93,46,941
		2017-18	32,05,602
		2018-19	93,53,889
		Total	6,19,06,432
		Average	2,06,35,477
		Penalty Imposed	6,19,064
		Penalty payable	Nil
4	Mr Suryanarayana Diwakaran	2016-17	3,57,74,586
		2017-18	15,98,017
		2018-19	36,65,596
		Total	4,10,38,199
		Average	1,36,79,400
		Penalty Imposed	4,10,382
		Penalty payable	Nil

OP-4/Officer/Employee of Carlsberg India Pvt Ltd**(In Rs)**

S.No.	Person	Year	Income
1	Mr Anil Bahl	2016-17	1,33,90,744
		2017-18	2,36,38,489
		2018-19	2,07,04,492
		Total	5,77,33,725
		Average	1,92,44,575
		Penalty imposed	5,77,337
		Penalty payable	4,61,870
2	Mr.Dhiraj Kapur	2016-17	1,53,61,813
		2017-18	1,23,78,773
		2018-19	99,51,080
		Total	3,76,91,666
		Average	1,25,63,889
		Penalty imposed	3,76,917
		Penalty payable	3,01,533

3	Mr Mahesh Kanchan	2016-17	1,74,03,961
		2017-18	2,75,81,723
		2018-19	2,26,37,907
		Total	6,76,23,591
		Average	2,25,41,197
		Penalty Imposed	6,76,236
		Penalty payable	5,40,989
4	Mr Michael Jensen	2016-17	7,26,35,826
		2017-18	4,58,25,868
		2018-19	37,96,281
		Total	12,22,57,975
		Average	4,07,52,658
		Penalty Imposed	12,22,580
		Penalty payable	9,78,064
5	Mr Nilesh Patel	2016-17	8,38,62,952
		2017-18	9,50,31,320
		2018-19	3,94,75,513
		Total	21,83,69,875
		Average	7,27,89,928
		Penalty Imposed	21,83,698

		Penalty payable	17,46,958
6	Mr Pawan Jagetia	2016-17	2,31,15,080
		2017-18	4,06,28,798
		2018-19	14,50,906
		Total	6,51,34,784
		Average	2,17,31,595
		Penalty Imposed	6,51,948
		Penalty payable	6,51,948

OP-5/Authorised Person of All India Breweries Association

(IN Rs.)

6	Mr Pawan Jagetia	2016-17	48,28,758
		2017-18	54,89,295
		2018-19	68,15,622
		Total	1,71,33,675
		Average	57,11,225
		Penalty Imposed	1,71,337

ORDER

309. The Commission, in terms of Section 27(a) of the Act, directs the parties to cease and desist in future from indulging in any practice/conduct/activity, which has been found in the present order to be in contravention of the provisions of Section 3 of the Act, as detailed in the earlier part of the present order.

310. Further, under the provisions of Section 27(b) of the Act, the Commission directs the following parties to pay the following amounts of penalty:

(In ₹)

S.No.	Name of Party	Amount of Penalty	Amount in words
1.	United Breweries Ltd	7,51,83,28,719	Rupees Seven Hundred and Fifty One Crores Eighty three lacs twenty eight thousand seven hundred and nineteen only
2	SABMiller India Limited (now Anheuser Bush InbEV India Ltd)	Nil	Nil
3.	Carlsberg India Pvt. Ltd.	1,20,56,47,362	Rupees One Hundred and Twenty Crores Fifty Six Lacs Forty Seven Thousand Three Hundred and Sixty Two Only
4.	All India Brewers' Association	6,25,126	Rupees Six Lacs Twenty Five Thousand One Hundred and Twenty Six Only
5.	Mr. Kalyan Ganguly	4,95,858	Rupees Four Lacs Ninety Five Thousand Eight Hundred and Fifty Eight Only

6.	Mr. Shekhar Ramamurthy	17,00,459	Rupees Seventeen Lacs Four Hundred and Fifty Nine Only
7.	Mr. Kiran Kumar	4,79,215	Rupees Four Lacs Seventy Nine Thousand Two Hundred and Fifteen Only
8.	Mr. Perry Goes	3,09,387	Rupees Three Lacs Nine Thousand Three Hundred and Eighty Seven Only
9.	Mr. Shalabh Seth	Nil	Nil
10.	Mr. Nilojit Guha	Nil	Nil
11.	Mr. Suryanarayana Diwakaran	Nil	Nil
12.	Mr. Anil Arya	Nil	Nil
13.	Mr. Michael Norgaard Jensen	9,78,064	Rupees Nine Lacs Seventy Eight Thousand Sixty Four Only
14.	Mr. Nilesh Patel	17,46,958	Rupees Seventeen Lacs Forty Six Thousand Nine Hundred and Fifty Eight only
15.	Mr. Pawan Jagetia	6,51,948	Rupees Six Lacs Fifty One Thousand Nine Hundred and Forty Eight Only
16.	Mr. Dhiraj Kapur	3,01,533	Rupees Three Lacs One Thousand Five Hundred and Thirty Three Only
17.	Mr. Anil Bahl	4,61,870	Rupees Four Lacs Sixty One Thousand Eight Hundred and Seventy Only
18.	Mr. Mahesh Kanchan	5,40,989	Rupees Five Lacs Forty Thousand Nine Hundred and Eighty Nine Only
19.	Mr. Sovan Roy	1,71,337	Rupees One Lac Seventy One Thousand Three Hundred and Thirty Seven Only

311.The parties mentioned in the table above are directed to deposit the respective penalty amounts within 60 days of the receipt of the present order.

312.It is made clear that all information used in the present order is for the purposes of the Act and as such, in terms of Section 57 of the Act, does not qualify for grant of confidential treatment.

313.The Secretary is directed to forward certified copy of the present order to the parties through their respective legal counsel, accordingly.

11. Mr. Gopal Subramaniam, learned senior counsel in the lead case i.e. Competition Appeal (AT) No.23/2021 at the very outset submitted that the order impugned is liable to be set aside primarily on the ground that the appellants were held guilty and penalised only on the basis of leniency application filed on behalf of the applicants. He has further assailed the order on the ground that the order was passed by a Bench of the CCI which was not having any Judicial Member. According to learned senior counsel since after receipt of the report of the DG a judicial approach was to be adopted by the CCI, in absence of any Judicial Member the order may not be tested with judicial approach. On the ground of non-availability of the Judicial Member, learned senior counsel submits that the impugned order is fit to be interfered with. He

further submits that the DG has also conducted a perfunctory investigation and primarily on the basis of leniency application he submitted the report against the appellant.

12. By way of referring to order dated 31.10.2017 passed under Section 26(1) of the Act in Suo Motu Case NO.06/2017, Mr. Subramaniam, learned senior counsel argued that CCI was not authorised to pass order under Section 26(1) of the Act without making reference to Information Petition or reference made by the Government. He highlights that for conducting enquiry and passing order Section 26(1) of the Act, the CCI was required to follow provisions contained in Section 19 of the Act. He submits that the CCI would have directed enquiry either on its own motion or on receipt of information from any person or on a reference made to it by the Central Government or State Government or a statutory authority. However, the impugned order is silent on this issue. The CCI in the impugned order i.e. order dated 4.10.2021 as clarified that the matter was initiated by the Commission suo motu pursuant to the filing of an application dated 26.07.2017 under Section 46 of the Act read with Regulation 5 of LPR.

13. According to Mr. Subramaniam, learned senior counsel the CCI was not authorised to conduct enquiry and pass order under

Section 26(1) of the Act on the basis of leniency application filed under Section 46 of the Act. It was vigorously argued that leniency application filed under Section 46 of the Act is to be examined at the time of imposing penalty. In any event leniency application would not have been treated as information for initiation of enquiry. He has referred to DG report which is at running page 1952 in Volume VII of the Paper Book to show that even DG in its report while dealing with back ground has mentioned that “the Commission was in receipt of certain information which discloses cartel among four major beer manufacturing companies in the domestic market in relation to purchase, marketing, distribution and sale of beer in India in contravention of provisions of Section 3(1) read with Section 3(3) of the Act.

14. Mr. Subramaniam, learned senior counsel further submits that the manufacturing and supply of beer and its rate is within the control of the State and as such there was no reason to make an allegation that the appellants being manufacturer of beer were in any way capable to influence the rate. The excise matter is under the State list i.e. List II Schedule 7 of the Constitution of India. He has referred to running page 1972 and 1973 of Volume VII of the Paper Book to show that there are three models of

distribution of beer i.e. (i) Corporation Markets (ii) Auction Market (iii) Free/Open Market. According to him even in all the three models relating to distribution of beer directly or indirectly it is the State which influences the supply and fixation of rate. In such situation the basic allegation of either formation of cartel or influencing the market by appellants appears to be insignificant.

15. Mr. Subramaniam, learned senior counsel has specifically drawn our attention to running page 1989 Volume VII of the Paper Book at para 6.4.7 which is as under:

“6.4.7. The State Governments play a key role in setting excise duties and retail prices especially in corporation markets where the State Government itself is the only customer for brewers. Given the required nature of the beer industry, any change in price of beer has to be got approved from the State Government. This requirement of obtaining an approval from the State Government applies irrespective of the route to market models followed in a particular State. IN all the marketing models, the price increase proposals are put forth by the beer companies which are accepted by the State Government. In such States, the beer manufacturing companies are required to periodically submit their cost cards setting out the costs of production and sales, for each stock keeping unit (“SKU”) and brands, to the Excise Authorities of respective States. Pursuant to such review,

the respective cost cards (including details such as Ex-Brewery Price (“EBP”), Promotional costs, if any, etc) are approved by the State Excise authorities. Besides, in certain States, the wholesaler and retailer profit margins are also fixed by the Government authorities. Thus, the EBP, applicable excise duties, taxes, various types of fee, and wholesaler’s and retailer’s margin form part of the maximum retail price (MRP) of beer to be sold in a particular State.”

16. Learned senior counsel has also questioned the summary finding and period of cartel noticed by DG in its investigation report. Since learned senior counsel has emphasised on aforesaid finding it is apt to reproduce summary of findings as well as period of cartel discussed by DG in its report which is at running page 2160 and 2161 of Volume VIII of the Paper Book in para 6.30 and 6.31 which are reproduced hereinbelow:-

“Summary of findings

6.30 Though the investigating team has come across large number of emails communication, WhatsApp and SMS messages among the key personnel of the Ops (except OP-2) which contain anti-competitive content, the emails discussed in above paras are only illustrative in nature. Based on the documentary evidences seized during the search and seizure operations (discussed in details earlier), replies as well as the

statements of the key persons of Ops, it is found that irrespective of the type of beer market in a particular State (Corporation/Free/Hybrid), OP-1, OP-3 and OP-4 have joined hands in fixation of prices of their beer brands, with active assistance of the association/AIBA/OP-5), violating the provisions of Sec 3 of the Act. Though, OP-2 was also a member of the association, and few emails exchanges have also been found between OP-2 and other Ops, no evidence of any active coordination by OP-2 with other Ops have been found during the course of investigation.

Period of cartel

6.31 As per the prima facie order of the Commission passed u/s 26(1) of the Act, the period of cartelisation among the OPs is from March 2005 to at least upto March, 2017. The evidence collected during investigation indicate that practice of price coordination and information exchange is continuing from the year 2007, i.e. even prior to 20th May, 2009 which is the date from which Sec 3 of the Act became enforceable prohibiting anti-competitive agreements. The practice of exchange of confidential and commercially sensitive information among the Ops, including exchange of cost cards and price revision strategies in various States (directly and through AIBA), continued till 10.10.2018, the date when search and seizure operations were conducted at their premises. Therefore, the

*cartel among Ops is considered to be till the above date. **Thus, the period of the contravention of the provisions of sec 3 of the Act, in the present case, is from 20.05.2009 to 10.10.2018.***

17. Learned senior counsel has also referred to leniency application filed by the appellants which is at running Page 541 Volume 2 of the Paper Book. According to him in the leniency application it was specifically indicated that *“application is being presented in the spirit of full, true and vital disclosure for any conduct that may have potentially resulted in any alleged violation of certain provisions of the Competition Act. UB, its directors and promoters, are fully committed to ensuring compliance with the law and the instant confidential application is being filed in furtherance to the said commitment. We would like to emphasize that all of UB’s business and operations are fully compliant with law and have not resulted in any alleged violation of any provisions of the Competition Act, owing to the extremely regulated environment of this sector across each state. UB is committed to working with the Hon’ble Commission in abiding a detailed understanding of the working of the industry and the challenges under which companies operate.”* He submits that though it was an application under Section 46 of the Competition Act read with Regulation 5 of LPR in categorical

word it was indicated that appellant had committed no violation of the provisions of the Act. He has also relied on a judgement of Hon'ble Supreme Court of India, particularly para 60 in (1995) 1 SCC 574, Khoday Distilleries Ltd & Ors Vs State of Karnataka and Others and (2020) 16 SCC 615 in the matter of Rajasthan Cylinders which is as follows:

60. We may now summarise the law on the subject as culled from the aforesaid decisions.

(a) The rights protected by [Article 19\(1\)](#) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of [Article 19](#). The fundamental rights guaranteed in [Article 19\(1\)\(a\)](#) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of [Article 19](#) of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., res extra commercium, (outside commerce). There cannot be business in crime.

(c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is res extra commerce being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(d) [Article 47](#) of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and

improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. [Article 47](#) is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in [Article 47](#), except when it is used and consumed for medicinal purposes.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under [Article 19\(6\)](#) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are res commercium. The restrictions and limitations on the trade or business in potable liquor can again be both, under [Article 19\(6\)](#) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and [Article 47](#) enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

(j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.

(k) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under [Article 19\(6\)](#) place reasonable restrictions on the right to trade or business in the same in the interests of general public.

(l) Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under [Article 19\(6\)](#) of the Constitution.

(m) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage.

18. It has also been reiterated that whatever documents were filed alongwith the petition filed under Section 46 of the Act were required to be looked into before passing of order under Section 27(b) of the Act. He emphasised that leniency application is to be looked into only after an order under Section 27(b) is passed with a view to either grant 100% exemption of penalty or reduce the same in the light of provisions contained in Regulation 3, 4 and 5 of LPR.

19 Mr. Subramaniam, learned senior counsel has also referred to NATHAN T Economic Report Volume XIV which starts from Page 3907 of the Paper Book. He submits that even in this report it has been noticed that State Governments and State Corporations were having second control over the price of beer and as such they were competent to restrict other means of competition. By way of referring to NATHAN Report he further submits that declining profits in most States were evidenced that information exchanged was not driven by goal of earning normal cartel profits.

20. It has also been argued that though it was alleged that violation committed by forming cartelisation across India, however, the cases in respect of few States/UTs were noticed by the DG as well as CCI. Besides this in different State/UT there were different excise laws. Accordingly the Commission has incorrectly concluded regarding cartelisation across the India. He has given some instances of Rajasthan, Karnataka, Odisha, Maharashtra, West Bengal.

21. In sum and substance it has been argued that neither on the basis of leniency application the Commission was required to form an opinion against the appellants before passing order under Section 26(1) of the Act nor DG conducted thorough investigation

and in a perfunctory investigation report, the CCI has proceeded to pass the impugned order. Mainly it has been argued that since the appellant had filed leniency application, only based on information submitted through such application, the Commission has grossly erred in passing the impugned order. In any event according to learned senior counsel for the appellant order is not sustainable in the eye of law because of the fact that from initiation of the enquiry under Section 26(1) of the Act everything was done contrary to the statutory provisions. Without any further evidence, save and except leniency application, there was no other evidence on record to hold the appellant guilty and as such order impugned is fit to be set aside.

22. Mr. Aditya Sodhi, learned senior counsel in furtherance of argument of Mr. Gopal Subramaniam, learned senior counsel for the appellant has referred to certain statement filed before the CCI which is at running page at 3601 Volume XIII. He submits that though the appellant had referred to the judgement of Hon'ble Supreme Court in Rajasthan Cylinder case (Supra), the learned CCI ignored to notice the law laid down by the Hon'ble Supreme Court in its order. He has also referred to para 99 and 100 of

which are quoted hereinbelow:

99. The Commission observes that the printed notes of Mr. R. P. Khaitan and statements of concerned persons of OP-1 and OP-3 thereon depict exchange of commercially sensitive information amongst OP-1 and OP-3 regarding pricing of OP-1's products. However, these notes and statements do not establish that the concerned persons agreed upon the actual terms of increasing or determining prices. In other words, the prices discussion amongst OP-1 and OP-3 does not categorically establish that they fixed prices. Further, the e-mail exchange amongst OP-1, OP-2 and OP-3 shows that these OPs were monitoring market of flashlights for entry but does not establish contravention of the provisions of the Act.

100. Based on the discussion in the foregoing paras, the Commission comes to the conclusion that in the instant case though there is evidence of exchange of production/ sales data, draft press release and price information amongst OPs indicating possibility of collusion, there is hardly any evidence to show that such activities of OP-1, OP-2 and OP-3 did in fact result in determining the prices of flashlights. Further, there is no information or evidence in the case to establish that the agreement depicted by the e-mail exchange in March 2012 was acted upon by the OPs. Even OP-1, who disclosed the alleged

anti-competitive behaviour of the OPs in the instant case, expressed inability during the course of hearing to provide any definite evidence of increase in prices of flashlights due the conduct of the Ops.”

23. On aforesaid observation it was argued that exchange of certain information through email which has been taken note by the CCI was not sufficient for coming to the conclusion against the appellants. Besides arguments being advanced by Mr. Gopal Subramaniam, learned senior counsel in the lead case i.e. Competition Appeal (AT) No.23/2021, Mr. Rajsekhar Rao, learned senior counsel advanced argument in Competition Appeal (AT) No.18/2021. He emphasised that the appellant Mr. Nilesh Patel was an additional director in Respondent No.5 from 5.5.2017 to October, 2018. He has also referred to page No.349 of Volume 2 in Memo of Appeal of 18/2021 to show that by Resolution on 5.5.2017 the appellant was appointed as Additional Director and thereafter on 26th April, 2018 he became Managing Director whereas Mr Pawan Jagatia was Deputy Managing Director on 21.09.2017. He has also referred to email dated 9.01.2018 which is at Page 390 in Volume II. It was submitted by Mr. Rao that the appellant Mr.

Nilesh Patel has not played any role in the alleged cartelisation. However, Learned CCI has held him also guilty.

24. Mr Abir Roy, learned counsel has argued in Competition Appeal (AT) No.16/2021. He has adopted the argument advanced by Mr. Gopal Subramaniam, learned senior counsel. The appellant Pawan Jagatia in Competition Appeal (AT) No.16/2021 was Deputy Managing Director from 2014 to 2018 in Respondent No.4. It was submitted by Mr. Roy, learned counsel that though DG exonerated the appellant under Section 48(2) of the Act, however, learned CCI without affording any opportunity to the appellant held him responsible for violation of Section 48(1) of the Act. According to him it is contrary to the principle of natural justice.

25. Mr. Subodh Prasad Deo, learned counsel has appeared in Competition Appeal (AT) No.21 and 22/2021. He submits that since the appellant in Appeal No.22/2021 is an association there was no reason for the CCI to impose monetary penalty on him. He also reiterates that beer market was controlled by the Government though it was alleged that the appellant association was involved in Rajasthan, West Bengal, Orissa and Delhi. He has placed

reliance on the judgement of Hon'ble Supreme Court in the case of Rajasthan Cylinder.

26. Mr. Manas Kr. Chaudhury, learned counsel appearing on behalf of Respondent No.2 and 3 has supported the impugned order. He submits that the Respondent No.2 itself through its email 26.7.2017 had informed the CCI regarding cartelization in the beer market. The said communication was responded by the CCI and thereafter on 18.8.2017 the Respondent No.5 filed leniency application in terms of Regulation 5 of LPR read with Section 46 of the Act. According to Mr. Chaudhury since through leniency application Respondent No.2 has provided information regarding forming cartelization in beer market across India and also claimed the confidentiality, Learned CCI without disclosing regarding said communication had taken note and registered Suo Motu vide Case No.06/2017 after being satisfied with information showing prima facie cartelization and by order dated 31.10.2017 under Section 26(1) of the Act, the CCI rightly directed for investigation by DG.

27. Mr. Chaudhury, learned counsel has categorically referred to Regulation 4 and 5 of the LPR. He further submits that during course of investigation search and seizure was conducted on

10/11 October, 2018 in the premises of all the respondents and only thereafter appellant in Competition Appeal (AT) No.23/12021 i.e. United Breweries on 12.10.2018 filed leniency application. However, finally detailed confidential application with relevant information and evidences were filed by the appellant on 9th November, 2018. DG after investigation submitted confidential report on 28.6.2019 after completing investigation. It was argued by Mr. Manas Kumar Chaudhury, learned counsel that after confidential report was submitted by the DG completing investigation on 28.06.2019 the appellant came out with a report i.e. economic report. However, final official investigation report was communicated to the appellant on 13.12.2019. It has been argued that since DG has already concluded investigation prior to the Economic Report on which reliance has been placed by the appellant, the DG was having no occasion to consider the Economic Report and as such the DG Report cannot be faulted on the basis of facts disclosed in the Economic report. He by way of referring to Page 654 Volume III submits that as to how the appellants had influenced supply of beer to premier institutions in order to restrict Respondent No.4 to compete in the market. He has further referred to Statement of Mr. W. Ramamoorthy which

was recorded during the enquiry which is at running Page 2220 Volume VIII. It has been argued that besides exchange of communication in between the parties there are oral evidences which establishes violation of provisions contained in the Act by the appellants in view of their formation of cartelization.

28. Mr. Manish Vashist, learned senior counsel appearing for the CCI has categorically referred to Page 389 para 57 Volume II in the Memo of Appeal, Competition Appeal (AT) No.23/2021 and highlighted how Maharashtra market was influenced by the cartelization. He further submits by way of referring to Page 524 para 301 Volume II in Competition Appeal (AT) No.23/2021 that since application under Section 46 filed by Respondent No.4 was the basis for initiation of the proceeding and disclosed sufficient material showing cartelization, the Respondent No.4 was given 100% reduction in the penalty in terms of Regulation 4 of LPR. In any event the information provided by Respondent No.4 was first information and as such Respondent No.4 was entitled to 100% reduction in the penalty and was given the same. Mr Vashisth, learned senior counsel contravorting the submission of learned counsel for the appellants regarding non-availability of Judicial Member in the quorum of the CCI which passed the order,

submitted that neither there is such provision in the Act nor there is any instructions which binds the CCI to include Judicial Member for deciding the case. On the contrary he submits that this Appellate Tribunal in a case Amazon.Cot.Com NV Investment Holdings LLC Vs CCI and Others in Competition Appeal (AT) No.1/2022 has rejected such plea. He has further placed reliance on judgement of Hon'ble Delhi High Court in CADD Systems and Services Vs CCI reported in AIR 2019 Delhi 194. He submits that Section 15 of the Competition Act prescribes that no proceeding of the CCI shall be invalid merely by the reason of (a) any vacancy in, or any defect in the constitution of the Commission; or (b) any defect in the appointment of a person acting as a Chairperson or as a Member; or (c) any irregularity in the procedure of the Commission not affecting the merits of the case. Besides arguing on merits he has also filed written submissions on behalf of the Respondent/CCI. We think it appropriate to reproduce the same as follows:

"1. Introduction

1.1 In India, United Breweries (UB), Crown Beers, SABMiller, and Carlsberg are well known companies having famous beer brands such as Kingfisher, Budweiser, Haywards, Fosters, Tuborg, Carlsberg, etc. and holding around 88% share of the total volume in the domestic beer market. [DG Report paras 1.2.1-1.2.4 and 6.4.3] They have huge sales and earn large profits running into

thousands of crores. However, some of them are guilty of cartelisation and contravention of the provisions of the Competition Act ("**Act**").

1.2 The instant Appeal has been preferred against the Order dated 24.09.2021 passed by the Respondent/ CCI whereby UB (OP-1), SABMiller India Ltd. (OP-3) and Carlsberg (OP-4) were found to have been colluding with each other directly and using the platform of All India Brewers' Association ("AIBA") (OP-5), to, inter alia:

- align the prices of beer, and
- seek/ implement price adjustments in several States and Union Territories of India.

1.3 The Commission further held various employees of the OPs guilty under the provisions of Section 48(1) and/ or (2) of the Act. Crown Beers India Pvt Ltd (OP-2) and SABMiller India Ltd (OP-3) are now part of Anheuser Busch InBev.

1.4 The matter was initiated upon receipt of a lesser penalty application filed under Section 46 of the Act read with the CCI (Lesser Penalty) Regulations 2009 from OP-2 and OP-3 on 26.07.2017. Order under Section 26(1) was passed on 31.10.2017 and investigation was commenced by the DG. During the investigation, the DG conducted search-and-seizure operations on 10-11.10.2018 upon the premises of the OPs, following which lesser penalty applications were also filed by OP-1 on 12.10.2018 and subsequently by OP-4 on 15.10.2018.

1.5 After investigation, the DG submitted his report on 28.06.2019. Based on the evidence collected by the DG during investigation, and the disclosures made by the various lesser penalty applicants, the Commission found three beer companies i.e. OP-1, 3 and 4 and their employees as well as AIBA, guilty of contravention of the provisions of the Act for different periods [**Impugned Order para 288**].

1.6 Ultimately, the Commission imposed a penalty @ 0.5 times of profit for each year of the continuance of the cartel or 2% of the turnover for each year of the continuance of the cartel, whichever is higher, on OP-1, OP-3 and OP-4. This is a highly nominal penalty, given that penalty in cartel cases can be up to three times the profit or ten percent of the turnover, whichever is higher [Sec. 27(b)]. For OP-5, penalty @ 3% of the average of its turnover for the last three preceding financial years of the cartel was imposed. With regard to the individuals, the Commission imposed penalty

@ 3% of the average of their incomes for the last three preceding financial years [**Impugned Order paras 296-300**].

1.7 However, all the lesser penalty applicants got the benefit of reduction in penalty as provided under the Regulations. OP-3 and its employees, the first lesser penalty applicant, got benefit of 100% reduction in the penalty amount. OP-1 and its employees, the second lesser penalty applicant, got benefit of 40% reduction in the penalty amount. OP-4 and its employees, the third lesser penalty applicant, got benefit of 20% reduction in the penalty amount [**Impugned Order paras 301-307**].

2. Judicial Member

2.1 At the outset, the Appellants have raised the contention that there was no 'judicial member' in the CCI and hence the entire proceedings are void.

2.2 This identical contention has been rejected by this very Hon'ble Tribunal in its Order dated 13.06.2022 in Competition Appeal (AT) No. 1/2022, Amazon.com NV Investment Holdings LLC v Competition Commission of India & Ors, paras 336-338.

2.3 This contention had also been rejected by the Hon'ble Delhi High Court in CADD Systems & Services v Competition Commission of India, AIR 2019 Delhi 194, paras 16-21. These two judgements are squarely applicable to the instant case and the Appellants' contention is to be rejected.

2.4 It may further be noted that the Appellants did not take this contention either before the DG or before the CCI and participated in the proceedings without protest.

2.5 It is submitted that the composition of the Commission is as per the provisions of the Act, which does not have a requirement of 'judicial member'. Further, in any event, as per s.15 of the Act, no proceedings would be rendered invalid by reason of any vacancy or defect in the constitution of the Commission.

2.6 Moreover, the reliance of the Appellants on the judgement in Mahindra Electric Mobility v Competition Commission of India, 2019 SCC OnLine Del 8032 [**Convenience Vol. III p. 776**] is misplaced as that judgement will have to be dealt with by the appropriate authority. However, it is pointed out that the judgement was rendered prior to the enactment of the Tribunals Reform Act 2021, which clearly specifies which bodies mandatorily require a judicial member. The CCI has not been covered under the Tribunals Reform Act.

3. Lesser Penalty Application

3.1 The Appellants have contended that the Lesser Penalty Applications filed by them could not have been considered at all by the CCI while arriving at a conclusion of existence of cartel. According to them this can only be considered at the stage of determining penalty. This submission is absolutely misconceived and in fact strikes at the very core of the Lesser Penalty regime in India as well as in many other jurisdictions.

Background

3.2 Cartels are nothing but conspiracies that are hatched and implemented in secret. They are the most pernicious violation of competition law and also the most difficult to bring down because of the difficulty in obtaining direct evidence. Cartels restrict competition without producing any countervailing benefits for the consumers. A successful cartel raises prices above competitive level and reduces output. Even non-efficient undertakings are able to survive and stay in market and loot consumers. Enterprises / persons that participate in cartels are usually fully aware that their behaviour is unlawful and go to great lengths to maintain secrecy and to avoid detection.

3.3 A crucial tool in practice is to incentivise participants in cartels to 'blow the whistle' to the authority on their fellow cartel members. Such incentive is provided by immunity/ leniency/ lesser penalty programmes. Hence, competition regimes worldwide give importance to leniency/ lesser penalty programmes to attack cartels.

- Richard Whish & David Bailey, *Competition Law* (2012), p. 280

3.4 It is important to appreciate that the lesser penalty programme is beneficial both the applicant and to the Commission. Further, cartel participants are most often / generally aware that their conduct is illegal, and therefore the penalties / sanctions they might face are high to create deterrence and therefore leniency as an option is an attractive alternative. The applicant gets the benefit of a reduced penalty. The Commission gets access to material and evidence that otherwise may not have come to its attention at all. If the benefit to either party is taken away, then the entire programme will collapse.

The Indian Lesser Penalty Regime

3.5 The power to award lesser penalty is contained in Section 46 of the Act and the detailed procedure is set out in the CCI (Lesser Penalty) Regulations 2009, which are to be considered in detail.

- Section 46 provides that "The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is

vital, impose...a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:..."

- *Reg. 2(1)(b) defines an 'applicant' as "an enterprise... who is or was a member of a cartel... and submits an application for lesser penalty to the Commission".*

- *The very definition makes it clear that it is only a member of a cartel who can apply. A person who claims there is no cartel, or that he is not a member of the cartel, ipso facto cannot be an applicant under this provision.*

3.6 Cartel members who come forward with full, true and vital information / disclosures about the alleged cartel receive lenient lesser penalty. An application may be received when there are no proceedings pending before the Commission at all, or when investigation has already been ordered. Hence, 'vital disclosure' is defined as having two possible components:

- *Reg. 2(1)(i) defines 'vital disclosure' as "full and true disclosure of information or evidence... which is sufficient to enable the Commission to form a prima facie opinion about the existence of a cartel or which helps to establish the contravention of the provisions of section 3 of the Act"(emphasis supplied). The instant case is more concerned with the latter part of the provision. The information or evidence provided must help to establish the contravention. Any contention that there is no violation of s.3 cannot be considered under this provision at all.*

3.7 Reg.3 provides the condition for availing the benefit of lesser penalty under Section 46 of the Act. Reg.3(1A) provides that the applicant must also name the individuals who have been involved in the cartel on its behalf and for whom lesser penalty is sought.

3.8 Reg.5 provides the detailed, time-bound procedures for lesser penalty applications. The detailed application has to be as per the Schedule to the Regulations, which provides as much detail about the cartel as available with the applicant.

3.9 The grant of lesser penalty will be as per Reg.4, depending on the time of receipt of the application. In order to encourage enterprises to approach the Commission early, the regime is structured so that the first applicant may receive up to or equal to 100% reduction, the second may receive up to or equal to 50%, and the third may receive up to or equal to 30%. This is similar to the lesser penalty regimes in most jurisdictions. That is why the application is called a 'marker application' –it is primarily used to mark the applicant's rank in the priority of applications. It can be very brief and even be oral. Once the priority is assigned,

the applicant is given time to file its detailed application(**see Reg.5**).

3.10 In this regard, It is also pertinent to mention that as per the conditions laid out in Reg. 3 (Condition for availing lesser penalty), the applicants in their lesser penalty application also mention about discontinued/ ceased participation in the cartel.

3.11 Accordingly, it is submitted that an enterprise cannot be permitted to approbate and reprobate simultaneously –in other words, it cannot seek benefit of lesser penalty by making vital disclosures in the form of relevant information, documents and evidences and at the same time claim that there was no cartel.

3.12 It is further submitted that there is no such thing as a lesser penalty application made on a “without prejudice” basis. Adding such phrases or making some averments in the application that in fact there was no cartel, is not only contrary to the Act and Regulations, but also leads to absurdity and such an interpretation ought to be avoided. Hence such averments/ caveats are to be rejected outright and only the ‘vital disclosure’ in the application is to be considered.

Lesser Penalty Applications in the instant case

3.13 In the instant case, all three beer companies and their several individuals made applications for lesser penalty:

- United Breweries at Vol. 2 p. 559 of Competition Appeal (AT) No. 23/2021

- Carlsberg at Vol. 2 p. 340 of Competition Appeal (AT) No. 16/2021 (Pawan Jagetia)

- Crown Beers and SABMiller (not on record but can be furnished for perusal of the Hon’ble Tribunal if so directed). 3.14 By way of illustration, some relevant admissions made in these applications are set out below:

- “Against the background above, this Application relates to a cartel, as defined under Section 2(c) of the Competition Act and includes the following instances of co-ordinated ‘conduct” [**Vol. 2, p. 575 para 35**]

- “The Applicants have provided details with respect to the method of functioning of the Cartel, names and contact details of persons having direct knowledge of the Cartel, etc...” [**Vol. 2, p. 577 para 40**]

- “The coordination among the Participants took place, through various media, prior to tender/price increase application submissions. This involved discussions on the price increase being quoted by the Participants through a cost card, which is a formula based excel sheet. In some cases, this would be done by pre-deciding what the Participants desired as the maximum retail price (“MRP”) to be inserted in the cost card...” [Vol. 2, p. 585 para 48]

- “The duration of the cartel is from a period prior to 20 May 2009... and until April-May 2018” [Vol. 3, p. 673, para 81]

- “In one instance with respect to Bangalore city in particular, the Applicants had a meeting with SAB during which they discussed the marketing support (financial incentives) to be provided to certain premium institutions (13th Floor, Zero G, Zeus, E Zone, Urban Edge, FUGA, Hint, Indi and Bull and Bush, Club Nero and Unwind IVY) in Bangalore, with the objective of: (a) optimizing their spend on such institutions; and (b) restricting the placement of Carlsberg's brands at these institutions...” [Vol. 3, pp. 654-656, para 69 and relevant portion of Table 5]

- “86. The Applicants submit this Application to the Hon'ble Commission in the bona fide belief that it constitutes a "full, true, and vital disclosure"/ "vital disclosure" for the purposes of Section 46 of the Competition Act and the LPR, as it is reasonably confident that the Hon'ble Commission would not have direct evidence and details about the functioning of the Cartel but for the Applicants' Application...

87. By any measure, the following information provided herein allows the Hon'ble Commission to arrive at a finding that a breach of Section 3(3) occurred for purposes of finding a conclusive contravention of the Competition Act:

- disclosing the existence of the Cartel;
- disclosing in broad terms how the Cartel functions;
- identifying the companies involved in the Cartel;
- identifying specific individuals at those companies involved in the Cartel;
- identifying specific phone numbers and email addresses that the Hon'ble Commission and/or the DG can investigate under its broad powers pursuant to the Competition Act

88. Notwithstanding this genuinely held belief, the Applicants submit that the information contained in this Application also constitutes "full, true, and vital disclosure"/ "vital disclosure" under Section 46 of the Competition Act and the LPR as it will clearly allow the Hon'ble Commission to establish a contravention of Section 3 regarding the Cartel.

89. Accordingly, the Applicant respectfully requests the Hon'ble Commission to:

- confirm their priority status for purposes of the Regulation 5(a) of the LPR; and

- confirm that the information contained in this Application constitutes "full, true, and vital disclosure"/ "vital disclosure" for purposes of Section 46 of the Competition Act and the LPR.

90. In that regard, and as discussed in detail below, the Applicant respectfully submits that the information contained in the Application is sufficient in its own right to pass a final order regarding a contravention of Section 3(3) of the Competition Act."

[Vol. 2, pp. 683-684 paras 86-90]

- "The Applicant understands from a review of the Prima Facie Order that the alleged violation relates to Section 3(3)(a) of the Competition Act, which relates to price fixing. ...Importantly, as additional value, the Applicant has provided email evidence to assist the Hon'ble Commission and the DG to establish a violation of Section 3(3)(b) of the Competition Act, which deals with limiting production or supply in India. Further, in addition to the e-mail evidence, the Applicant has also provided an explanation of the cartel arrangement which existed between the beer companies in various States in India" **[Competition Appeal 16/2021, Vol. 2, pp. 351-352 para 9]**

- "The other enterprises, which to CIPL's knowledge are, involved in the cartel are:

(i) United Breweries Limited (**UB**);

(ii) Anheuser-Busch InBev India Limited (**ABI**);

(iii) SABMiller India Limited (**SAB**); and

(iv) All India Brewers' Association (AIBA)" **[Competition Appeal 16/2021, Vol. 2, p. 355 para 17]**

- "CIPL has been primarily interacting with UB (occasionally with SAB), to discuss pricing of beer in the States mentioned below. The pricing discussions have taken place with a view to seek increases in beer prices and proposed actions in response to extraordinary excise duty increases by various State authorities" **[Pawan Jagetia Appeal, Vol. 2, p. 370 para 49]**

- "CIPL has been interacting with its competitors (especially UB) to limit supplies of beer in Maharashtra, Orissa and West Bengal. There was a conscious agreement to curtail supply of beer in these States until the State authorities amended the excise policies" **[Pawan Jagetia Appeal, Vol. 2, p. 387 para 84]**

- "All beer companies decided to limit supply of beer in Orissa and refused to sign the agreement to supply. The curtailment of supply took place through AIBA and Mr. Shekhar Ramamurthy (UB), Mr. Michael Jensen, Mr. Shalabh Seth (SAB), Mr. Shobhan Roy (AIBA), Mr. Dhiraj Kapur, Mr. Manish Shyam, Mr. Perry Goes and Mr. Chris White had discussions around this issue." **[Pawan Jagetia Appeal, Vol. 2, p. 392 para 94]**

Statements made before the DG

3.15 In their sworn statements made on oath before the DG, the senior officers of the Appellants further admitted the violation of s. 3 of the Act.

3.16 By way of illustration, some of the relevant portion of the statements/ communications are mentioned below:

Statement of Shekhar Ramamurthy

- “These communications appear to have an anti-competitive intention / objective and are being submitted for scrutiny by the Hon'ble DG” [**Vol. 8, p. 2198 @ 2201 para 4**]
- “We would seek the Commission's favour in looking at the extreme mitigating circumstances imposed by the various State Governments on our business which led to the transgression of the competition law. ...We are committed to stay within the provisions of the law and would hope that the Commission would recognise that our transgressions happened due to extreme mitigating circumstances.” [**Vol. 8, p. 2207 @ 2220 Q.20**]

Statement of Kiran Kumar

- Q.3. Please explain the background and scope of the coordination by United Breweries with its competitors in the domestic beer industry in respect of price revisions etc. in various States and UTs. What is the role of AIBA in this conduct?
- **Ans.** The coordination between UBL and its competitors with respect to pricing in various States and UTs varies from State to State on account of beer and alcohol being a State subject and the pricing policies varying from State to State....
- Q.6. ...In the said trail of emails, Mr. Diwakaran S. of SABMiller had exchanged SABMiller's tentative list of MRP for Andhra Pradesh with you. Please explain the contents and context of the said communications.
- **Ans.** ...we had exchanged pricing proposals with SAB Miller prior to price fixation. Mr. Diwakaran had forwarded SAB Miller's proposed price list for AP to me and we would have submitted similar pricing for UBL brands. Q.7. ...In the said communication, you and Mr. Guha have exchanged commercially sensitive information regarding price revisions requested by UBL and SABMiller from Orissa State Beverages Corporation Ltd. Pl. explain the context of such communication. • **Ans.** We might have discussed the proposed prices for Orissa, and submitted the price revision requests accordingly... • Q.8. ...On 08/03/2010, Mr. Nilojit Guha of SABMiller again sought your 'views', to which you replied on the same day that you "...would like the current

differential between KFS and KBLS going forward. Please explain the context and content of the said trail of emails. •

Ans. ...Mr. Nilojit Guha and I might have discussed our respective company's prices and aligned our prices accordingly...• Q.9. ...Please explain the contents and context of the above email communication. What transpired thereafter? •

Ans. ...UBL and SAB Miller might have exchanged prospective pricing plans. It is most likely that these would have been implemented in the market.” [Vol. 8, p. 2252 @ 2254-58]

3.17 It is clear from the above that the Appellants have admitted to the existence of the cartel as well as their involvement in the same. Further, OP-4 has shown its bona fides by paying the penalty and bringing the matter to an end. It is only OP-1 which has tried to approbate and reprobate, by on the one hand making clear admissions and on the other inserting some caveats about its purported innocence. As already submitted, such caveats are to be ignored. By reading the provisions of the Lesser Penalty Regulations, the clear admissions in the Lesser Penalty Application, the evidences provided in the applications and the admissions in the communications and statements to the DG, it is clear that there was conclusive evidence of a cartel in the instant case. Moreover, none of the OPs sought to cross-examine the persons whose statements had been recorded by the DG, despite having ample opportunities to do so. This is not an Application for Compounding 3.18 The Appellant has tried to equate an application for lesser penalty with an application for compounding under the Andhra Pradesh Excise Act 1968. It is submitted that such a comparison is utterly misconceived. Firstly, the Act and the Lesser Penalty Regulations form a sui generis and complete code in themselves. Secondly, the language used in the Lesser Penalty Regulations and in the Andhra Pradesh Excise Act are totally different and not comparable. Thirdly, even if one were to consider the provisions regarding compounding of offences under the Cr. P.C., they stand on a different footing. Section 320(8) Cr. P.C. specifically provides that “The composition of an offence... shall have the effect of an acquittal of the accused...”, which is the very opposite of what the Lesser Penalty Regulations envisage. 3.19 In fact, if at all any analogy is to be drawn from criminal law, an application under the Lesser Penalty Regulations can be compared to an application for plea bargaining under s. 265B of the Cr. P.C. where the accused pleads guilty in the hope of getting a lenient sentence. It can also be compared to the tender of pardon to an accomplice under ss. 306-308 Cr. P.C. However it is submitted that even these comparisons are not absolutely identical and it is better to

interpret the Act and the Lesser Penalty Regulations as a complete code without trying to draw misleading analogies. Lesser Penalty Application is not the sole basis for decision 3.20 In an appropriate case, it may be examined whether the admissions in the lesser penalty application can be the sole basis for the decision in the case. In fact, the Appellants in their lesser penalty application invited the Commission to do precisely this [**Vol. 2, p. 684 para 90**]. 3.21 However, the Commission has not done that. It has considered the lesser penalty applications, oral and documentary evidence collected by the DG, the investigation report of the DG, oral and written submissions of the parties, and then arrived at its conclusion. The lesser penalty application is one amongst the totality of material considered by the Commission. No enterprise has been found in violation on the basis of the application alone. On the contrary, OP-2, which was also a lesser penalty applicant, has been exonerated [**Impugned Order para 288**]. This alone shows holistic and the independent approach of the Commission in arriving at the conclusion. 3.22 The Appellant has further tried to draw an analogy with Order XII Rule 6 of the CPC pertaining to judgement on admissions. It has contended that a judgement on admissions can only be passed on unqualified admissions. As explained above, firstly this analogy is misplaced. Secondly the Commission has not passed its Order based on admissions alone. Hence on both counts this argument is misconceived. This is of course without prejudice to the settled position of law that an admission is the best evidence against a party making it [See Evidence Act s. 58; *Avtar Singh v Gurdial Singh*, (2006) 12 SCC 552 paras 8-12; *Narayan Bhagwantrao v Gopal Vinayak*, AIR 1960 SC 100 paras 12 and 22].

4. Role of the State Government

4.1 The Appellants have contended that (i) sale of alcohol is highly regulated by the State Governments concerned and it is the State Government that determines the Ex Brewery Price (EBP) as well as the Maximum Retail Price (MRP); (ii) hence any coordination between the OPs could not have had any AAEC since they did not have the power to determine price of the product; (iii) the DG and CCI erred by not summoning any records or recording the statement of any State Government; and (iv) the approach of the CCI is contrary to the judgement in *Rajasthan Cylinders v Union of India*, (2020) 16 SCC 615. Each of these contentions are refuted below. 4.2 Insofar as the role of the State Government is concerned, the finding of the DG has been summarised in the Impugned Order at paras 8-10 and not seriously disputed by any party. Hence the same is not repeated herein. Further the observations of the

Commission with regard to justification by the OPs for their cartel conduct is given in para 128 of the Impugned Order, where the view of the Commission was that State cannot be held responsible for the OPs co-ordinated conduct. 4.3 However, the consequential submission of the Appellants deserves to be rejected outright. Definition of 'cartel' 4.4 Firstly, even an attempt to determine the price is sufficient to bring the arrangement within the meaning of cartel. • S. 2(c) of the Act provides that "cartel" includes "as association of producers... who, by agreement among themselves... attempt to control the production, distribution, sale or price of... goods" 4.5 While the word 'attempt' is not defined in the Act and indeed defies any precise definition, it is generally understood under the Penal Code that a person commits the offence of 'attempt to commit a particular offence' when he intends to commit that particular offence; and he, having made preparations and with the intention to commit the offence, does an act towards its commission, though such act need not be the penultimate act towards the commission of that offence [see for example *State of Maharashtra v Mohd Yakub*, (1980) 3 SCC 57 para 13]. 4.6 In the instant case, it is the admitted position of the OPs that they coordinated with each other before submitting their individual price quotes/ cost cards with the objective of obtaining the desired EBP/ MRP from the State Government and in fact submitted their quotes accordingly. At this point, the definition of 'cartel' stands satisfied. Whether the Government accepted the quotation, rejected it, or partially granted it are all irrelevant to this determination. 4.7 Indeed in every case of bid rigging, ultimately the entity inviting the tender is setting the price. If the argument of the Appellant is accepted, then there can never be a successful case against a bid rigging and / or cartel in such a case. This is an absurd interpretation. 4.8 At the cost of repetition, it may be pointed out that the moment an OP sent its desired cost card/ quote for approval to the State Government, having previously coordinated with other OPs, their agreement stood implemented. They have attempted to determine the price as they have already shared Commercially Sensitive Information with each other and the same has potential to affect independent decision making. • This is also the distinction between this case and the CCI decision in *Flashlights* [**Convenience Vol. II p. 304 @ 321, para 100**] where the CCI noted that "there is no evidence in the case to establish that the agreement depicted by the email exchange... was acted upon by the OPs". In the instant case, there is no dispute that the agreement was indeed acted upon by the OPs. Whether they were wholly or partially successful is entirely a different matter.

Res extra commercium

4.9 Secondly, it is well settled that the trade in alcohol is *res extra commercium*. There is no fundamental right to sell beer. State Governments are entitled to regulate the trade, prohibit the trade, establish a monopoly on the trade, and impose such rates of excise or other taxes as they deem fit. The mere fact that the State levies taxes or fees on the production, sale etc of liquor does not make the State a party to the said activities.

• See *Khoday Distilleries v State of Karnataka*, (1995) 1 SCC 574 at paras 1-2, 60. 4.10 Even otherwise, levy and collection of taxes is part of the sovereign function of the State, which is expressly excluded from the scope of the Competition Act [**see s. 2(h)**]

4.11 Therefore, the role of the State whether in setting the final price or in levying and collecting excise duty in the matter of beer is beyond the jurisdiction of the Commission as well as that of this Hon'ble Tribunal. It falls either in the scope of *res extra commercium* or in the exercise of sovereign function.

Sufficient direct evidence

4.12 This is the reason that the DG has not summoned any records or recorded the statement of any State Government official. Their role is beyond the scope of the instant case insofar as the determination of 'cartel' is concerned. Furthermore, the DG may not have found it necessary to do so in view of the clear evidence already on record including admissions by the representatives of the OPs. At the same time, nothing prevented the Appellants to seek such a summons to be issued, and they never availed any such opportunity.

Rajasthan Cylinders

4.13 The observation of the Hon'ble Supreme Court in *Rajasthan Cylinders* [**Convenience Vol. I, p. 73 @ 129, para 105**] that IOCL should have been summoned needs to be understood in the facts of that case. The following factors are to be especially noted:

(i) *Rajasthan Cylinders* was not a case arising out of lesser penalty applications – there was no direct primary evidence of cartelisation in the form of admissions or even emails

(ii) In *Rajasthan Cylinders* the case was built primarily from price parallelism, unlike in the instant case, which is based on direct evidence of coordination;

(iii) In *Rajasthan Cylinders* there were over eighty players spread across the country who were not even part of any common association [**Convenience Vol. I, p. 73 @ 123, para 93**]. In the instant case there were four players who controlled 88% percent of the market and came together to form the association [OP-5].

(iv) In *Rajasthan Cylinders*, there were many factors 'shrouded in mystery' (as observed by the Court) that required the statement of IOCL to clarify. There is no such mystery in the instant case.

(v) *Rajasthan Cylinders* was dealing with supply of gas cylinders, which are a public utility item and squarely within Article 19 of the Constitution. Here we are concerned with alcohol, where there is no fundamental right to trade or to form associations.

4.14 In view of the above, the role/ policy of the State Government is irrelevant and cannot be a justification for the OPs to form a cartel, as noted by the Commission [**Impugned Order Para 128 Page No. 156**]. The decision in *Rajasthan Cylinders* is entirely inapplicable to the instant case insofar as determination of ‘cartel’ is concerned. At best, the role of the State Government, the nature of the industry, etc could be mitigating factors while determining the penalty. That is the reason why the two arguments raised by the Appellants in this regard – that beer is a highly regulated industry and that State Authorities are in the position of monopsony buyers – have been noted by the Commission as a mitigation factor argued by the OPs. [**para 172**].

5. Appreciable Adverse Effect on Competition

5.1 The Appellants have contended that (i) s.3(1) and 3(3) of the Act have to be read separately; (ii) the phrase “likely to cause AAEC” finds mention only in s.3(1) and not in 3(3) and hence cannot be invoked in cartel cases; (iii) the concept of “likely AAEC” cannot be invoked in cases of past conduct; and (iv) they have rebutted the AAEC presumption through the report of their economic consultant. Each of these contentions are refuted below:
Relationship between s.3(1) and 3(3)

5.2 It is firstly submitted that all provisions of a statute need to be read together and not in isolation. In particular, s.2(b), 2(c), and 3 form part of the anti-cartel goal of the Act and cannot be read in isolation. It has already been pointed out that under s.2(c), even an attempt to determine prices is sufficient to attract the definition of cartel.

5.3 Secondly, s.3(1) and 3(2) are the main provisions dealing with anticompetitive agreements, of which cartels are the most pernicious form. S.3(1) provides that no enterprise shall enter into an agreement that causes or is likely to cause AAEC. S.3(2) provides that any agreement in contravention of s.3(1) is void. S.3(3) and 3(4) go on to deal with certain types of anticompetitive agreements, popularly known as horizontal and vertical agreements. There is a presumption of AAEC in all cases of horizontal agreements and not just cartels. There is no such presumption in cases of vertical agreements. Thus every case under s.3(3) or s.3(4) necessarily has to be read with s.3(1).

- It may be noted, though the situation does not arise here, that there may be agreements falling under s.3(1) that cannot be classified as ‘horizontal’ or ‘vertical’, which has also been noted by NCLAT in few cases.

“Likely to cause AAEC”

5.4 Thirdly, every case before the Commission will generally involve past conduct. If the concept of “likely to cause AAEC” is to be excluded from all such cases, it would render that phrase otiose. Such an interpretation is obviously to be avoided. The phrase should rather be given its natural meaning. In order to attract s.3(1), the agreement may ‘actually’ cause AAEC or be ‘likely’ to cause AAEC, irrespective of when the Commission takes up the matter. This is the view taken by the Commission in the instant case also. Collusion amongst the Ops with submission of EBP, cost cards and SKUs to State authorities discourage the reflection of true market conditions to the State and may result in a compromised price determination process. Thus, consumers may end up paying higher prices. This cartelisation in dealing with State and exchange of commercially sensitive business information between and amongst beer manufacturing companies adversely affects and is likely to adversely affect the competition in the relevant market. [**See for e.g. Impugned Order paras 23, 39, 56, 130, etc**]

Presumption of AAEC and Report of Economic Consultant

5.5 Fourthly, as mentioned above, AAEC is to be presumed in the case of cartels. It is evident from the extracted e-mail communications between and amongst the OPs that they were indulging in anti-competitive activities and were even aware about the illegal nature of the same. The OPs, inter alia, coordinated prices of their brands, collectively arranged and sent similar or identical proposals to State authorities to receive favourable outcomes, and indulged in restricting/ limiting supplies of beer in the market. It is even otherwise logical to presume AAEC in such cases. [**See for e.g., Impugned Order paras 78, 102, 109, 131, 139, etc**]

5.6 It was now for the OPs to rebut the presumption cast by s.3(3), which has to be done by leading evidence in this regard. The manner of leading evidence is clearly specified in Sections 36(2) and 41(2) of the Act and Regulations 41, 42 and 43 of the CCI (General) Regulations 2009.

5.7 Sec. 36(2) and 41(2) give the Commission and the DG the power of a Civil Court to receive evidence. The detailed procedure of filing affidavits, seeking cross examination etc is provided in the Regulations mentioned above. No attempt was made by the Appellants to provide any evidence by following these provisions.

5.8 The original report of the economic consultant is dated 28.06.2019 [**Vol. 14 p. 3907**], which is the same date on which the DG submitted his investigation report to the Commission [**Impugned Order para 6**]. It is obvious that the DG could not take note of it. Even otherwise, it was not tendered as evidence or in the form of an affidavit of evidence. At best it could be regarded as an opinion under s. 45 of the Evidence Act. It is highly doubtful

whether a statutory presumption can be displaced by such an opinion. That is the reason why the Commission has only briefly noted the submission of the report. It is merely an opinion of a consultant regarding the impact of the coordination between the parties on the final consumer price. This is not the issue in this case and is irrelevant. The question in this case was whether the OPs colluded, and exchanged information to seek price increases from the Government, to which the answer is a clear 'yes' even according to that report. Whether their attempt was wholly/ partially successful is immaterial. The report merely reiterates the contentions of the Appellants that beer is a highly regulated industry, prices are fixed by the Government, and so on, which contention has been duly taken note of and given weight by the Commission.

6. Nature of the arrangement 6.1 It has been observed in the CCI's order that between the period of 2009-18, the OPs were involved in (i) sharing sensitive business information, (ii) deciding mutually agreed Ex Brewery Price ("EBP") and Maximum Retail Price ("MRP") to be sought from respective State authorities, (iii) sharing periodical sales data to monitor the implementation of understanding among them, (iv) collectively restricting supplies as a strategy to oppose the Government policies, (v) OP-1 and OP-3 agreeing to coordinate with respect to premium institutions/ bulk buyers in Bengaluru and sharing cost and benefits by keeping the competition out, (vi) OP-1 and OP-3 colluding to decide on the quantity and rate at which they would buy second-hand bottles from the market for reuse purposes (bottles constitute the major component of the cost of production of beer), and (vii) OP-1, OP-3 and OP-4 using the platform of OP-5 to decide collectively and in forwarding their prospective quotes to respective State authorities in order to have increased bargaining power. 6.2 The e-mails recovered from the OPs further revealed that they were aware that their joint representation on pricing to the authorities and discussions on sensitive business information amongst competitors is violative of the provisions of the Act. **[Impugned Order para 29(i) and 126].**

7. State-wise Analysis : 7.1 Andhra Pradesh: Mr. Kiran Kumar of OP-1 and Mr. Shalabh Seth and Mr. S. Diwakaran of OP-3 exchanged commercially sensitive information regarding pricing proposals to be made to the State of Andhra Pradesh in 2009 and 2013 which is a compromise with the integrity of the independent bidding process and likely to stifle competition between them in the market. **[Impugned Order Para 18 Page No. 54-57 and Para 23 of Page No. 59].** 7.2 Delhi: Mr. Shekhar Ramamurthy and Mr. Perry Goes of OP-1, Mr. Shalabh Seth, Mr. Nilojit Guha and Mr. Anil Arya of OP-3, Mr. Anil Bahl, Mr. Michael Jensen, Mr. Dhiraj Kapur and Mr. Soren Lauridsen of OP-4 and Mr. Sovan Roy of OP-5, exchanged e-mails to coordinate their price revision request to the NCT of Delhi through the platform of OP-5 in 2012-2013, which understanding amongst the OPs was likely to cause

AAEC in India. [Page No. 62-68]. In an E-mail communication dated 11.05.2012, the Legal & Corporate Affairs Director of OP-4 instructed to not to discuss such sensitive information on e-mails and use conference calls or discuss in person only. **[Impugned Order Para 30 of Page No. 70]**. Thus, the anti-competitive conduct is evident from a perusal of the said emails. 7.3 Karnataka: E-mail dated 25.01.2011 sent by Mr. S. Diwakaran of OP-3 to Mr. Kiran Kumar of OP-1 regarding proposed MRPs for various brands to State authorities. Further, it was observed that prices of H5K, Knockout and KFS in the 650 ml strong bottle category were revised by OP-1 according to the proposals sent by OP-3. [Page No. 75-80, Para 42 of Page No. 81, Para 46 of Page No. 82] It was also observed that in 2015, subsequent to talks between Mr. Nilojit Guha of OP-3 and Mr. Anil Bahl of OP-4, OP-3 forwarded its proposed prices in the State to Mr. Anil Bahl of OP-4, who in turn directed his subordinates to follow the prices according to the e-mail communications sent by Mr. Nilojit Guha regarding price proposals. **[Impugned Order Para 47 of Page 82]**. 7.4 Regarding collusion between OP-1 and OP-3 for supply of beer to premium institutions in Bengaluru, it was observed that Mr. Kiran Kumar, Mr. Vivek Agnihotri, Mr. Nirmal Rajani and Mr. Chandrika Kalia of OP-1 had a meeting with Mr. S. Diwakaran of OP-3 in March 2010. They decided to optimize their spending and have equal opportunities for promotion of their brands while ensuring minimal market share to OP-4's Tuborg and Budweiser. **[Impugned Order Para 54 and 56 of Page 87]**. 7.5 Maharashtra: Mr. Kiran Kumar of OP-1 and Mr. Anil Arya of OP-3 had exchanged the breakup cost of production for different MRP levels and subsequent price revisions also carries closeness. Further, internal e-mails of OP-4 and admission of OP-1 also showed collective disruption of supply of beer in the State to protest against increase in Excise Duty. Also, personal data exchange regarding revenue and targets took place between OP-1, OP-3 and OP-4 **[Impugned Order Para 57 and 58 of Page No. 89-91]**. 7.6 Odisha: When the Odisha Government implemented Odisha Liquor Excise Policy for 2015-16 which reduced the EBP and Ex-distributor prices (EDP) by 20% and 10 % respectively. OP-1, OP-3 and OP-4 collectively decided to stop the supplies to the State Corporation. Discussions in this regard took place on OP-5's platform. [Page 110 (Email 4) Para 90 of Page 124 and Para 99 of Page 127]. Also, e-mail communications exchanged inter alia between Mr. Kiran Kumar of OP-1 and Mr. Nilojit Guha of OP-3 show price coordination between OP-1 and OP-3 **[Impugned Order Para 82 and 83 of Page 108]**. 7.7 Puducherry: OP-1, OP-3 and OP-4 coordinated the prices of their brands and even monitored the implementation of understanding among them. The Commission also observed that OP-1 and OP-4 increased their MRP of strong beer SKU to identical figure of Rs 80 in Feb-March 2017 as proposed. **[Impugned Order Para 104 of**

Page No. 134 and Para 107 of Page No. 135]. 7.8 Rajasthan: E-mail communications exchanged between OP-1, Mr. Shalabh Seth of OP-3, Mr. Michael Jensen of OP-4 and Mr. Sovan Roy of OP-5 show coordination of price increase to be asked from Rajasthan Excise Department for Strong category beer. E-mails also show that these companies even gave justifications to RSBCL, in coordination with each other. The Commission also observed that EBP of OP-1 KFS 650ml, OP-3's H5K 650 ml, and TBS 650 ml of OP-4 was identical for Rajasthan till last paisa in June 2018. In an e-mail sent in October 2016, Mr. Sovan Roy of OP-5 voiced his concern and suggested that "we should avoid getting caught". **[Impugned Order Para 111 of Page 151 and Para 116 of Page 152].** 7.9 West Bengal: OP-1, OP-3 and OP-4 coordinated prices and revised the prices of their brands accordingly. **[Impugned Order Para 134 of Page 170 Page 160 (iii)].** OP-1 and OP-4 also coordinated through OP-5 for restricting/limiting the supply of beer in the State in 2018. 7.10 From e-mail communications exchanged between Mr. Santosh Kumar of OP-1 and Mr. Shalabh Seth of OP-3 in 2009 and communication between Mr. Kalyan Ganguly and Mr. Shekhar Ramamurthy of OP-1 and Mr. Shalabh Seth and Mr. Shirish Wakchaure of OP-3 in 2010, it is also evident that OP-1 and OP-3 were coordinating on prices of second-hand bottles and discussed the number of truckloads of second-hand bottles each had been purchasing for reuse. **[Impugned Order Para 152 and 153 of Page 183].** 8. **'Nation-wide cartel'** 8.1 The Appellants have contended that the Commission has come to a finding of 'nation-wide cartel' by relying upon few words in para 293 of the Impugned Order. In this regard it is submitted that this is a misreading of the Order, which has very clearly identified that cartelisation was happening in at least eight States spread across the country **[Impugned Order para 143].** The context in which the phrase 'nation-wide' has been used by the Commission makes it clear that it was merely responding to the contention that penalty should only be imposed in those specific States and for specific periods, which has been rightly rejected by holding that there is no such restriction in the Act or in the judgement of the Supreme Court in Excel Crop Care. 9. **Penalty** "9.1 It is respectfully submitted in the instant case that the Appellant was liable for a penalty up to three times its profit for each year of continuation of the cartel. However the Commission has imposed only 0.5 times the profit. In other words, the penalty could have been as much as six times more than what has actually been imposed. The Commission has also discussed the mitigating factors in detail **[Impugned Order para 291].** 9.2 Thereafter, the Commission has also granted the OPs almost the entire leniency that could have been granted under the Act. OP-3 and its individuals, the first applicant, received reduction of 100% of the penalty. OP-1 and its individuals, the second applicant, received reduction of 40% [as against the limit of 50%]. OP-4 and

its individuals, the third applicant, received reduction of 20% [as against the limit of 30%]. OP-5 was penalised only for three years and not for the entire period. 9.3 Thus, the Commission has been reasonable and in fact rather lenient on the OPs. It is well settled that on the issue of quantum of penalty, the Appellate Court would not interfere as long as the discretion has been exercised reasonably. • Deputy Commissioner, Kendriya Vidyalaya Sangathan v J. Hussain, (2013) 10 SCC 106 paras 5, 7-10, 14, 16 • Harbans Kaur v CWT Jullundur, (1997) 2 SCC 567 paras 5-8, 10, 11 • Punjab State Civil Supplies Corp v Narinder Singh Nirdosh, (1997) 5 SCC 62 para 4

10. All India Brewers Association (AIBA) 10.1 The contention of AIBA regarding s.3(1) and 3(3) of the Act has already been dealt with above. The other contention that it is not an enterprise with turnover and hence no penalty can be imposed on it is not acceptable. This would become a very convenient route for cartels to operate through an association. Even an employee can claim that he only earns salary and does not have a turnover as such. The fact is that AIBA is providing services to its members for which it earns income through subscription fees and other sources. Hence, the word 'turnover' has to be interpreted in a manner to further the intent of the Act and should include all income. This is the decisional practice of the Commission. The predecessor of this Hon'ble Tribunal has also taken a similar view in Karnataka Film Chamber of Commerce v Kannada Grahakara Koota, 2017 Comp LR 472 (COMPAT), paras 16.23-16.24.

11. Appeals of Nilesh Patel, Pawan Jagetia and Kalyan Ganguly 11.1 These are strange cases where the Deputy Managing Director and Managing Director are each trying to shift blame on to the other, and the Company has actually paid the penalty and not filed any appeal. 11.2 Insofar as Mr. Nilesh Patel is concerned, the Lesser Penalty Application of Carlsberg specifically says that he is one of the persons involved and seeks benefit of lesser penalty for him [Vol. 2 p. 401 of Competition Appeal 16/2021]. He has tendered an affidavit affirming its contents [Vol. 10 p. 2688 of Competition Appeal 23/2021]. There are emails where he is discussing 'starving the State [of beer]'. It is hard to believe that he has no responsibility. Even though Mr. Jagetia identified him as the 'de facto managing director', he did not seek to cross examine him. Further, he contended that his name was included in the lesser penalty application 'by way of abundant caution'. However, no such thing is mentioned in the lesser penalty application or in his affidavit. It was argued for the first time during final hearing before the Commission and rightly rejected. 11.3 Insofar as Mr. Jagetia is concerned, it is submitted that no separate notice concerning s. 48(1) is required for someone who is Deputy Managing Director of the Company as he is deemed to be liable. Hence there is no violation of principles of natural justice. 11.4 A brief submission was made in the appeal of Mr. Kalyan Ganguly

that he was not given the benefit of lesser penalty. The short answer is that he never sought lesser penalty and his company also did not seek it for him. **12. Conclusion:** 12.1 The submissions of the Commission may be summarised as follows: (i) Absence of judicial member does not render the Impugned Order void; (ii) An enterprise cannot approbate and reprobate. Having filed an application for lesser penalty and admitted its violation before the DG, it cannot at the same time claim that there was no cartel at all; (iii) The lesser penalty regime cannot be equated with compounding under criminal laws or passing judgement on admissions under the civil law – it is a sui generis regime and a complete code in itself; (iv) In the instant case, the Order of the CCI is not based on the admissions alone but is based on the totality of material including the lesser penalty applications, oral and documentary evidence collected by the DG, the report of the DG, and oral and written submissions of the parties; (v) The role of the State in either fixing the price or determining the excise duty is beyond the scope of the present case and in any event not a justification for cartelisation; (vi) The observations in Rajasthan Cylinders have no application to the instant case; (vii) It is incorrect to argue that the agreement between the OPs was not implemented. In any event, even an attempt to determine the price or share commercially sensitive information such as price is sufficient to attract the definition of ‘cartel’; (viii) All provisions of the Act have to be read together and not in isolation. The contention that ‘likely AAEC’ cannot be used in cartel cases is incorrect; (ix) The report of the economic consultant is not ‘evidence’ that can be used to rebut the presumption and, in any event, does not carry the case of the Appellant any further and moreover itself establishes information exchange, discussion and coordination; (x) The observation regarding ‘nation-wide’ cartel was made in the context of imposing penalty and should not be misread; (xi) The argument of AIBA that an association cannot be penalised under the Act is not acceptable; (xii) The appeals of individual directors do not have much merit, particularly when the company has not appealed; and (xiii) The penalty in this case has been reasonable and in fact lenient and should not be interfered with. 12.2 It is respectfully submitted that all the appeals should be dismissed.”

29. After the reply learned counsel for the appellants have made submissions in rejoinder and tried to persuade that order impugned is liable to be set aside.

30. At the very outset we may record that submission made on behalf of the appellant that order impugned is liable to be set aside in the absence of Judicial Member is required to be noticed only for its rejection. At this juncture it would be appropriate to reproduce Section 8 of the Competition Act and 9 of the Competition Act which are as follows:

8 Composition of Commission. —*(1) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.*

(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

(3) The Chairperson and other Members shall be whole-time Members.

9. Selection Committee for Chairperson and Members of

Commission-*(1) The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –*

(a) the Chief Justice of India or his nominee Chairperson

(b) the Secretary in the Ministry of Corporate Affairs Member

© the Secretary in the Ministry of Law and Justice Member

(d) two experts of repute who have special knowledge

Of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy

(2) The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

31. On perusal of aforesaid provisions it is evident that nowhere it has been indicated that CCI must consist a Judicial Member. The Act does not reflect to add a Judicial Member for deciding the proceeding. Section 8 as quoted hereinabove is very much reflected on the issue. Even Section 9 quoted hereinabove does not indicate that Chairperson or Members of the Commission must be a Judicial Member rather there is no indication in the aforesaid provision for selecting Chairperson and Members of the Commission. There is a selection committee presided over by Hon'ble the CJI or his nominee besides other three Members. It is settled that if a statute speaks to do it in a particular manner that has to be done in the same manner not in other way. Since the

statute does not speak about inclusion of Judicial Member the objection raised by Learned counsel for appellant that in absence of Judicial Member order impugned is illegal has got no substance.

32. Besides hearing learned counsel for the parties we have carefully examined the materials available on record. After examining the materials and considering the arguments we are of the opinion that since the appellant had already admitted in the leniency application regarding their involvement in the cartelization the appellants were not justified to argue on merit of the case or point out any fault in the impugned order. Once they have admitted their involvement in application filed under Section 46 read with Regulation 5, they were only entitled to question the imposition of penalty. Even in our opinion such liberty was also not available to them. It is not in dispute that cartelization is termed as conspiracy. If it is case of cartelization involvement of participants can be inferred even from their conduct. However, in the present case we have noticed that CCI has dealt with number of evidences i.e. oral and documentary besides admission made by the appellants in their application filed under Section 46 of the Act. Cartelisation can be inferred from the entire conduct of the appellants with private respondents. The present case has

essentially been initiated on the basis of confession made by Respondent No.4 through its leniency application filed under Section 46 of the Act. In our opinion the Respondent No.4 has described regarding role played by all the parties and the same has further been substantiated through leniency application filed by appellants. Since it was a case of cartelization which is also termed as conspiracy, it would be profitable if we may examine provisions under Section 3(1)(2) of the Act and Section 120-A of the Indian Penal Code which are reproduced below:

Section 3 in the Competition Act, 2002

3. Anti-competitive agreements.—

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

Section 120-A- Definition of criminal conspiracy-

When two or more persons agree to do, or cause to do be done-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation-It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

32. On examination of aforesaid both provisions one thing is apparent that an agreement in between two and more than two persons or association to commit illegal act can be termed as conspiracy or cartelization. Similarly we can examine Section 46 of the Competition Act juxtapase Section 306 and Section 308 of the Code of Criminal Procedure. Those provisions are reproduced: **“Section 306(1) in The Code Of Criminal Procedure, 1973**

306(1). Tender of pardon to accomplice. [\(1\)](#) *With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.”*

Section 308(1) of Criminal Procedure, 1973

308(1) . Trial of person not complying with conditions of pardon.

(1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:

33. On examination of aforesaid provisions it can be inferred that lesser penalty application is like admission of guilt in a cartel. Once the appellants admitting their guilt made a disclosure of alleged violation of Section 3 of Act he may claim lesser penalty. After getting reduction in the penalty on the basis of leniency application under Section 46 of the Act one may not be allowed to resile from his own admission. If one resiles he may be liable to consequences and his reduction in penalty can be withdrawn. Further on examination of Section 46 of the Act, it is clear that Lesser penalty even after disclosure may not be claimed as a matter of right. It is the discretionary power vested with the CCI to be exercised in the facts and circumstances of the case.

34. In the present case it is not in dispute that on the basis of leniency application amount of penalty of appellants was reduced. Once it was reduced on the request made by appellant showing his

involvement his right to appeal on merit against order of the CCI can be deemed to have been forfeited.

35. We can draw some assistance on perusal of Section 306 and 308 of the Cr PC which has been quoted hereinabove. In a criminal case as per Section 306 an accomplice can be pardoned, however, if during trial it is noticed that he is concealing or giving false evidence he can be put on trial and proceeded further. Similarly once tendering an application under Section 46 the appellants were granted benefit of reduction in penalty, they were expected to abide by leniency application. In any event he may not be allowed to assail the order impugned on its merit.

36. Mr Gopal Subramaniam, learned senior counsel for the appellant had also argued that the order forming prima facie case and directing enquiry under Section 26(1) of the Act on the basis of leniency application was not valid. However, we are of the opinion that there is no substance in such argument particularly in view of the fact that in the present case while Respondent/Calsberg India Pvt Ltd had filed leniency application he had claimed confidentiality. Since the leniency application filed by Respondent/Calsberg India Pvt Ltd, besides admission of the Respondent in cartelisation had also disclosed involvement of

others including appellants in violation of Section 3 of the Act, the CCI was well within its jurisdiction under Section 19 of the Act to treat the leniency application as suo motu case and proceed with the same. Accordingly we are of the opinion that the ground for assailing the impugned order which we have discussed hereinabove has got no substance. The CCI has rightly considered the leniency application of Respondent No.4 as suo motu case under Section 19 of the Act and thereafter being satisfied with prima facie case directed for investigation exercising its jurisdiction under Section 26(1) of the Act.

37. So far as quantum of penalty is concerned it is evident that though the CCI was having discretion under Section 27(b) of the Act to impose penalty upto 10% average turnover for the last three financial years but in the present case besides granting benefit on leniency application the CCI has also taken lenient view and in determining the quantum of penalty @ 0.5 times profit for each year of continuance of cartel or 2% of the turnover for each year of the continuance of cartel whichever was higher. The lenient approach in imposing penalty is evident on perusal of the impugned order. Learned CCI in its order has also dealt with leniency application filed by the appellants and private

respondents and granted appropriate reduction in the penalty which is evident from para 301 to 306 of the impugned order as quoted hereinbelow:

301.Regarding lesser penalty, it is noted by the Commission that OP-3 was the first lesser penalty applicant to approach the Commission. As such, it is eligible for up to 100% reduction in the penalty amount imposed upon it. It is noted by the Commission that the order passed under Section 26(1) of the Act by the Commission was based on the disclosures made by OP-3 in its lesser penalty application. At that stage, the Commission and/or the DG had no evidence in their possession regarding cartelisation between the OPs. In its lesser penalty application, OP-3 explained the nature and modus operandi of the cartel and explained the market structure of Beer industry and the different models being followed in various States apart from submitting evidences with regard to exchange of e-mail communications between the key managerial personnel of the OPs. The information and co-operation extended by OP-3 enabled the DG to conduct search and seizure operation at the premises of the OPs and seize quality evidence. Full and true disclosures of information and evidence and continuous co-operation provided by OP-3 and its individuals, not only enabled the Commission to order investigation into the matter, but also helped the Commission in establishing contravention of the provisions of Section 3(3) of the Act by the

OPs. OP-3 and its individuals extended genuine, full, continuous and expeditious co-operation not only during the course of investigation before the DG, but also during the subsequent proceedings before the Commission. Mr. Shalabh Seth also approached the Commission independently as a lesser penalty applicant, and was granted the same marker status as afforded to OP-3. As such, the Commission decides to grant to OP-3 and its individuals found liable in terms of Section 48 of the Act viz. Mr. Shalabh Seth, Mr. Nilojit Guha, Mr. Suryanarayana Diwakaran and Mr. Anil Arya, 100% reduction in the penalty amount imposed upon them.

302. The second lesser penalty applicant before the Commission was OP-1. As the second applicant, OP-1 is eligible for up to 50% reduction in the penalty amount imposed upon it. The Commission notes that OP-1 had filed the lesser penalty application on behalf of itself and its individuals viz. Mr. Shekhar Ramamurthy, Mr. Kiran Kumar, Mr. Shalabh Seth and Mr. Perry Goes. Being the second lesser penalty applicant in the matter, OP-1 and its 3 individuals (excluding Mr. Shalabh Seth who has been found liable for the conduct of OP-3) are eligible for reduction in penalty up to 50% of the full penalty leviable.

303. The Commission notes that OP-1 and its individuals had filed the lesser penalty application after the DG had conducted the search and seizure operations on 10- 11.10.2018. By this time,

from the lesser penalty application filed by OP-3, and from the Dawn Raid, the DG already had the bulk of evidence on the basis of which cartelisation in the present matter has been established. In its lesser penalty application, OP-1 made disclosures about discussions and co-ordination between OP-1 and its competitors, inter alia, in relation to (i) prospective price increases applied for by the OPs before various State/UTs Authorities like Madhya Pradesh, Chhattisgarh, Andhra Pradesh, Telangana, Rajasthan, Delhi, Maharashtra, Odisha, Karnataka and Puducherry; (ii) basic prices for procuring old/used patent bottles; (iii) limiting/ stopping the supply of Beer for limited period in certain States like Odisha, Maharashtra, Rajasthan, West Bengal and Andhra Pradesh; and (iv) discussions on proposed financial and other incentives to premium institutions. Though much of such evidence was already in possession of the DG by the time OP-1 came forward with the same, some evidence submitted by OP-1 has been used by the Commission above to form a complete trail evidencing anti-competitive conduct of the OPs, especially in relating to co-ordination in respect of premium institutions in Bengaluru, Karnataka and with respect to purchase of old/used bottles. Further, the pricing data furnished by OP-1 during the course of investigation enabled the DG and the Commission to tabulate the MRP and EBP revisions effected by the OPs over a number of years, which has helped in mapping price parallelism in respect of Beer sold by the OPs. Moreover, from the lesser penalty

application filed by Mr. Steven Bosch, it is noted that OP-1 was contemplating to file a lesser penalty application even before the Dawn Raid was conducted.

304.As such, given the stage at which OP-1 came forward with the disclosures, the quality of information provided by OP-1, the evidence already in possession of the DG at that time, and the entire facts and circumstances of the present case, the Commission decides to grant to OP-1, Mr. Shekhar Ramamurthy, Mr. Kiran Kumar and Mr. Perry Goes, reduction in penalty to the tune of 40% of the total penalty leviable.

305.The third lesser penalty applicant before the Commission was OP-4. OP-4 has requested lesser penalty for itself and its individuals viz. Mr. Nilesh Patel, Mr. Michael Jensen, Mr. Dhiraj Kapur and Mr. Anil Bahl. The Commission notes that OP-4 had filed the lesser Suo Motu Case No. 06 of 2017 225 penalty application after the DG had conducted the search and seizure operations on 10- 11.10.2018. By this time, from the lesser penalty applications filed by OP-3 and OP-1, and from the Dawn Raid, the DG already had most of the evidence on the basis of which cartelisation in the present matter has been established. In its lesser penalty application, OP-4, while giving details of the cartel in the domestic Beer market, inter alia, explained the background of the Beer market in India and the market scenario. It explained the operation of the cartel and provided a list of the

key persons of the OPs who were involved in the cartel. As evidence, it submitted printouts of e-mail communications between the OPs. Thereafter, during investigation, OP-4 also gave further evidence in the form of e-mail communications and WhatsApp communications between the employees of the OPs. Though most of the evidence submitted by OP-4 was already in possession of the DG by the time OP-4 came forward with the same, some evidence submitted by OP-4 has been used by the Commission above to form a complete trail evidencing anticompetitive conduct of the OPs, as such providing value addition to the investigation of the DG. Further, the pricing data furnished by OP-4 during the course of investigation enabled the DG and the Commission to tabulate the MRP and EBP revisions effected by the OPs over a number of years, which has helped in mapping price parallelism in respect of Beer sold by the OPs. 306.As such, given the stage at which OP-4 came forward with the disclosures, the quality of information provided by OP-4, the evidence already in possession of the DG at that time, and the entire facts and circumstances of the present case, the Commission decides to grant to OP-4, Mr. Nilesh Patel, Mr. Michael Jensen, Mr. Dhiraj Kapur and Mr. Anil Bahl, reduction in penalty to the tune of 20% of the total penalty leviable.”

38. Besides rejection of appeal on the ground as indicated hereinabove on merits also the appeals are required to be

dismissed in view of facts and circumstances elaborated in the impugned order and Notes of the Written Submission filed on behalf of CCI which we have reproduced in the present order. In view of the facts and circumstances, we do not find merit in either of the appeals and all the appeals are dismissed without cost.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member (Technical)

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