GAHC010204292018

2024:GAU-AS:8600

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6342/2018

STAR CEMENT LTD.
(FORMERLY KNOWN AS CEMENT MANUFACTURING CO LTD) A CO
INCORPORATED UNDER THE PROVISIONS OF THE COMPANIES ACT
1956 AND HAVING ITS OFFICE SITUATED AT MAYUR GARDEN
2ND FLOOR
OPP RAJIV BHAWAN
G S ROAD
GUWAHATI- 781005
ASSAM
REP. BY MR. NIRMAL KUMAR AGARWAL
THE DEPUTY GM (FINANCE AND ACCOUNTS)

VERSUS

THE COMPETITION COMMISSION OF INDIA AND 2 ORS
THE HINDUSTAN TIMES H NO. 18-20 KASTURBA GANDHI MARG
NEW DELHI- 110001

2:DIRECTOR GENERAL
CCI
B WING
HUDCO VISHALA
14 BHIKAJI CAMA PLACE
NEW DELHI- 110066

3:JOINT DIRECTOR GENERAL
CCI
B WING
HUDCO VISHALA
14 BHIKAJI CAMA PLACE
NEW DELHI- 110066

Advocate for : DR. A SARAF
Advocate for : MR. WISE IMRAN (R1-R3) appearing for THE COMPETITION

COMMISSION OF INDIA AND 2 ORS

WP(C)/6343/2018

STAR CEMENT LTD.
(FORMERLY KNOWN AS CEMENT MANUFACTURING CO. LTD) A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE COMPANIES ACT 1956 AND HAVING ITS OFFICE SITUATED AT MAYUR GARDEN, 2ND FLOOR, OPP RAJIV BHAWAN, G S ROAD, GHY- 781005, ASSAM AND REP. BY MR. NIRMAL KUMAR AGARWAL THE DEPUTY GENERAL MANAGER (FINANCE AND ACCOUNTS) OF THE PETITIONER COMPANY

VERSUS

THE COMPETITION COMMISSION OF INDIA AND 4 ORS
THE HINDUSTAN TIMES H NO. 18-20, KASTURBA GANDHI MARG, NEW DELHI- 110001

2:ASSAM REAL ESTATE AND INFRASTRUCTURE DEVELOPERS ASSOCIATION
REP. BY ITS PRESIDENT ER. P K SHARMA
S/O- LATE K N SHARMA
LANDMARK BUILDING
GROUND FLOOR
M G ROAD
MACHKHOWA
GUWAHATI- 781009

3:RAJESH PRASAD
COMMISSSIONER AND SECRETARY
DEPTT OF FOOD CIVIL SUPPLIES AND CONSUMER AFFAIRS
GOVT OF ASSAM
ASSAM SECRETARIAT
DISPUR
GHY- 781006

4:DIRECTOR GENERAL
CCI
B WING
HUDCO VISHALA
14 BHIKAJI CAMA PLACE
NEW DELHI- 110066

5:JOINT DIRECTOR GENERAL
CCI

B WING
HUDCO VISHALA
14
BHIKAJI CAMA PLACE
NEW DELHI- 11006

Advocate for the Petitioner : DR. A SARAF, MR. P BARUAH,MR. Z ISLAM,MR. N N DUTTA,MR. P DAS,MR. S P SHARMA

Advocate for the Respondent : MR J SHARMA (R2), MR G KAKOTI (R2),MR. H J RAI (R2),MR. M A CHOUDHURY (R1, R4, R5),MR. WISE IMRAN (R1, R4, R5)

BEFORE
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

Advocates for the petitioner : Dr. A. Saraf, Sr. Adv.
Mr. P. Das.

Advocates for the respondents: Mr. T.J. Mahanta, Sr. Adv.
Mr. D. Das.
Mr. D. Nath Sr. GA for State respondent.

Dates of Hearing : 09.04.2024, 19.04.2024, 23.04.2024.

Date of Judgment : 30.08.2024.

JUDGMENT & ORDER (CAV)

Heard Dr. A Saraf, learned Senior Counsel assisted by Mr. P. Das learned counsel appearing for the petitioner. Also heard Mr. T.J. Mahanta, learned Sr. Counsel assisted by Mr. D. Das, learned counsel for respondent Nos. 1, 4 and 5 (the Competition Commission of India) and Mr. D Nath, learned Sr. Government Advocate for the State respondents.

2. In WP(C) 6343 of 2018, the petitioner company is seeking inter alia quashing of the proceedings of Case No. 77 of 2016 with Reference Case No. 4/2016

registered with the Competition Commission of India *(herein after referred to as the CCI)* and the impugned Order dated 06.12.2016 passed by the CCI under Section 26(1) of the Competition Act, 2002 *(herein after referred to as the said Act, 2002)* and the impugned Order dated 08.08.2018 passed by the CCI rejecting the application seeking review/recall of the Order dated 06.12.2016 passed by the CCI on 08.09.2016 and 15.09.2016 respectively filed by the petitioner.

3. Whereas, in WP(C) No. 6342/2018, the writ petitioner company is assailing the impugned Order dated 27.08.2018 passed by the CCI in Case No. 77/2016 with Reference No. 4/2016 imposing a penalty of Rs. 5,00,000/- (Rupees Five Lakhs) under Section 43 of the said Act, 2002 to the petitioner for non-compliance with the direction of the Director General pursuant to the impugned Order dated 06.12.2016, which is the subject matter in WP(C) 6343/2018.

4. Both the writ petitions are taken up together for hearing as the consequential action of the CCI in levying penalty upon the petitioner company for non-compliance of the direction passed by the Director General, pursuant to the direction of the CCI under Section 26(1) of the said Act, 2002 to the Director General to cause an inquiry which is under challenge in WP(C) No. 6343/2018 is challenged in WP(C) 6342/2018.

5. The facts of the instant case are as follows:-

6. The petitioner is a company registered under the provisions of the Companies Act, 1956 and is engaged in the manufacture and sell of clinker and cement.

7. On 08.09.2016, the respondent No. 2, i.e., Assam Real Estate and Developer Association filed information under Section 19(1)(a) of the said Act, 2002 before the CCI, alleging inter alia that the petitioner company alongwith some other

cement manufacturing companies have been indulging in cartelization and abuse of dominants to manipulate the prices of their respective brands of cement in North East Region of India. Accordingly, a case was registered being Case No. 77/2016. Thereafter, on 15.09.2016, similar information was filed under Section 19(1)(b) of the said Act, 2002 before the CCI by one Shri Rajesh Prasad, IAS, Commissioner & Secretary, Govt. of Assam (respondent No. 3) alleging inter alia that three major cement manufacturing companies including that of the petitioner company had been indulging in anti-competitive activities by entering into Anti-Competitive Agreements in contravention of Section 3 of the said Act, 2002. Accordingly, the said information was registered and numbered as Reference Case No. 4/2016.

8. Thereafter, the CCI by impugned Order dated 06.12.2016 in terms of Section 26(1) of the said Act, 2002 prima facie formed an opinion that the petitioner company and some other cement manufacturing companies by seeking stifle competition in the market through collusive practices have indulged in anti-competitive activities in violation of the provisions of Section 3(3) r/w 3(1) of the said Act, 2002. The CCI therefore, under Section 26(1) of the said Act, 2002 directed the Director General to cause an investigation into the matters and complete the investigation within a period of 60 days from the date of receipt of this order. It was further provided that during the course of investigation, if involvement of any other party/parties was found, the Director General shall investigate the conduct of such other party/parties and the Director General was also directed to investigate the role, if any, of other persons who were in charge of and were responsible for the alleged conduct of the petitioner or with his consent or connivance, the alleged conduct of the petitioner company took place.

9. After almost one year since the aforesaid order was passed, the Joint Director General issued a Notice on 08.12.2017 under Section 36 (2) read with Section 41(2) of the said Act, 2002, whereby the petitioner company was directed to

furnish various information as called for in the said notice. Pertinent that the Order dated 06.12.2016 however was not furnished to the petitioner company, despite the same is said to have been annexed with the said notice.

10. By letter dated 19.12.2017, the petitioner company requested the CCI to provide with additional details and till date the said details are not furnished, the timeline for submission of the requisite information be extended.

11. Thereafter, the petitioner company was served with the impugned Order dated 06.12.2016 passed by the CCI.

12. Accordingly**,** on 30.05.2018, the petitioner company filed an application for review and recall of the said impugned Order dated 06.12.2016 passed by the CCI.

13. The said application filed by the petitioner company was heard and thereafter, the CCI by review Order dated 08.08.2018 rejected the application for review/recall.

14. Aggrieved, by the aforesaid order of the CCI rejecting the review application as well as the order of the CCI drawing prima facie opinion against the petitioner company and the order of investigation thereof, the instant petition under Article 226 of the Constitution of India, i.e., WP(C) No. 6343/2018 is being filed.

15. Pursuant to the registration of the investigation, the Director General issued notice to the petitioner company under Section 36(2) read with Section 41(2) of the said Act, 2002 directing the petitioner company to furnish various information as enumerated in the said notice.

16. Though various responses and submissions are made by the petitioner, the CCI by impugned Order dated 27.8.2018, without appreciating the submission of the petitioner company in the correct perspective held that the petitioner company has not only failed to provide complete information to the Director General, but

also did not show any reasonable cause for not providing the same within the stipulated time and thereafter, by invoking the provisions of Section 43 of the said Act, 2002 imposed a penalty of Rs. 5,00,000/- (Rupees Five Lakhs) for non-compliance.

17. Aggrieved by the aforesaid Order dated 27.8.2018 passed by the CCI in Case No. 77/2016 with Reference Case No. 4/2016, the petitioner company filed the instant petition, i.e., WP(C) No. 6342/2018 under Article 226 of the Constitution of India.

18. Dr. A. Saraf, learned counsel for the petitioner company submits that the CCI Authorities without existence of a prima facie case as contemplated under Section 3 of the said Act, 2002, ordered investigation under Section 19(1) of the said Act, 2002, and therefore, it is in total contravention of the provision of the said Act, 2002. According to him, there has to be first a prima facie finding as regards the existence of the agreement entered into by enterprise or association or person or association of person and thereafter, there has to be a determination as to whether such an agreement is anti-competitive agreement within the meaning of the said Act, 2002 and once it is found to be so, other provisions relating to the treatment that needs to be given thereto shall get attracted. He further submits that as such, before issuing direction under Section 26(1) of the said Act, 2002, the CCI must be of the opinion that there exist a prima facie case and any action taken without the fulfillment of the aforesaid pre-condition, shall be totally illegal and void *ab initio*.

19. He accordingly submits that the impugned Order dated 06.12.2016 and Review Order dated 08.08.2018 are wholly illegal and without jurisdiction and thereby warrants setting aside and quashing thereof.

20. He further submits that the consequent penalty imposed upon the petitioner company as such is unwarranted.

21. Mr. T.J. Mahanta, learned Sr. Counsel for the respondent Nos. 1, 4 and 5 on the other hand submits that the instant writ petition is not maintainable, inasmuch as, the writ petition is pre-mature and the investigation directed by the CCI Authorities is based on a prima facie opinion without involving an adjudicatory process and once the Director General submits the final report, the same can be appealed before the National Company Law Appellate Tribunal under Section 53-A of the said Act, 2002. In reliance of the aforesaid submission, he relies upon the decision of the Apex Court in the case of ***Competition Commission of India vs. State of Mizoram*** reported in ***(2002) 7 SCC 73***. He further submits that the CCI Authorities does not have the power and jurisdiction for review of its order on merits. In support of the aforesaid submission, he relies upon the decision of the Apex Court, in the case of ***Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Limited & Another,*** reported in ***(2005) 13 SCC 777*** and the decision of the Delhi High Court in the case of ***Eaton Power Quality Private Limited Vs. Competition Commission of India & Ors*** reported in ***2021-DHC-2804***.

22. He further submits that the investigation being at threshold, the same is ought not to be interfered or stopped. In support of the aforesaid submission, he relies upon the following decisions-

1) ***Competition Commission of India Vs. Grasim Industries Limited,*** reported in ***(2019) SCC Online DEL 10017.***

2) ***Flipkart Internet Private Limited Vs. Competition Commission of India,*** reported in ***MANU/KA/3124/2021.***

23. He further submits by relying on the decision of the Apex Court in the case of the ***Competition Commission of India Vs. Bharti Airtel Limited & Others*** reported in ***AIR 2019 SC 113***, that the order under Section 26(1) of the said Act,

2002 being administrative in nature, the High Court ought not adjudge the validity of such an order on merits.

24. He further submits that the grounds raised by the petitioner are all on merits, which this Court is not empowered to adjudicate upon in terms of the powers conferred upon it under Article 226 of the Constitution of India.

25. I have given my prudent consideration to the submissions made by the learned counsels for the parties and perused the materials available on record including the case laws cited by them.

26. The two Orders under challenge in W.P (C) 6348/2018 are:-

(i) Order dated 06.12.2016 vide which the CCI after having received information under Section 19 (1)(a) and 19(1)(b) of the said Act, 2002 respectively, from **a)** Assam Real Estate and Infrastructure Developers Association (respondent No. 2) and **b)** Shri Rajesh Prasad, I.A.S., Principal Secretary, Food, Civil Supplies & Consumer Affairs Department, Government of Assam (respondent No. 3), alleging anti-competitive practices and cartelization carried out by Star Cements Limited (petitioner company) along with other cement manufacturers in the North-East region, caused an inquiry into the alleged contravention of the provisions contained in sub-section (1) of Section 3 formed a prima facie opinion under Section 26(1) of the Act and directed the Director General to cause an investigation into the matter.

(ii) Order dated 08.08.2018 vide which the CCI rejected the petitioner's application seeking a review and recall of the above mentioned Order dated 06.12.2016.

27. The consequent order under challenge in WP(C) No. 6342/2018 is:-

(i) Order dated 27.08.2018 passed by the CCI imposing penalty to the tune of Rs. 5,00,000/- (Rupees Five Lakhs) under Section 43 of the said Act, 2002 against the petitioner company for non-furnishing information as sought by the Director General for the purpose of conducting the investigation as directed by the impugned Order dated 06.12.2016.

28. It appears that the said impugned Orders dated 06.12.2016 and 08.08.2018 were triggered by information received from respondent No. 2 and reference from the Govt. of Assam and that the information as alleged in the said letters were that there had been cartelization amongst the cement manufacturers as the said manufacturers had simultaneously increased the price of cement within the State of Assam approximately within the same time frame and that post such synchronies price hike, the price of cement in the State of Assam became substantially higher than the price of cement sold by the same manufacturers in the neighbouring State, where the price of cement deferred between manufactures unlike the case in the State of Assam.

29. It further appears that by Order dated 27.08.2018, the petitioner company was directed to pay a penalty to the tune of Rs. 5,00,000/- (Rupees Five Lakhs) under Section 43 of the said Act, 2002 for non-furnishing information as directed by the Director General.

30. Before adverting on the merits of the case, it would be apposite to refer to the historical timelines which made it necessary to regulate competition in the market.

31. The origin of competition law in world history can be traced back to the United States first and then parallel in the European Union and India. In the 1800s, giant business houses in the United States were known as "Trusts". The four major

sections of the economy like railroads, oil, steel and sugar were controlled by these business houses. One of the famous business houses was Standard Oil Company which held a monopoly in the Oil Industry, thereby dictating the price and controlling the supply of their products. Thus, there was no choice left for the small businesses but to agree to the said price, which was increasing beyond limits at the discretion of the said company for which the market was abused, disrupted and competition was hampered. This led the then President Roosevelt to break up their trusts by enforcing the very first antitrust law, known as the Sherman Antitrust Act of 1890. Pertinent that this is the very reason for the Competition Law to be known as Antitrust Law in the United States. Subsequently, in 1914, Congress passed two more antitrust legislations in the United States namely, Federal Trade Commission Act and Clayton Act. Pertinent also that the objectives of all these antitrust legislation throughout the year had remained the same, namely, consumer welfare, economic welfare, promoting healthy competition and curving anti competitive practices.

32. The origin of competition policy in the European Union evolved as an aftermath of World War-II. It was accepted by the independent nations with mature industrialized economics as one element in the project of economic integration. The immediate goal of the project was to promote economic prosperity and was ancillary to its fundamental political purpose, which was "to substitute for age old rivalries, the merging of essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts". Pertinent that the same can be traced in two major documents, the Schuman Plan and Spaak Report.

33. After independence, India followed a centrally planned economy, thereby vesting all the power to make economic decision upon the public sector and the Government. This model was known as the Nehruvian Socialism Model (Mixed

Economy Model), also known as "Command and Control" economy. It was a mid way between an extreme market economy and socialist economy. Both the private and public sector were co-existing but there was more restriction, control and supervision on the private sector. Public sector businesses were also failing miserably and the Government was burden with debt and the restriction on the private sector made it impossible for those businesses to contribute positively to the Indian economy. Therefore, in 1991 through liberalization, privatization and globalization movement, it became imperative for India to change the ways to meet up with their international obligation and for the efficient working of the economy. The Hazari Committee in 1951 was the first Committee to undertake a study to access the viability of the Industrial Licensee Procedure under the Industries (Development and Regulation) Act, 1951. After few more studies being undertaken, it was decided that there was a need to enact a legislation to prevent the concentration of economic power leading to common detriment of the economy of the nation. Accordingly, the Monopolistic and Restrictive Trade Practices Bill was introduced in the Parliament in the year 1967, which was passed and finally came into force w.e.f. 1st June, 1970. The objectives of this Act were:-

1. Prevention of Concentration of Economic Power to the common detriment.

2. Control of Monopolist.

3. Prohibition of Monopolist Trade Practices.

4. Prohibition of Restricted Trade Practices.

34. There were many amendments made to the Act, major ones being in 1984

and 1991, The Monopolies and Restrictive Trade Practices Act, 1969 *(herein after referred to as the MRTP Act).* The MRTP Act being too restrictive in nature and after the LPG reform of 1991, there was a need to introduce a legislation which is liberal, promotes healthy competition and has positive reinforcement. The provisions of the MRTP Act were just preventative and prohibitive and the concept of MRTP Act was becoming obsolete, since India was moving from the Nehruvian model to a more liberalize form of economy. To combat all short coming of the MRTP Act, a High Level Committee on Competition Policy and Competition Law was set up by the Govt. of India in October, 1999. The Committee was appointed to advice regarding a modern competition law for the Country in line with international developments and to suggest a legislative frame work which may entail a new law or amendments related to the MRTP Act. The said Committee, having being appointed under the Chairmanship of Mr. SVS Radhavan, was popularly known as Radhavan Committee Report and the said Act, 2002 is based on a commentary of the Radhavan Committee Report, apart other recommendations. This is how the MRTP Act was repealed and the said Act of 2002 was passed and brought into force w.e.f. 31.03.2003.

35. Apt to reproduce hereunder, the statements and objects and reason of the said Act, 2002 for ready reference:-

> "*The Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift our focus from curbing monopolies to promoting competition.*
>
> *2. The Central Government constituted a High Level Committee on Competition Policy and Law. The Committee submitted its report on the 22nd May, 2000 to the Central Government. The Central Government consulted all concerned including the trade and industry associations and the general public. The Central Government after considering the suggestions of the trade and industry and the general public decided to enact a law on Competition.*

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

4. The Bill also aims at curbing negative aspects of competition through the medium of CCI. CCI will have a Principal Bench and Additional Benches and will also have one or more Mergers Benches. It will look into violations of the Act, a task which could be undertaken by the Commission based on its own knowledge or information or complaints received and references made by the Central Government, the State Governments or statutory authorities. The Commission can pass orders for granting interim relief or any other appropriate relief and compensation or an order imposing penalties, etc. An appeal from the orders of the Commission shall lie to the Supreme Court. The Central Government will also have powers to issue directions to the Commission on policy matters after considering its suggestions as well as the power to supersede the Commission if such a situation is warranted.

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

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

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

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

9. The Bill seeks to achieve the above objectives.

Statement of Objects and Reasons of Amendment Act 39 of 2007-

The Competition Act was enacted in 2002 keeping in view the economic developments that have resulted in opening up of the Indian economy, removal of controls and consequent economic liberalization which required that the Indian market be geared to face competition from within the country and outside. The Competition Act, 2002 provided for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto".

36. Reading of the said statements and objects of the said Act, 2002, amply clarifies that CCI was established mainly to prohibit trade practices which cause appreciable adverse effect on competition on market in India. In order to curb such anti competitive agreement and practices, CCI is entrusted quasi judicial powers. In pursuance with the said objects, the Director General for the CCI is empowered to conduct investigation but such powers cannot be exercised by the Director General suo moto.

37. Apt to refer to the relevant provisions of the said Act, 2002. Section 2(b)(c) of the said Act, 2002 is quoted hereunder for ready reference:-

"*2. Definitions.—In this Act, unless the context otherwise requires,—*

(a) "acquisition" means, directly or indirectly, acquiring or agreeing to acquire-

(i) shares, voting rights or assets of any enterprise; or

(ii) control over management or control over assets of any enterprise;

(b) "agreement" includes any arrangement or understanding or action in concert,-

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

[(ba) "Appellate Tribunal" means the National Company Law Appellate Tribunal referred to in sub-section (1) of Section 53-A;]

(c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;"

38. Section 3(a)(b)(c) of the said Act, 2002 is quoted hereunder for ready reference:-

"*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.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;"

39. Section 4 of the said Act, 2002 is quoted hereunder for ready reference:-

"*4. Abuse of dominant position.—[(1) No enterprise or group shall abuse its dominant position.]*

(2) There shall be an abuse of dominant position [under sub-section (1), if an

enterprise or a group]—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation. ---For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access '[in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.-- For the purposes of this section, the expression-

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

[(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to Section 5.]"

40. Section 19 of the said Act, 2002 is quoted hereunder for ready reference:-

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

on its own motion or on—

(a) 27 [receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

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

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

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

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;

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

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

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

(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;

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

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

(f) dependence of consumers on the enterprise;

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

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or

likely to have appreciable adverse effect on competition;

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

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

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

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

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

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

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

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in house production;

(e) existence of specialised producers;

(f) classification of industrial products."

41. Section 26 of the said Act, 2002 is quoted hereunder for ready reference:-

"*[26. Procedure for inquiry under Section 19.---(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under Section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:*

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under Section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub-section (3) to the parties concerned:

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

(6) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.]"

42. Section 27 of the said Act, 2002 is quoted hereunder for ready reference:-

"***27. Orders by Commission after inquiry into agreements or abuse of dominant position.-*** *Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:--*

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

[2][(b) impose such penalty, as it may deem fit which shall be not more than ten

per cent. of the average of the turnover or income, as the case may be, for the last three preceding financial years, upon each of such person or enterprise which is a party to such agreement or has abused its dominant position:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher.

Explanation 1.--For the purposes of this clause, the expression "turnover" or "income", as the case may be, shall be determined in such manner as may be specified by regulations.

Explanation 2.--For the purposes of this clause, "turnover" means global turnover derived from all the products and services by a person or an enterprise.]

(c) [***]

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) [***]

(g) pass such other [5][order or issue such directions] as it may deem fit:

[Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.]"

43. Section 53A of the said Act, 2002 is quoted hereunder for ready reference:-

"***[53A. Appellate Tribunal.**--The National Company Law Appellate Tribunal constituted under section 410 of the Companies Act, 2013 (18 of 2013) shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall--*

(a) hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under [sub-sections (6) of section 6, sub-sections (2), (2A), (6) and (9) of section 26], section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of this Act; and

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

44. Perusal of the aforesaid provisions indicates that an 'Agreement' means any kind of arrangement or understanding or action whether or not in writing. It further appears that in order to constitute a 'cartel', it includes the association of seller/distributor/manufacturer who by agreement amongst themselves limit, control or attempt to control the production, distribution, sell or price of, or trade in goods or provisions of services.

45. It further appears that the CCI is empowered to conduct enquiry into certain agreements and dominant possession of enterprise upon receipt of any information as provided under Section 19 of the said Act, 2002. However, it appears that under Section 26(1) of the said Act, the CCI before directing the Director General to cause an investigation, has to form an opinion on the basis of the information received thereof that there exist a 'prima facie' case. Therefore, it is amply apparent that only after the CCI is of the opinion that there exists a 'prima facie' case, it shall direct the Director General to cause an investigation to be made in the matter. In other words, the information received must prima facie indicates that there exist agreement which is likely to cause an appreciable adverse effect on competition within India and such agreement or decision taken by any association of enterprises, including cartel engaged in identical or similar trade of goods or provision of services which directly or indirectly determines purchase or sell prices; limit or control production, supply, market, technical development, investment or provisions of services; share the market or source of production or provisions of services by way of allocation of geographical area of market, or types of goods or services, or number of customer in the market or any other similar way; directly or indirectly result in bid rigging or collusive bidding shall be presumed to have an

appreciable adverse effect on competition. Further, it appears that under Section 4 of the said Act, 2002, there shall be abuse of dominant position if an enterprise or a group directly or indirectly imposes unfair or discriminatory condition in purchase or sell of goods or service; or price in purchase or sell of goods or service; or limits or restricts productions of goods of provision of service or market thereof; or indulges in practice or practices resulting in denial of market assess; or makes conclusion of contract subject to acceptance by other parties of supplementary obligation which, by the nature or according to commercial usage, have no connection with the subject of such contract; or uses its dominance position in one relevant market enter into, or protect, other relevant market.

46. The definition of "Appreciable Adverse Effect" though is not clarified in the said Act of 2002 but under Section 19(1) of the said Act, 2002, the factors for the determination of "Appreciable Adverse Effect" are stipulated therein. Thus, if the information received prima facie indicates existence of any such agreement or decision between the enterprises which is causing appreciable adverse effect on competition within the territorial limit of India and or indicates abuse of dominant position by any such enterprise or group or person, the CCI shall direct the Director General to cause an investigation to be made into the matter. This is consonance with the statements and objects of the said Act, 2002.

47. Pursuant such inquiry, Section 27 of the said Act, 2002 confers the CCI to pass appropriate directions/orders of penalty etc. for contravention of the provisions contained under Section 3 or Section 4 of the said Act, 2002, as the case may.

48. Section 53A of the said Act, 2002 stipulates the order or decision passed by the CCI which are appealable before the appellate Tribunal i.e. the National Company Law Appellate Tribunal (NCLAT). Apparent thus, that the orders passed

by the CCI after inquiry into agreement or abuse of dominant position, is appealable under the said provision. However, the order of the CCI directing the Director General to investigate as provided under Section 26(1) of the said Act, 2002 is not included in the said list of appealable orders. As such, such orders of the CCI directing the Director General to investigate, which is the order impugned in the present writ petition is not an appealable order under the provision of Section 53A of the said Act, 2002.

49. At this juncture, it would be relevant to refer to the said two letters of information received based on which the CCI has directed the Director General to investigate into the subject matter by the impugned Order dated 06.12.2016.

50. Para 1 to 11 of the letter dated 02.09.2016 submitted by the respondent No. 2 is reproduced hereunder for ready reference:-

> "*1. The petitioner is an association of bulk purchasers of cement as their members are in the business of construction and real estate development across the state of Assam. The members of the petitioner association are engaged in building homes including homes for the common people under the affordable housing category.*
>
> *2. The respondents above named are three dominant cement manufacturers in the North Eastern Region of India. Their operations are heavily financed by the government with the taxes paid by the common citizens; in the form of huge subsidies under the North East Investment and Industrial Policy first notified in 1997 and extended in 2007.(NEIIP).*
>
> *3. The aforesaid subsidies are as follows:-*
> *a. 100% Income tax exemption.*
> *b. Exemption of excise duty.*
> *c. Transport subsidy on transportation of raw materials and finished products.*
> *d.Manpower subsidy.*
> *e.Power subsidy.*
> *f. Genset subsidy.*
> *g. 30% Capital subsidy.*
> *h. 99% Vat exemption.*
> *i. Interest subsidy on working capital.*
> *j. 100% reimbursement of insurance premium.*

4. The combined impact of the subsidies as listed above is estimated to be giving the manufacturers a reimbursement of approx Rs 150/-(Rupees one hundred and fifty only) per bag of cement. We have filed an RTI application with the Industries Department on the exact impact of these subsidies per bag of cement and beg leave of your honour to allow us to submit the same as soon as the RTI reply is received.

5. The respondents have been leading a rampant syndicate of cartelisation by controlling and manipulating the market price of cement making it the highest in India inspite of the drawing huge subsidies as aforesaid, and violating Clause 3 and 4 of the THE COMPETITION ACT, 2002. Based on the artificial price hike effected by tactic agreements between the respondents, the entire market price gets artificially inflated as even the smaller manufacturers who may or may not be in the cartel soon follow with price hikes. We enclose herewith cash memos documenting market price of cement of the three respondent companies as of end August 2016, which clearly demonstrates that the price of all three companies are exactly the same i.e Rs 360/=(Rupees three hundred and sixty only) per bag of 50 kgs. This also documents a Rs 40/-(Rupees forty only) hike in price during the month of August 2016 and that too by exactly the same amount by all three respondent companies. The other smaller companies are now following suit with similar unfair increases in market price without any justifying reason other than cartelisation. This has loaded an additional burden of 20% to housing costs affecting the interests of a large segment of the population across the region. The petitioner being a consumer Association is therefore highly aggrieved by such acts.

6. We beg to bring to the notice of the Commission that the respondents are also transporting their products to distant regions and selling the same goods manufactured in the North East at a much lower price in neighbouring States. We have collected data from our CREDAI chapters in Siliguri(Assam West Bengal border), Kolkata, Ranchi and Patna amongst a host of other regions and submit herewith the some of the figures obtained of average price of these three brands per bag. We have also indicated the road distance of these markets from Guwahati.

Kolkata (550kms) Rs/bag	*Siliguri (500kms) Rs/bag*	*Ranchi (1100 kms) Rs/bag*	*Patna (900kms) Rs/bag*	*Guwahati (Rs/bag)*
225	*250*	*250*	*260*	*360*

The above figures proves that there is blatant cartelisation by the respondents as there is neither any impact on additional transport cost nor competition between the parties as they are selling at similar price in all neighbouring

areas outside as well as within the north east.

7. The above table also demonstrates that inspite of the liberal subsidies the price of cement has been artificially hiked by these cartels and the citizens of this part of the country has been fleeced into paying the highest rates in India.

8. We have recently had a discussion with the Dungsam Cement Corporation Ltd of Bhutan, the manufacturers of Dragon Cements, and they are willing to supply cement @ Rs 215/- Rupees two hundred and fifteen only) for ppc, landed cost at Guwahati. This despite the fact that the Government of India does not extend any subsides to them. It follows therefore, from this fact as well as the table above, that a legitimate expectation of the people of Assam and North East would be a price not more than aprox.(Rs 150/= (Rupees one hundred and fifty only) in Guwahati, for the subsidised cements.

9. National brands of cement which have already been comprehensively proved to be guilty of cartelisation and your honour has been pleased to impose a penalty on them after due process of law, are also selling their products in the North East. These brands like ACC, Ultratech, Lafarge, Ambuja, etc are not entitled to any of the subsidies under the NEIIP and have to pay a significant additional transportation costs as their factories are located in other parts of India. In this context we beg to bring to your esteemed notice that Inspite of such huge difference in production and transportation costs the selling price is only marginally higher than the subsidised variety produced by the respondents; but here again similar pricing is noticed from this category. This goes to prove that cartelisation takes place at various level. All India as well as regional level and there is understanding between all India as well as local brands. Prevailing retail market price of All India brands in Guwahati:-

Ambuja Rs per bag	*Lafarge Rs per bag*	*ACC Rs per bag*	*Ultratech Rs per bag*
380/-	*380/-*	*380/-*	*380/-*

10. The North East is a notified backward region of India and the highest cement price illegally enforced by the cartels of the respondents have, besides fleecing the consumers been a severe drain on national resources both in terms of subsidy payouts, as well as the increased cost of all infrastructure projects.

11. Under the circumstances the petitioner begs to makes the following humble prayers both in public as well as in national interest:-

(a) It is humbly prayed that your honour would be pleased to initiate proceeding against the respondents as per the Competition Act 2002.

(b) Until such time as this matter is not disposed off by your honour, direct the respondents to maintain a price range not more than the price being charged in Siliguri, which is Rs 250/- (Rupees two hundred and fifty only) per bag delivered at site.

Money receipts documenting site delivered price at Siliguri is enclosed for your kind verification.

(c) Allow the petitioner to place additional relevant facts, figures and supporting evidence before your honour as may be required to establish the truth from time to time.

(c) Impose a penalty of Rs 10,000/= crores (Rupees ten thousand crores only) on each of the respondent companies, namely Star Cements, Topcem Cements and Dalmia Cements aggregating a total of Rs 30,000/= crores (Rupees thirty thousand crores only) on account of the illegitimate gains made from the tax payers money in the form of subsidies received since inception and further illegitimate gain made by cartelisation and manipulating the market price."

51. Relevant portion of the information submitted by the respondent No. 3 by Letter dated 05.09.2016 is also reproduced hereunder for ready reference:-

"*From: Shri Rajesh Prasad, IAS*
Commissioner & Secretary, Food, Civil Supplies & Consumer Affairs

Government of Assam
Dispur

To: The Competition Commission of India
Hindustan Times Building
Kasturba Gandhi Marg
New Delhi

Subject: Information under Section 19(1)(b), Competition Act, 2002 regarding cartelization by cement manufacturing companies in Assam, in contravention of Section 3 of the Act.

Sir,

With reference to the above, I have the honour to inform you that it has come to the notice of the Government of Assam that three cement manufacturing companies in Assam, namely M/s. Calcom Cement India Ltd. (Dalmia Brand), M/s. TOPCEM India (Topcem Brand) and M/s. Star Cement Ltd. (Star Brand)

have been indulging in anti- competitive activities by entering into anti-competitive agreements, in contravention of Section 3, Competition Act, 2002.

These three companies, which together have a market share of 60% in Assam, have suddenly increased the price of cement substantially through cartelization, without any corresponding increase in costs of inputs like limestone, clinker, fly ash etc.
In spite of stable input cost and no demand-supply mismatch, these three major cement manufacturing companies i.e. M/s. Calcom Cement India Ltd. (Dalmia Brand), M/s. TOPCEM India (Topcem Brand) and M/s. Star Cement Ltd. (Star Brand) formed a cartel in August, 2016 and all of them increased their billing prices per bag of their respective brands of cement by an amount ranging between Rs. 20/- to Rs 40/- per bag, clearly indicating an anti-competition agreement under Section 3(3)(a) of the Act. This apart, these three aforementioned companies also resorted to reduction in post invoice trade discount in such a manner from 17/08/2016 onwards that there is net increase of about Rs. 40/- per bag of cement.

This may be illustrated by the evidence given below in regard to the net sale prices of their cement in Guwahati, collected with great difficulty as the companies as well as the dealers have not cooperated, refusing to give copies of the bills :-

1. M/s. Calcom Cement India Ltd. (Dalmia Brand) billed a bag of cement for Rs. 347/- on 16/08/2016. This was increased to Rs. 375/- per bag on 17/08/2016. (The details of movement of prices between 1/08/2016 and 30/08/2016 has been shown in Annexure I enclosed herewith which is supported by relevant Invoices in Annexure II.)

2. M/s. TOPCEM India (Topcem Brand) billed a bag of cement for Rs. 325/- on 16/08/2016. This was increased to Rs. 365/- per bag on 17/08/2016. Similarly the MRP of a bag of cement which was Rs. 345/ on 16/08/2016 was increased to Rs. 385/-on 17/08/2016. (The details of movement of prices between 1/08/2016 and 30/08/2016 has been shown in Annexure I enclosed herewith which is supported by relevant Invoices in Annexure III.)

3. M/s. Star Cement Ltd. (Star Brand) billed a bag of cement for Rs. 345/- on 16/08/2016. This was increased to Rs. 366/per bag on 17/08/2016. Similarly the MRP of a bag of cement which was Rs. 370/- on 16/08/2016 was increased to Rs. 400/- on 17/08/2016. (The details of movement of prices between 1/08/2016 and 30/08/2016 has been shown in Annexure I enclosed herewith which is supported by relevant Invoices in Annexure IV.)

A market study of whole sale prices prevailing in Siliguri (West Bengal) market during the month of August, 2016 reveals that the same bag of Topcem /Dalmia /Star Cement was available in the open market at a much lower price in Siliguri

(West Bengal) as compared to the prevailing prices of the same in Assam. Moreover after 16/08/2016, though the prices in Assam were raised but the same remained more or less constant in Siliguri.

For example, a bag of TOPCEM cement was billed at Rs. 310/- on 16/08/2016 in Siliguri while the same was billed at Rs. 325/- in Guwahati. Again on 17/08/2016 a bag of TOPCEM cement was billed at Rs. 310/- in Siliguri whereas the same was billed at Rs. 365/- in Guwahati. (Annexure V)

Selling cement in Siliguri at prices lower than those in Guwahati by all the three companies, in spite of additional transportation costs, establishes the collusion and cartelization between the companies, when viewed in the light of facts given below:

All these three brands are being manufactured in Assam, and the manufacturers have been granted Mega Status (granted for investment of more than Rs 100 crore, or employing more. than 1000 persons) and are, therefore, enjoying a host of incentives including VAT and CST exemption, Entry Tax exemption and power subsidy etc). These brands are also enjoying various benefits under NEIIPP 2007 like capital subsidy, transport subsidy, interest subsidy, insurance subsidy, Excise Duty exemption, Income Tax exemption etc.

It may be noted that these units of Assam save Rs. 40 to Rs. 45/- per bag on account of VAT exemption alone, in respect of sale of cement effected in Assam; whereas if they sell such cement in West Bengal they are liable to pay such VAT; and in addition, as mentioned above, the cement manufacturers have to incur substantial transportation costs for carrying cement from Assam to West Bengal. The pricing data given above, therefore, clearly establishes cartelization.

To further substantiate our point of view, we would like to submit that the input cost of cement, transportation, electricity duty, labour costs etc have remained unaltered for last six months to one year. Further, in respect of demand-supply issue, the supply is found to be more or equal to the demand of the state and other parts of India and North Eastern states. Moreover, due to local availability of raw material and close proximity to market, the logistical costs for both raw materials and finished goods are also substantially lower for the local cement manufacturing companies vis-a-vis the out-of-state manufacturing companies, with the local cement manufacturers also reaping the benefits of substantial tax incentives and other subsidies as mentioned earlier. In spite of all such favourable factors the consumers of the State have been forced to pay higher prices of cement compared to the other states.

It is further submitted that these cement companies are deliberately restricting or limiting their production by resorting to the utilization of less than half of

their installed capacity and/or indulging in chocking up supply in the market, in contravention of Section 3(3)(b) of the Act.

Meanwhile the entire matter has got wide range of public scrutiny with both electronic and print media paying due attention to the matter. (Annexure VI)

In view of the above, this information about contravention of Section 3, Competition Act, 2002 is being submitted under Section 19(1)(b) of the Act, for kind consideration, investigation, and appropriate orders by the Competition Commission of India."

52. Based on the aforesaid two letters of information, the CCI by the impugned Order dated 06.12.2016 directed the Director General to cause an investigation into the matter and to complete the investigation within a period of 60 days from the date of receipt of this order under provision of Section 26(1) of the said Act, 2002. Relevant paragraphs of the said impugned Order dated 06.12.2016 is also reproduced hereunder for ready reference:-

"*5. The Informants appear to be aggrieved by the conduct of the OPs in simultaneously raising the prices of their respective brands of cement in North Eastern states during August, 2016 without any corresponding increase in Input costs for manufacturing cement or demand-supply mismatch in the market of cement in North Eastern states. The Informants have averred that even though the OPs are availing huge subsidies under NEIIPP for cement production in North Eastern states, they are not passing on the benefits of the same to the consumers. Rather, they are charging higher prices per bag of cement for their respective brands compared to the prices at which they are selling the same bag of cement in neighbouring states such as West Bengal, Bihar, etc. Consequently, the Informants have alleged cartelisation by the OPS in the determination of their sale prices of cement and limiting of production of cement in North Eastern states in contravention of the provisions of Sections 3(3)(a) and 3(3)(b) of the Act.*

6. The submissions of the Informants in support of their allegations of cartelisation by the OPs and the observations of the Commission upon the same are highlighted below:

(i) OPs simultaneously raised prices of their respective brands of cement in tandem on 17.08.2016. From the price data submitted, as compiled from the tax invoices of OPs during different dates in the month of August, 2016, it is observed that on 17.08.2016, OP 1 has raised the net sale price of per bag of

cement from Rs. 345/- to Rs. 366/-, OP 2 has raised the net sale price of per bag of cement from Rs. 325/- to Rs. 365/-, and OP 3 has raised the net sale price of per bag of cement from Rs. 347/- to Rs. 375/-,

(ii) OPs are selling cement at lower prices in the neighbouring states compared to the North Eastern states. From the cement prices data collected from CREDAI chapters in Kolkata, Siliguri, Ranchi and Patna as stated in the information, it is observed that the OPs are charging higher prices per bag of their respective brands of cement in North Eastern states as compared to the neighbouring states despite incurring additional costs for transportation of cement to those states. From the informations, it is observed that on 16.08.2016, the billing price of a bag of cement of OP 2 was Rs. 310/- in Siliguri whereas it was Rs. 325/- in Guwahati. Similarly, the billing price of a bag of cement of OP 2 on 17.08.2016 was Rs. 310/- in Siliguri and the same was Rs. 365/- in Guwahati.

(iii) From the submissions of the Informants, it is also observed that other major cement brands like ACC, Ultratech, etc. which are not enjoying any subsidies under NEIIPP and incurring additional transportation costs as their factories are located in other parts of the country are selling cement at marginally higher prices than the OPs in the North Eastern states.

7. Based on the above observations, the Commission is of the view, that there exists a prima facie case and there was meeting of minds amongst the OPs to determine the price of cement in the North Eastern states. The Commission observes that all the OPs have simultaneously raised the prices of their respective brands of cement on 17.08.2016 and simultaneously reduced the prices on 22.08.2016. There seems to be no economic logic for such simultaneous increase and reduction in prices by the OPs on same dates.
There may be certain market situations which require change in the price of a product by the producers, but changing the prices together on the same date shows some concerted action by the OPs. It is also observed that the prices of OPS followed a similar trend during the month of August, 2016 indicating a parallel movement of prices.

8. Further, from the analysis of the regional and monthly average cement prices data collected from CRISIL research for the period August, 2015 to August, 2016, the Commission observes that the average cement price in the North East region has been higher than the price prevailing in the North, West and Central regions of India in most of the months during the said period. The Commission also notes that in the month of August, 2016, except for North- East region where there was a rise in cement price vis-a-vis the previous month, all other regions in India witnessed a fall or stability in the cement prices vis-a-vis the previous month. In fact, In North East region, there was a falling trend in the cement prices beginning from May, 2016 which was reversed only in August, 2016. Thus, the Commission is of the opinion that the OPs have prima facie

indulged in cartelisation in contravention of the provisions of Section 3(3) of the Act.

9. In view of the foregoing, the Commission is of the prima facie opinion that the OPs, by seeking to stifle competition in the market through the above said collusive practices, have indulged in anti-competitive activities in violation of the provisions of Section 3(3) read with Section 3(1) of the Act."

53. Reading of the impugned Order dated 06.12.2016 makes it apparent that the Director General has been directed to cause an investigation wherein no right of the parties is adjudicated. However, the basic requirement under the provisions of Section 26(1) of the said Act, 2002 requires the CCI Authorities to form a 'prima facie' opinion as regards existence of anti competitive activities in violation of the provision of Section 3 and/or 4 of the said Act, 2002 before directing investigation into the matter. Therefore, the mandate of law is that it is mandatory for the CCI to arrive at a prima facie opinion upon reading the information received as whether if the said information is taken on its face value, to be true, the provisions of Section 3 and/or Section 4 of the said Act, 2002 are being contravened or not. Therefore, an investigation cannot be directed by the CCI mechanically and/or in a routine manner. Though the CCI is not required to conduct a mini trial or determine the reasonableness or credibility of the information received before directing such investigation, however, it is a condition precedent for the CCI for directing investigation that the information received discloses prima facie contravention of Section 3 and/or Section 4 of the said Act, 2002.

54. Therefore, the issue that arises at the outset is whether at the stage of the CCI directing investigation under Section 26(1) of the said Act, 2002, a writ petition under Article 226 of the Constitution of India is maintainable.

55. Reiterated that, the CCI at this stage of directing the investigation under

Section 26(1) of the said Act, 2002, is obliged under the statute to apply its mind upon the information received and take a decision as regards the existence of a prima facie case showing contravention of Section 3 and/or 4 of the said Act, 2002. Therefore, it is imperative for the CCI to exercise the powers of directing investigation under Section 26(1) of the said Act, 2002 strictly in accordance with the parameters provided therein. Certainly CCI is not adjudicating the information received at this stage and is merely directing an investigation thereof. However, since the manner of exercising such power/jurisdiction is provided under the statute itself, such power/jurisdiction has to be strictly followed in the manner provided thereof and any other manner is statutorily forbidden. Reiterated that existence of prima facie case is *sine qua non* for the CCI to exercise power/jurisdiction under Section 26(1) of the said Act, 2002. Therefore, any investigation directed under Section 26(1) of the said Act, 2002 without the existence of the prima facie case is totally without jurisdiction. In fact, the CCI derives jurisdiction to direct investigation only upon the fulfillment of the said condition precedent. This Court, under Article 226 of the Constitution of India in the considered opinion of this Court is certainly empowered to intervene if the investigation is directed under Section 26(1) of the said Act, 2002 without the existence of the prima facie case. The issue of maintainability of writ petition under Article 226 of the Constitution of India against an Order passed under Section 26(1) of the said Act, 2002 is accordingly decided.

56. Reference is made to the decision of the Apex Court in ***Competition Commission of India Vs. Bharati Airtel Limited & Others*** reported in ***(2019) 2 SCC 521***, wherein the Apex Court was considering the question as to whether a writ petition challenging the order passed under Section 26(1) of the said Act, 2002 was maintainable.

57. Para 115 - 120 of the said decision is reproduced hereunder for ready reference:-

> "*115. Here comes the scope of judicial interference under Article 226 of the Constitution. As per the RJIL as well as CCI, the High Court could not have entertained the writ petition against an order passed under Section 26(1) of the Competition Act which was a pure administrative order and was only a prima facie view expressed therein, and did not result in serious adverse consequences. It was submitted that the finding of the High Court that such an order was quasi-judicial order is not only erroneous but it is contrary to the law laid down in SAIL14. The respondents, on the other hand, have submitted that the judgment in the above case had no application in the instant case as it did not deal with the sector that is regulated by a statutory authority. Moreover, such an order was quasi-judicial in nature and cannot be treated as an administrative order since it was passed by CCI after collecting the detailed information from the parties and by holding the conferences, calling material details, documents, affidavits and by recording the opinion. It was submitted that judicial review against such an order is permissible and it was open to the respondents to point out that the complete material, as submitted by the respondents, was not taken into consideration which resulted in an erroneous order, which had adverse civil consequences inasmuch as the as the respondents were subjected to further investigation by the Director General.*
>
> *116. We may mention at the outset that in SAIL, nature of the order passed by CCI under Section 26(1) of the Competition Act [here also we are concerned with an order which is passed under Section 26 (1) of the Competition Act] was gone into. The Court, in no uncertain terms, held that such an order would be an administrative order and not a quasi-judicial order. It can be discerned from paras 94, 97 and 98 of the said judgment, which are as under (SAIL case14, SCC pp. 785 & 787)*
>
> > *"94. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi-judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgment of this Court in CCT v. Shukla & Bros, wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi- judicial and administrative bodies.*

97. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as aforereferred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well-reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well-reasoned.

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

117. There is no reason to take a contrary view. Therefore, we are not inclined to refer the matter to a larger Bench for reconsideration.

118. It was, however, argued that since SAIL was not dealing with the telecom sector, which is regulated by the statutory regulator, namely, TRAI under the TRAI Act, that judgment would not be applicable. Merely because the present case deals with the telecom sector would not change the nature of the order that is passed by CCI under Section 26(1) of the Competition Act. However, it raises another dimension. Even if the order is administrative in nature, the question raised before the High Court in the writ petitions filed by the

respondents touched upon the very jurisdiction of CCI. As is evident, the case set up by the respondents was that CCI did not have the jurisdiction to entertain any such request or information which was furnished by RJIL and two others. The question, thus, pertained to the jurisdiction of CCI to deal with such a matter and in the process the High Court was called upon to decide as to whether the jurisdiction of CCI is entirely excluded or to what extent CCI can exercise its jurisdiction in these cases when the matter could be dealt with by another regulator, namely, TRAI. When such jurisdictional issues arise, the writ petition would clearly be maintainable as held in Barium Chemicals Ltd. v. Company Law Board and Carona Ltd.

119. In Carona Ltd. this Court held as under: (SCC pp. 569 & 571, paras 26-28 & 36)

> *"26. The learned counsel for the appellant Company submitted Eastern Book Company v. D.B. Modak, that the fact as to "paid-up share capital" of rupees one crore or more of a company is a "jurisdictional fact" and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to "paid-up share capital" of a company can be said to be a "preliminary" or "jurisdictional fact" and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the "jurisdictional fact" did not exist and the Rent Act was, therefore, applicable.*
>
> *27. Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.*
>
> *28. In Halsbury's Laws of England (4th Edn.), Vol. 1, Para 55, p. 61; Reissue, Vol. 1(1), Para 68, pp. 114-15, it has been stated:*
>
> *'Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not*

and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive.' The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal.

36. It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue."

120. Thus, even when we do not agree with the approach of the High Court in labelling the impugned order as quasi-judicial order and assuming jurisdiction to entertain the writ petitions on that basis, for our own and different reasons, we find that the High Court was competent to deal with and decide the issues raised in exercise of its power under Article 226 of the Constitution. The writ petitions were, therefore, maintainable."

58. Thus, the question that arises for determination now is how to adjudge whether a "prima facie" case existed or not for the CCI to direct investigation by the Director General.

59. The test is to take the information received at its face value and examine whether there has been any prima facie violation of Section 3 and/or 4 of the said Act, 2002. By applying the aforesaid test, if it appears that a prima facie case exist, this Court shall not thereafter go into the merits of the matter. However, if it appears that no prima facie case exists, then in such a situation, this Court for the ends of justice, is entitled to quash such proceedings.

60. The power of this Court to quash such registration of proceeding for investigation is akin to the powers of this Court under Section 482 of Cr.PC for quashing FIR/complaints, parameters of which has been well settled by the Apex Court in the case of ***State of Haryana & Others Vs. Bhajan Lal & Others,*** reported in ***(1992) Supp(1) SCC 335***.

61. The relevant portion of the ***State of Haryana & Others Vs. Bhajan Lal & Others (Supra)*** is reproduced hereunder for ready reference:-

> "*102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> *(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
>
> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
>
> *(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*
>
> *(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
>
> *(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

62. Thus, the order under Section 26(1) of the said Act, 2002 being merely a prima facie opinion directing the Director General to carry the investigation, the

Writ Court under Article 226 of the Constitution of India shall not adjudge the validity of such order on merits. However, the Writ Court is competent to test the information on the face of it to satisfy itself as whether a prima facie case exist for the CCI to direct investigation under Section 26(1) of the said Act, 2002 or not.

63. Having laid down the test as hereinabove, what is relevant to be seen is that, if the information received by the CCI even if taken at its face value, then, whether there exist some 'agreement' or 'understanding' between the various cement manufacturers including the petitioner company to determine the price of cement in contravention of Section 3 and/or 4 of the said Act, 2002.

64. The sum and substance of the information received under Section 19(1)(b) of the said Act, 2002 regarding cartelization by the cement manufacturing companies in Assam in contravention of Section 3 of the said Act, 2002 are as follows:-

i) Three cement manufacturing companies in Assam, namely, M/s Calcom cement India Limited (Dalmia Brand), M/s TOPCEM India (Topcem Brand) and M/s Star Cement Limited (Star Brand i.e. petitioner company), which together have a market share of 60% in Assam have suddenly increased the price of cement substantially through cartelization without any corresponding increased like limestone, clinger, fly ash etc.

ii) In spite of stable in put cost and no demand supply mismatch, these three cement manufacturing companies formed a cartel in August 2016 and all of them increased their billing prices per bag of their respective brands of cement by amount ranging between Rs.20/- to Rs.40/- per bag, clearly indicating anti-competition agreement under Section 3(3)(a) of the Act 2002.

iii) This apart, these three companies also resorted to reduction in post in voice trade discount in such a manner from 17.08.2016 onwards that there is

net increase of about Rs. 40/- per bag of cement.

(iv) M/s Calcom Cement India Limited billed a bag of cement for Rs. 347/- on 16.8.2016. This was increased to Rs. 375/- per bag on 17.8.2016.

v) M/s Topcem India billed a bag of cement for Rs. 325/- on 16.08.2016. This was increased to Rs.365/- per bag on 17.08.2016. Similarly, the MRP of a bag of cement which was Rs. 345/- on 16.08.2016 was increased to Rs. 385/- on 17.08.2016.

vi) M/s Star Cement Limited (petitioner Company) billed a bag of cement of Rs. 345/- on 16.08.2016. This was increased to Rs.366/- per bag on 17.08.2016. Similarly, the MRP of a bag of cement which was Rs. 370/- on 16.08.2016 was increased to Rs. 400/- on 17.08.2016.

vii) A market study of whole sale prices prevailing in Siliguri (West Bengal) market during the month of August 2016 reveals that the same bag of Topcem/ Dalmia/ Star cement was available in the open market at a much lower price.

viii) Selling cement in Siliguri at prices lower than those at Guwahati by all the three companies, in spite of additional transportation cost, establishes the collusion and cartelization between the companies.

65. It further appears that the CCI mainly on the three grounds stated below as recorded in paragraph No. 5 of the impugned Order dated 06.12.2016 directed the impugned investigation under Section 26(1) of the said Act, 2002.

(i) The Petitioner and other two cement companies simultaneously raised the prices of their respective brands of cement in North Eastern States during August 2016 without any corresponding increased in the inputs cost of the manufacturing cement or demand-supply mismatch in the market of cement in North Eastern states.

(ii) Though the Petitioner and other two cements companies were availing huge subsidies under NEIPP for cement production in North Eastern States, they were not passing on the benefits of the same to the consumers.

(iii) The three cements companies were charging higher prices per bags for their respective brands compared to the prices at which they were selling same bags of cement in the neighbouring States such as West Bengal, Bihar etc. and thereby the three companies were alleged cartelization in the determinations of sale price of cement and limiting of production of cement in North Eastern States in contravention of the provisions of Sections 3(3)(a) and 3(3)(b) of the said Act, 2002.

66. In fact, in the review Order dated 08.08.2018, the CCI in paragraph No. 4 stated as under:

"In Reference Case No. 04 of 2016, it has been alleged that the Ops had formed cartel and suddenly increased the prices of their respective brands of cement substantially in the month of August, 2016 in Assam. It was further averred that despite stable input costs and no demand-supply mismatch, Ops have increased their billing prices per bag by an amount ranging between Rs. 20 to Rs. 40."

67. Thus, it appears that the three cement companies were alleged to have formed a cartel for increasing of sale price of cement per bag, which was by an amount ranging between Rs. 20/- to Rs. 40/-. In fact in the impugned Order dated 06.12.2016 in paragraph No. 6(i) the CCI observed as under:

"Ops simultaneously raised prices of their respectives brands of cement in tandem on 17.08.2016. From the price data submitted, as compiled from the tax invoices of Ops during different dates in the month of August, 2016, it is observed that on 17.08.2016, OP 1 has raised the net sale price of per bag of cement from Rs. 345/- to Rs. 366/- and OP has raised the net sale price of per bag of cement from Rs.347/- to Rs. 375/-."

68. Apparent thus, that the cement company namely Calcom Cement Limited increased its prices by Rs. 21/- i.e. Rs. 345/- to Rs. 366/- whereas, the another cement Company namely, Topcem Cement Limited raised the sale price of cement bag by Rs. 40/- i.e. from Rs. 325/- to Rs. 365/- and the petitioner raised the sale price of cement bag by Rs. 28/- i.e. from Rs. 347/- to Rs. 375/-. As such, there was no uniform increase in the prices of cement by the three cement companies. Whereas, one cement company increase the price by Rs. 21/-, the second company increase the price by Rs. 40/- and the petitioner increase the price by Rs. 28/-. The prices of the cement after increase is also stated to be different i.e. Rs. 365/- and Rs. 375/-. When there was no uniform rising of the prices by the three cement companies, it cannot be said by any stretch of imagination that there was any agreement entered into by three cement companies, which directly or indirectly determined the purchase of sale price. Infact, the different increase in prices and different sale prices of cement instead of having adverse effect of competition would lead to better competition between the cement companies. Further, the claim of the informant that one of the cement companies of Bhutan was willing to supply cement at a rate of Rs. 215/- per bag at Guwahati itself would show that the fixed prices of the petitioner and other two companies has no adverse effect on the competition and the prices depends on the quality and brand of the cement. The aforesaid factors cannot be said to limit or control productions, supply, markets, technical development, investment or provision of services under Section 3(3)(b) of the said Act, 2002. In fact, the different prices of all the three bags of cement are indicative of a better competition instead of having an adverse effect of competition. Therefore, I am of the considered view that the aforesaid factors could not have a basis for forming an opinion by the CCI about the existence of a prima facie case of the contravention of Section 3(3)(a) and Section

3(3)(b) of the said Act, 2002.

69. The second allegation that the three cement companies were availing huge subsidy under NEIPP for cement production in North Eastern States and were not passing on the benefits of the same to the consumers is not a ground at all which falls under Section 3(3)(a) and Section 3(3)(b) of the Act, 2002, inasmuch as, the subsidy which are given for establishment of new Industries in this region is by way of an incentive and the same is not to pass to the consumers as has been held by the Divisional Bench of this Court in the case of ***PVR Ltd. Vs. State of Assam & Ors,*** reported in ***(2017) 5 GLR 117***. Therefore, I am of the considered view that such allegations also cannot be considered to have an adverse effect on competition and thereby, the direction under Section 26(1) of the said Act, 2002, issued by CCI, is not tenable.

70. The third allegation that the three cement companies were selling the cement at a higher price in the North-Eastern Region then at a lower price in the other States appears to be misplaced, inasmuch as, the prices of the cement sold by the petitioner is fixed and the said cement is sold to the wholesaler after granting of the discount which varies from the quantities purchased by the wholesaler which is named as incentives discount and the said wholesaler may in his discretion pass over a part of the said discount to the customer. Be that as it may, I am of the considered view that the aforesaid allegation even if the same is taken to be true on the face of it also cannot be said to be a factor of making an adverse effect on the competition and thereby violating Section 3(3)(a) and Section 3(3)(b) of the said Act, 2002.

71. Thus, it is apparent that the information received does not disclose existence of the prima facie case as regards contravention of the provisions of the Section 3

and/or 4 of the said Act, 2002, and since the same is a *sine qua non* for CCI to direct the investigation, the decision of the CCI in directing investigation without fulfillment of the said mandatory pre-condition is totally without jurisdiction and is therefore, null and void.

72. In ***Central Council for Research in Ayurvedic Sciences and Anr. Vs. Bikartan Das & Ors,*** reported in ***2023 SCC OnLine SC 996,*** the Apex Court at paragraph 58 held as under:

> *"58. From the aforesaid, it could be said in terms of a jurisdictional error that want of jurisdiction may arise from the nature of the subject matter so that the inferior court or tribunal might not have the authority to enter on the inquiry. It may also arise from the absence of some essential preliminary or jurisdictional fact. Where the jurisdiction of a body depends upon a preliminary finding of fact in a proceeding for a writ or certiorari, the court may determine, whether or not that finding of fact is correct. The reason is what by wrongly deciding such a fact, the court or tribunal cannot give itself jurisdiction."*

73. The arguments of the learned counsel for the respondents, to the effect that the writ petition is pre-mature and as such, is not maintainable is not well founded and accordingly, rejected.

74. Pertinent that the decision of the Apex Court in the case of ***Competition Commission of India Vs. State of Mizoram & Ors,*** reported in ***(2022) 7 SCC 73***, relied by the respondents, wherein the Apex Court held that intervention of the High Court at the stage of the order under Section 26(1) of the said Act, 2002 is pre-mature and ought to have waited for the CCI to come to a conclusion is not relevant in the present context inasmuch as in the said case, the order passed under Section 26(1) of the said Act, 2002 was not challenged on the ground that the pre-conditions of the exercise of the jurisdiction under Section 26(1) of the said Act, 2002 were wholly absent.

75. Therefore, the impugned Order dated 06.12.2016 having been passed without fulfillment of the precondition of the Section 26(1) of the said Act, 2002, i.e., without arriving a prima facie finding under Section 3(1) and 3(3) of the said Act, 2002 is without jurisdiction and as such, is a nullity.

76. Resultantly, the Review Order dated 08.12.2018 is also null and void.

77. Accordingly, in WP(C) No. 6343/2018, the impugned Order dated 06.12.2016 passed by the CCI under Section 26(1) of the said Act, 2002 and the Review Order dated 08.08.2018 passed by the CCI stands quashed and set aside.

78. Consequently, in WP(C) No. 6342/2018, the impugned Order dated 27.08.2018 passed by the CCI imposing penalty to the tune of Rs. 500,000/- (Rupees Five lakhs) under Section 43 of the said Act, 2002 also stands quashed and set aside.

79. Hence, the two writ petitions succeeds.

80. Accordingly, the two writ petitions stands disposed of.

JUDGE

Comparing Assistant