COMPETITION APPELLATE TRIBUNAL
NEW DELHI

APPEAL No. 98 of 2015

[Under Section 53B of the Competition Act, 2002 against order dated 04.06.2015 passed by the Competition Commission of India in Case No.79 of 2012]

CORAM

Hon'ble Shri Justice G.S. Singhvi
Chairman

Hon'ble Shri Rajeev Kher
Member

In the matter of:

The Air Cargo Agents Association of India,
28-B, Nariman Bhavan,
Nariman Point,
Mumbai – 400 021. ... Appellant

Versus

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

2. International Air Transport Association ("IATA")
33, Route de l' Aeroport
PO Box 416 416,
1215, Geneva – 15 Airport,
Switzerland.
Representative : Mr. Tony Tyler
The Director General and CEO

3. International Air Transport Association
(India) Private Limited,
Registered Office Address :
C/o T.M. Khumri & Co.,
Company Secretaries,
12/13, Esplande, 3rd Floor 3,
A.K. Nayak Marg, Fort,
Mumbai – 400 001.
Represented by its Director Mr. Sunil Chopra … Respondents

Appearances: Shri Jimmy F. Pochkhanawalla, Senior Advocate assisted by Shri M.M. Sharma, Ms. Deepika Rajpal and Shri Danish Khan, Advocates for the Appellant.

Shri Abhishek Malhotra, Shri Angad Singh Dugal and Ms. Nishita Chaturvedi, Advocates for Respondent No. 1.

Shri Rajshekhar Rao, Shri Bharat Budholia, Ms. Neelambera Sandeepan and Shri Sameer Dawar, Advocates for Respondent Nos. 2 and 3.

Per Chairman

O R D E R

Whether in the absence of express negation by the Competition Commission of India (for short, 'the Commission') at the threshold i.e. at the stage of passing an order under Section 26(1) of the Competition Act, 2002 (for short 'the Act') of the allegation of abuse of dominant position and consequential contravention of Section 4(2) levelled by the appellant against Respondents Nos.2 and 3, the Director General (DG), who is entrusted with the investigation, is duty bound to record a finding on that allegation under clause (4) of Regulation 20 of the Competition Commission of India (General) Regulations, 2009 (for short, 'the Regulations') is the question which arises for consideration in this appeal filed against order dated 04.06.2015 passed by the Commission under Section 26(6) of the Act in Case No.79 of 2012, whereby it held that the respondents have not contravened the provisions of Section 3(3) read with Section 3(1) of the Act.

2. Appellant – The Air Cargo Agents Association of India is a company incorporated under the Companies Act, 1956. As on date, it has 281 active International Air Transport Association approved cargo agents, 298 associate members and 42 allied and commercial members. The appellant is recognised by the Ministry of Civil Aviation, Commerce and Finance and also by various

commercial organisations and trade associations. Respondent No.2 – International Air Transport Association (IATA) represents 260 airlines across the globe. It accredits air cargo agents in all the countries. Respondent No. 3- International Air Transport Association (India) Private Limited is affiliated to Respondent No. 2.

3. The appellant filed an information dated 21.12.2015 through its President under Section 19(1)(a) of the Act alleging that Respondent Nos.2 and 3 are guilty of anti-competitive conduct and prayed that an investigation may be ordered under the Act. The information was accompanied by detailed written submissions. For the sake of reference, the covering letter of the information and paragraphs 5(iv) and (v) thereof as also paragraphs 2.2, 2.3, 3.2.1, 3.2.14, 3.3.3 and 4.2 to 4.2.3 of the written submissions, which formed part of the information, are reproduced below :

> Dated : 21st December, 2012
>
> To
>
> The Secretary
> The Competition Commission of India
> New Delhi.
>
> Sub : Filing of Information under Section 19(1)(a) read with Section 3 and 4 of the Competition Act, 2002.
>
> Dear Sir,
>
> Please find enclosed herewith the Information filed by the Air Cargo Agents Association of India (ACAAI) against the International Air Transport Association (IATA) on violation of the Competition Act, 2002.
>
> Thanking you,
>
> The President
> The Air Cargo Agents Association of India"

"5. Details of the Information :

(i) to (iii) xx xx xx

(iv) Allegations against IATA

At the outset the Informant submits that any allegations of anti-competitiveness against IATA India are also allegations against Airlines who constitute IATA. IATA unilaterally prescribes the regulatory system arrogating to itself self-generated regulatory power for registering, accrediting and regulating the engagement of Cargo Agents by Airlines of India and without any authority in law by any legal provision runs the licensing system for the IATA registered Cargo Agents by virtue of its Resolutions 801 inter alia prescribing various registration and accreditation requirements for India Cargo Agents and also enforcing many of the financial, functional and terms and conditions on Cargo Agents of India who are the members of ACAAI. A copy of IATA Resolution 801 is hereby produced and annexed as Annexure No. 2.

IATA has three kinds of conferences which govern the relationship of members of ACAAI and IATA namely:-

Agency Conference : Agency Conference which accredits Cargo Agents to IATA.

Service Conference : Service Conference which prescribes the Rules relating to the services to be provided by Cargo Agents.

Tariff Conference : Tariff Conference which prescribes the Terms and Conditions of the tariff / omission to be payable to Cargo Agents.

It is pertinent to note that these conferences in the nature of resolutions between the members airlines but impose conditions on the Cargo Agents. The above mentioned unilateral actions and decisions of IATA prejudice the functions, market practices and interest of members of ACAAI i.e. Cargo Agents.

In addition, the Informant submits that, whenever there is an increase in price of Air Fuel, IATA deliberately mandates the Cargo Agents to collect the increased or extra price under the head of “surcharge”. As a consequence the Cargo Agents suffers the loss of commission.

With the enforcement of Competition Act in India on and from 2009 specific to provision on anti-competitive practice (Sec 3) and abuse of dominant position (Sec 4). ACAAI was doubtful about the legal position of the Resolutions relating to Freight Forwarding Air Cargo agents and made a submission to the Competition Commission of India as a whistleblower vide its letter

dated 22nd July 2010 and a copy of the same has been produced herewith as Annexure No. 3.

IATA is now about to unilaterality introduce a Cargo Accounts Settlement System (CASS) in India under Resolution 801. CASS is the Cargo Amounts Settlement System run by IATA under which agents are billed and are required to make full payments on stipulated due dates for their freight and other dues to all airlines by paying the IATA CASS office, which in turn disperses relevant amounts to each individual airline. CASS Rules are exhaustive and are so worded that ACAAI apprehends that these would come within the mischief of anti-competitive activity. A copy of the said IATA CASS is hereby produced and annexed as Annexure No.4.

The unilateral introduction of a CASS in India under Resolution 801 will have the direct effect of negating two specific Reservations of the Government of India pertaining to established market practices which have stood the test of time.

Albeit these reservations were expressed by the Government as conditions for the implementation of Resolution 815 meant for Indian Cargo Agents Program which was never implemented. However, the apprehensions, graveman, pith and substance remain constant as far as the Indian air cargo industry is

concerned. ACAAI is of the view that introduction of CASS may be a circumvention of these reservations by IATA. A copy of Resolution 815 is hereby produced and annexed as Annexure No. 5. The Informant believes that such a unilateral action shall prejudicially affect the Indian Air Cargo Agents' interest by altering the present market practices. Further, AIR INDIA vide its letter dated 3rd December, 2007 to IATA had communicated the approval of Resolution 815 with the reservations. Copies of the Indian Government Reservation and letter from Air India are collectively hereby produced and annexed as Annexure No.6.

Further, it is pertinent to submit that IATA under Resolution 016aa prescribes the rate of commission to the Cargo Agents. Such prescription of financial term is anti-competitive and affects the interest at Cargo Agents. A copy of Resolution 016aa is produced herewith and annexed as Annexure No.7.

Members of ACAAI are also concerned with some of the provisions of Conferences and Resolutions of IATA that might attract the notice of Competition Commission of India for enquiry into an alleged act of anti-competitive practice, especially in View of the observations of Department of Transportation, United States of America in its order dated 30th March 2007. The EU Commission

has in fact inter alia observed that IATA Conventions and Resolutions on certain issues are not free from anti-competitive practices and hence directed IATA not to Indulge In such practices.

Provisions for the conduct of the IATA Traffic Conferences are laid down in three Conferences, namely, Cargo Service Conference, Cargo Agency Conference and Cargo Tariff Coordinating Conference. Besides, through Resolution 801, IATA unilaterally prescribes Cargo Agency Rules, inter alia, including, license for trade, basis of commission both online and interline, agency fees, Air way bill transmittals, billings, remittances and collection in Cargo Accounts Settlement System (CASS) etc.

Similarly, the Composite meeting of Cargo Tariff Conferences takes action on the matters and practices relating to rate construction and currency rules (other than those which by their own terms are applicable only to one Cargo Tariff Conference), remuneration levels of intermediaries engaged in the same and/or processing of international air cargo and such other matters as may be referred to it by any Cargo Tariff Conference.

ACAAI are of the uncomfortable view that all of the above Conferences, Rules have the nature of anti-competitiveness and therefore further feel that such

Conferences. Rules which are in the nature of agreement between ACAAI and IATA are required to be scrutinised by the Competition Commission of India. ACAAI cannot take any responsibility for any of the transactions if directed as cartelization and/or anti-competitive either as accomplice or in any way aiding or abetting in to such offences. Therefore, we hereby file this information under Section 19 (1) of the Competition Commission of India Act, 2002 to investigate and accordingly decide whether the said Rules and conferences are anticompetitive or not and if so, to pass suitable orders.

(v) Relief sought

Since unilateral introduction of CASS under Resolution 801 by IATA is likely to affect adversely the interest of the Indian Air Cargo Agents by unilaterally altering the financial relations as well as unilaterally violating the long prevailing market practices and since the introduction of CASS is threatened by IATA as evident in the enclosed email from the authority of IATA respectively dated 15th November 2012. Copies of the email dated 15th November, 2012 along with all other correspondence are collectively produced hereby and annexed as Annexure No. 8.

The informants hereby seek that the Rules and Conferences of IATA may be investigated to determine anti-competitiveness and also seek for interim and final suitable orders. ACAAI shall extend help and submit all necessary information and data that would be needed in the enquiry for determining lapses if any on the part of IATA/Airlines under the Competition Act, 2002."

Written submissions :

"2 Issues raised for investigation and direction of CCI

Ever since the Competition Act, 2002 was notified and enforceable i.e. 2009 [Section 3 & 4 on anti-competitive practices and abuse of dominant position] and 2012 [Section 5 & 6 on combination] ACAAI has been concerned and came to CCI by way of a letter as a whistle blower to understand the following :

2.1. xx xx xx

2.2 Whether or not Resolution 801 of IATA enforcing straight jacketed restrictive prescriptions are void ab initio on ground of anti-competitive practices and **abuse of dominant position by Airlines** acting in concert through the Association; and

2.3. Whether or not the present decision of IATA unilaterally prescribing a Cargo Accounts

Settlement System (CASS) is detrimental to the interest of Air Cargo Agents in an anti-competitive practice and void ab initio insistence of such a practice would attract penalty.

3. Analysis of the Facts leading to file the information

3.1. to 3.1.19 xx xx xx

3.2. Issue No.2 : In what way Resolution 801 of IATA imposed unilaterally on members of ACAAI seems to be anti-competitive and restricting entry in the market

3.2.1 Resolution 801 – Cargo Agency Programme which sets out the Cargo Agency Rules is one of the basic institutions. Resolution 801 is to encourage the promotion, sale and handling of international air cargo transportation by Members through their Agents in an orderly manner and to establish and maintain ethical standards of business practice in interest of Members, their Agents and the general public. However, in reality, IATA slurs over the fact that these objectives but violate the provisions of Section 3 and 4 of the Act. In particularly, IATA involves in cartelization as it fixes the price and further limits or controls

the supply of the services as contemplated under Section 3(1) and 3(2) of the Act respectively. In addition, IATA through a collective action of its member airlines is also abusing its dominant position and imposing unfair and discriminatory conditions on the services provided by the Cargo Agents which is violative of Section 4(2) (a) and (b) of the Act.

3.2.2 to 3.2.13 xx xx xx

3.2.14. It is also pertinent to note that the member airlines that are joining together are in dominant position. The attached list in Annexure V demonstrates that out of the total 90 airlines operating to and from India, 62 airlines are members of IATA. This shows that IATA is in dominant position in India. (ACAAI understand from various decisions of CCI that an association cannot be charged under Section 4 as it is not an 'enterprise' under the Act. However, in view of the recent proposed amendment to this Act, under Section 4 an enterprise either jointly or group of enterprises acting singly

or jointly can be charged under the said Section.) Since, IATA is a group of airlines i.e., group of enterprises acting jointly, ACAAI submit to the CCI that the conduct of IATA may be investigated under Section 4 as well.

3.2.15. xx xx xx

3.3. Issue No.3 : Introduction of CASS – Another anti-competitive practice

3.3.1 to 3.3.2 xx xx xx

3.3.3. IATA mandates that all Cargo Agents shall join CASS (Res.851.5.1), whereas their airline members have the option not to join the same (Res.851.4.1). Therefore, on the one hand it makes mandatory for every IATA accredited cargo agent to join the CASS but on the other hand makes the same optional for the member airlines. This is a clear case of imposing unfair and discriminatory conditions by abusing its dominant position. It is pertinent to note that in its recent issue of quarterly newsletter of CCI, it was observed that “Competition law treats the activities of trade associations much like any other form of cooperation

between competitors. For competition law purposes, decisions or recommendations of trade associations are treated as agreements between its members and law may be breached even when they are not binding on the members". Therefore, since CASS is mandatory for the cargo agents and affects the interest of the cargo agents ACAAI and its members state that such rules of CASS are anti-competitive in nature. Further, where the Cargo Agent deals with an airline that chooses to be outside of CASS, then such Cargo Agent has to separately deal with billing and settlements with that airline on a bilateral basis, while dealing with the rest through CASS.

3.3.4 to 3.3.14 xx xx xx

4.2 Therefore, any attempt or action which affects the interest of intermediaries like Cargo Agents ultimately affects the interest of the consumers. In view of the above paragraphs, ACAAI and its members seek the following :

4.2.1 To investigate the entire conduct of IATA and its Resolutions from the perspective of competition law of India i.e. the Act;

4.2.2 To investigate various provisions of Resolution 801 and to declare the same as anti-competitive; and

4.2.3 To grant an interim injunction restraining IATA from implementing the same."

[Emphasis supplied]

3. The Commission considered the information in its ordinary meetings held on 03.01.2013, 12.03.2013 and 21.03.2013, heard the arguments of the advocate for the complainant, its three past Presidents and passed order dated 21.03.2013 under Section 26(1) of the Act, whereby the Director General (DG) was directed to investigate the matter about violations of the provisions of the Act. Paragraphs 3, 4 and 7 to 14 of that order read as under :

"3. The informant submitted that the OP 1 and 2 association conduct 3 kinds of conferences which govern the relationship of members of the informants and OP 1 and OP 2 namely: Agency Conference (which accredits cargo agents to OP 1's association); Service Conference (which prescribes rules relating to the services to be provided by Cargo Agents); Tariff Conference (which prescribes terms/conditions of the tariff/commission to be payable to the Cargo Agents). These conferences though appear to be in the nature of resolutions

between member airlines, but actually impose conditions on the Cargo Agents. The informant further alleged that the OP 1 and OP 2 were to unilaterally introduce a Cargo Accounts Settlement System (CASS) in India under Resolution 801. Under CASS agents are billed by OP 1 and OP 2 and they are required to make full payment on stipulated date for their freight and other dues to all airlines by paying to IATA CASS office, which in turn disperses relevant amounts to each individual airline. CASS Rules are so worded that informant apprehends them to be anti-competitive. The informant further submitted that the OP 1 and 2 prescribed the rate of commission for Cargo Agents through a Resolution 016aa. Such prescription of financial terms it is pleaded, was anti-competitive and adverse to the interest of Cargo Agents. The information also highlighted the observation of EU Commission against the OP 1 holding that Conventions and Resolutions of OP 1 on certain issues were not free from anti-competitive practices, EU Commission had directed the OP 1 not to indulge in such practices.

4. On the basis of the aforesaid facts, the informant has prayed the Commission to investigate the matter for anti-competitive behaviour and practices of OP 1 and OP 2. Informant also sought suitable interim relief.

5 and 6 xx xx xx

7. In recent years, allegations were made against OP 1 and OP 2 of functioning as a cartel of its members. The European Union started to work on a proposal to lift the exemption on consulting the prices. In 2006, the US Department of Transport also took action to withdraw antitrust immunity and held that the OP 1 tariff conferences were per se anti-competitive. Similar action was taken by the Australian Competition Authority, ACCC. The effect of the above stated investigations was that various conferences and resolutions, previously immune from the competition law provisions were held to be anti-competitive and 'IATA fares' were withdrawn in US (2007), EU (2006-2007) and Australia (2008).

8. As a result of the action taken by various authorities ending immunity on different fronts, OP 1 now explicitly states the do's and don'ts pertaining to anti-trust laws applicable at its various meetings and expects its members to adhere to them. Accordingly, the IATA Cargo Procedure conference: A quick reference guide, mentions the following statement-

"This meeting is being conducted in compliance with the Provisions for the Conduct of the IATA Traffic Conferences. Pursuant thereto, this meeting will not discuss or take action to develop fares or charges, nor will it discuss or take action on remuneration levels of any intermediaries engaged in the sale a cargo air transportation. This meeting also has no authority to discuss or reach agreement on the allocation of markets, the

division or sharing of traffic or revenues, or the number of flights or capacity to be offered in any market. Delegates are cautioned that any discussion regarding such matters, or concerning any other competitively sensitive topics outside the scope of the agenda, either on the floor or off, is strictly prohibited."

9. However, in spite of such observation, the OP 1 through its "Resolution 016 aa" fixed the commission to be payable to the cargo agents at 5%. Further, it is also stated that the commission payable to a cargo agent on international air cargo charter transportation should not exceed 5%. The resolution passed in this regard by the IATA is -

"the rate of commission payable by a TC Member to an IATA Cargo Agent pursuant to Resolution 801 and 801a(ll) on international air cargo transportation shall be 5% the carrier's charge for international air cargo transportation applicable to the consignment delivered by the IATA Cargo Agent to the TC Member, provided that the rate of commission on international air cargo charter transportation shall not exceed 5% of the agreed charter price but excluding taxed, demurrage and special handling charge. This resolution shall not apply:
In ECAA (European Common Aviation Area)
In USA / US Territories."

10. It is very much clear from the above resolution that this decision of the OP 1 was not made applicable to the three

jurisdictions i.e. EU, US and Australia perhaps, due to the lifting of immunity earlier granted by them and being per se anti competitive.

11. The OPs are Association of Enterprises as envisaged under section 3 of the Act. Section 3 of the Act declares an agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of service which causes or is likely to cause an appreciable adverse effect on competition within India, as void. Section 3 (3) declares that an agreement entered into between Enterprises which determines purchase or sale price, directly or indirectly, shall be presumed to have an appreciable adverse effect on competition.

12. There is no doubt that all the members of opposite parties were in the field of providing air cargo transport service. Any decision arrived at among its members at conferences would amount to an agreement among the Enterprises. If the Members of the 0P1 and OP 2 through a conference come to a decision about tariff rates or other rates in respect of services provided by them to be followed by the members or the percentage of commission to be provided to the cargo agents, it would naturally fall within the ambit of fixing or determining sale prices for the service for the cargo agents, leaving no scope for competition among the cargo agents as well as

among the members of OP 1. Such a decision would prima facie fall foul of the provisions of section 3(3).

13. In view of the foregoing discussion, the Commission is of the opinion that the decisions/ resolution prescribing the rate of commission to be paid to the intermediaries or similar other decisions pertaining to prices/charges were prima facie in contravention section 3(3) of the Act. The Commission considers it a fit case for investigation by DG.

14. The Secretary is directed to send a copy of this direction passed under section 26(1) to the office of the DG. The DG shall investigate the matter about violations of the provisions of the Competition Act on the part of OP 1 and OP 2. In case the DG finds OP 1 and OP 2 in violation of the provision of Competition Act, it shall also investigate the role of the persons, who at the time of such contravention were incharge of and responsible for the conduct of the business of the OPs so as to fix responsibility of such persons under section 48 of the Competition Act. DG shall give an opportunity of hearing to such persons in terms of section 48 of the Competition Act. The report of DG be submitted within 60 days from receipt of the order."

[Emphasis supplied]

5. The appellant's prayer for interim injunction was rejected by the Commission vide order dated 16.07.2013 on the ground that the elements of irreparable loss

and balance of convenience were not in favour of grant of injunction. The appeal filed against that order was dismissed by the Tribunal as withdrawn.

6. The Director General (DG), who was directed by the Commission to conduct investigation, issued notices/probe letters under Section 36(2) read with Section 41(2) of the Act to various airlines, i.e., Air India, Spicejet, Jet Airways, Indigo, Cathay Pacific Airways Limited, Lufthansa AG, Skymates (India) Pvt. Ltd., Skyways Air Services (P) Ltd., DHL Logistics Pvt. Ltd., Hindustan Cargo Ltd., TNT India Pvt. Ltd and Expeditors International (India) Pvt. Ltd. He also obtained information from cargo agents, who are members of the appellant, summoned Shri S.L. Sharma (President of the appellant), Shri Deepak Dadlani (Past President of the appellant), Shri S.J. Nagarvala, Member, Board of Advisors of the appellant, Shri Vinod Kumar, Assistant General Manager (Cargo Sales and Marketing) Air India, Shri N.R. Govind, Manager and Shri Aryan Bhola Krishnoo, Manager (Finance) Air India and Shri Ashish Kapur, Country Manager UAE & Oman, Cathay Pacific Airways Ltd. and Shri Anand Yedery, Regional Cargo Manager, Cathay Pacific Airways Ltd.

7. After eliciting the necessary information from those to whom notices/ probe letters were issued under Section 36(2) read with Section 41(2) of the Act and recording the statements of various persons, the DG submitted investigation report dated 22.12.2014 with the finding that the Respondent Nos.2 and 3 have not indulged in anti-competitive practices. In Chapter 6 of his report, the DG identified the following issues :

"(i) Whether the OPs have violated the provisions of Section 3(3)(a) by determining the rate of air Cargo agent's commission through Resolution 016aa in India.

(ii) Whether the implementation of CASS by IATA through Resolution 851 in India is in contravention of section 3(3) of the Act."

8. While considering Issue No. 1, the DG referred to the background in which 5% commission was fixed in terms of the approval granted by the Government of India and held that the grievance made by the appellant was untenable. In paragraph 6.18 of his report, the DG noted that Resolution 016aa has been rescinded with effect from 04.02.2013. He then discussed the implementation of Cargo Accounts Settlement System (CASS), noted that the same was introduced for the first time in 1979 in Japan and is being implemented in 81 countries including European Union, United Kingdom, Australia, Pakistan, Bangladesh etc. and in India, the same is effective from 06.05.2013 as a pilot programme. The DG also noted that CASS was introduced in India pursuant to the request made by the member airlines under Resolution 851 and it was absolutely voluntary. The analysis made by the DG on this issue is contained in paragraphs 6.44 to 6.47 and the conclusions are contained in paragraphs 7.3 and 7.4 of the report, which are extracted below :

"Analysis -

6.44 The investigation has revealed that the IATA is playing a role of private regulatory body in the Airlines Industry. It has formulated various rules and regulations which are

binding in nature on its members. IATA which is essentially a body of Air Carriers mainly takes care of the interest of its members only. It is seen that although the other stakeholders are allowed to participate in the framing of Resolutions which affect their business, it is the Airlines who prevail in the final decision making. As per the information, the Cargo Agents are required to seek accreditation with OP 1 in order to do business of selling international air cargo transportation services of OP 1's airlines in India. Although the accreditation is not mandatory, considering the market power of IATA member airlines and their practices it is not practically possible to do business without obtaining the IATA accreditation. The investigation has confirmed that the IATA airline membership of 240 odd airlines constitutes 84% of the airlines worldwide and thus it enjoys a market power to control and regulate the Industry.

6.45 Similarly when the CASS was introduced in India, some of the rules were opposed by the Cargo agents as they found them to be tilted in favour of Airlines. The documents relating to joint council meetings indicate that the ACAAI has not opposed the CASS in principle but has some reservations about the rules which are not in the interest of Cargo agents in India. The conferences of IATA where member airlines and other stakeholders jointly discuss various aspects of civil aviation industry

have attracted Competition concerns in many jurisdictions. The immunity granted by EU, USA, Australia and other countries has been withdrawn by them. The first to withdraw the exemption was the EU followed by Australia and then the USA. In sum, the reason for an end to the withdrawal of immunity was because it was no longer in the public interest due to changes in international aviation services. The growth of international airline alliances enabled airlines to establish interline fares without IATA conferences, making the pricing conferences unnecessary.

6.46 The OP has accepted that in Israel, permission has to be sought from the Israeli Antitrust Authority after every few years to renew the BSP a system like CASS, designed to facilitate and simplify the selling, reporting and remitting procedures of IATA Accredited Passenger Sales Agents. Further its various resolutions have attracted competition concerns in various jurisdictions and the antitrust immunities granted to IATA due to its positive role in the past was challenged and withdrawn. In India after notification of provisions of Section 3 & 4 the OP's conduct relating to regulation of Airline Industry do attract competition concerns.

6.47 The OP in its affidavit has stated that CASS is not mandatory in India and it is a Pilot Project. Further, the analysis of clauses of Resolution 851 in respect of CASS

do not show that it may limit or restrict the services in the air cargo market. However, it has been found that some of the major Airlines like Cathay Pacific and Emirates have started implementing the CASS. It is a fact that the CASS is handled and managed by IATA and it cannot absolve its role it the same is implemented in lndia by its members. Although the investigation has not found any violation of provisions of Section 3(3)(b) of the Act, by introducing CASS and its conditions relating to credit facility, or bank guarantee do not appear to limit or restrict the supply in the market, the OP may be asked to undertake that the rules of CASS have to be prepared bilaterally by having balancing bylaws and in compliance to the provisions of Competition Act. IATA has to show that its platform is not used by the member Airlines to control the industry jointly. There are valid concerns about sharing market knowledge at IATA conferences and likelihood of agreeing on fares or terms and conditions by competing airlines. All of its Resolutions and decisions affecting the Indian Airline industry needs to be in compliance of the Competition Act, 2002.

** ** **

7.3 The Investigation has not found the allegation of IP that the OP has violated the provisions of section 3(3)(a) by fixing the rate of commission to cargo agents, correct. In fact the investigation has revealed that it was IP who was

demanding a fixed rate of commission and the practice of 5% commission in air cargo industry after 2007 continued due to its demand only. There is nothing to show that the OP after the notification of Section 3 of the Act has tried to take decision in respect of determination of rate of commission directly or indirectly.

7.4 During the investigation, the issue of CASS has also been examined. CASS is an automated online billing and settlement system which simplifies reporting of cargo sales and settling of accounts between cargo agents and Airlines. It has manifold efficiencies and synergies such as full online correction capabilities for both airline and agents to eliminate billing errors, total flexibility to manage data centrally or from any field office with CASS links web-based applications, reduced personnel and administrative overhead costs associated with outsourcing activities. There is no extra cost to an agent as a result of CASS billing, it is stated by IATA that CASS in India is only at pilot stage and has not been mandated till date. The investigation has not indicated that the OP by introducing CASS has violated the provisions of Section 3(3(b) of the Act."

9. The Commission considered the investigation report and directed that copies thereof be forwarded to the parties to enable them to file their objections/suggestions. The appellant filed detailed objections and questioned the

negative finding recorded by the DG on the issue of violation of Section 3(3)(a) of the Act. The appellant also claimed that the DG committed serious error by not examining the issue of abuse of dominant position by Respondents Nos. 2 and 3 and consequential violation of Section 4 of the Act. This is discernible from the paragraphs 4.7 to 4.9 of the objections filed by the appellant, which are reproduced below :

> "4.7 For instance, IATA Resolution 801 – Cargo Agency Programme, sets out the Cargo Agency Rules is one of the basic institutions. Resolution 801 provides the rules for accreditation of cargo agents. IATA claims that the main objective of Resolution 801 is to encourage the promotion, sale and handling of international air cargo transportation by Members (Airlines) through their Agents in an orderly manner and to establish and maintain ethical standards of business practice in interest of Members, their Agents and the general public. However, in reality, IATA slurs over the fact that these objectives violate the provisions of Section 3 and 4 of the Act, since, decisions taken in IATA are implemented by each of its member airlines which clearly limits or controls the supply of the services of cargo agents as a horizontal agreement under the principal to principal model in violation of section 3(3)(b) and under the principal to agent model as a vertical agreement relating to exclusive supply agreement in violation of section 3(4)(b) of the Act respectively.

4.8 In addition, IATA through a collective action of its member airlines is also abusing its dominant position and imposing unfair and discriminatory conditions on the services provided by the Cargo Agents which also seems to violate section 4(2)(a) and (b) of the Act.

4.9 In support of the above allegation which was reiterated by ACAAI during the investigation but completely ignored in the DG Report, it is submitted that IATA rules and regulations cover on all Agency and Services aspects of cargo agents through their Cargo Agency and Cargo Services Conference Resolutions. These bind the air cargo agents and they are required to follow these without exception. These Resolutions mandate and restrict the air cargo activity. These Resolutions are changed unilaterally by IATA from time to time to suit the convenience of IATA and the member airlines, with no possibility for the forwarder/agent to seek redress or recourse. It is also pertinent to note that the member airlines that are joining together to take decisions in the form of the said Resolutions, already enjoy market power as compared to the cargo agents which gets strengthened by their joining hands under IATA. The Agents community are not allowed to participate in these closed door meetings. For instance, out of the total 90 airlines operating to and from India, 62 airlines are members of IATA. This shows that IATA as an

association of airlines is already in a dominant position in India, with a power to control and regulate the cargo industry in India, a fact even admitted by the DG in the Report. ACCAI therefore requested the DG to also investigate the conduct of IATA under section 4 as well but the DG Report is completely silent on this issue."

10. The Commission heard the counsel representing the parties on 26.03.2015 and directed them to file additional written submissions, if any, within one week. The appellant availed that opportunity and filed written submissions dated 31.03.2015, paragraphs 2.2 to 2.30 and clauses (iii) and (iv) of the prayer contained therein are extracted below :

"2.2 That it may be noted that in India about 95% of all the airlines operating, both in the domestic and international sectors are IATA members and IATA members do not issue Air waybills / stocks, mandatorily required for booking air cargo to non-IATA accredited air cargo agents in India and, therefore, IATA accreditation becomes absolutely necessary for any air cargo agents if he has to enter and survive in the business of air cargo agency. IATA accreditation is provided subject to fulfilling the stringent conditions of "productivity", "minimum staffing requirements", financial standing" etc. prescribed under the IATA Resolution 801 which prescribes the qualifications for registration of air cargo agents and his entry into the Cargo Agency List prepared

for each country. It has been held specifically in the DG Report that though no mandatory, in practice such accreditation is a sine qua non for the agent to do business with IATA member airlines in India.

2.3 That air cargo agents have no say before the large airlines as to book air cargo on their flights is their (the airlines') discretion. Therefore, airlines generally discriminate in issuing Air waybills stocks and to survive in the industry, almost all air cargo agents have to depend entirely on IATA member airlines and therefore both IATA and IATA member airlines become the "unavoidable trading partner" for air cargo agents in the absence of sufficient alternatives/

2.4 ACAAI submits that though in the prima facie order dated 21.03.2013, admittedly the Hon'ble Commission took cognisance only to the fact that in spite of having not been enforced in the three major jurisdictions with matured antitrust jurisprudence i.e. USA, European Union and Australia, IATA Resolution 016aa continued to operate in India after the coming in to force of the Competition Act, 2002 ("the Act") since May, 2009 and referred the matter to Director General (DG) for investigation, mainly on the issue of fixation of tariff by IATA as an association of airlines in violation of section 3(3)(a) of the Act, but the other IATA Resolutions such as IATA Resolution 801 (cargo agency rules), Regulation

801r (reporting and remittance procedure), Resolution 801a(ii) (cargo agency agreements) also have been scrutinized for competition concerns in the three major jurisdictions with matured antitrust jurisprudence i.e. USA, European Union and Australia and after careful examination either they have been modified suitably to remove competition concerns or immunity granted to them earlier have been withdrawn. Therefore, it is equally necessary for India, with an evolving jurisprudence in competition law, to review the above IATA Resolutions under the Act so as to promote competition in the air cargo industry by creating a 'level playing field between the airlines' collective position of dominance through IATA with the ACAAI, representing a majority of air cargo agents in India.

2.5 It is with the above broad understanding of IATA's historic anticompetitive behaviour in mind that, after finding that even after coming into force of the Act, in May, 2009 IATA continues to indulge in the same anticompetitive practices of controlling the air cargo industry, it was ACAAI who first approached the Hon'ble Commission vide its letter dated 22.07.2010 pointing out the above background of antitrust concerns against IATA and requesting for a serious examination of IATA's Resolutions mentioned above. However, no action was taken on the said complaint for unknown reasons and it

appears that this information was perhaps never considered before the full Commission since there is no order closing the same under Section 26(2) of the Act available on the website of CCI.

B. That DG has ignored the bona fide conduct of ACAAI while blaming it for being responsible for continuation of 5% commission by IATA airlines.

2.6 It was elaborately submitted by Mr. Pochkhanawalla on behalf of ACAAI that noticeably, whereas the DG, agreeing with IATA, has blamed ACAAI as the party responsible for continuation of the IATA practice of 5% commission by airlines for approaching the Government of India in 2006 for continuing with the minimum 5% commission, he has conveniently ignored the above letter dated 20.7.2010 submitted by ACAAI to CCI though the same was mentioned in the statement of Mr. S.L. Sharma, President ACAAI dated 14.10.2014. In any event, it was not proper for the DG to concentrate on what transpired in 2006 to hold today that it was because of ACAAI that IATA continued to give fixed 5% commission after 2009 when the Act came into force. He failed to appreciate that IATA had made ample opportunity to approach the Competition Commission and have the said Reservations of the Government of India rescinded; or to approach the Government of India

for this purpose IATA conveniently failed and neglected to do so.

2.7 That again in 2012, after noticing that, whereas, in the meetings of the Joint Council [constituted to consider the proposed India specific IATA Resolution 815 for adoption of the Indian Air Cargo Program (IACP) Rules] IATA was pressing ACAAI for removal of the reservations imposed by the Ministry of Civil Aviation (MOCA) vide letter dated 30.08.2007 (i) payment of 5% commission to all IATA accredited agents / intermediaries under Resolution 815 and (ii) issuance of Air waybills to all IATA agents), all IATA airlines were continuing with the IATA 5% commission in terms of Resolution 016aa, that ACAAI approached the Hon'ble Commission in the present information dated 21.12.2012 to draw attention to not only the issue of fixed 5% commission in terms of IATA Resolution 016aa, which clearly violates section 3(3)(a) of the Act but also against the unilateral imposition of the IATA Cargo Accounts Settlement System (CASS), which with its unfair and one sided terms, biased heavily in favour of protecting the interest of the IATA member airlines and not providing any relief against airline defaults to the air cargo agents, amounted to control of trade of air cargo agents by IATA, an association of airlines, in terms of section 3(3)(b) of the Act.

2.8 That inspite of arriving at the finding that the practice of paying 5% commission continued by IATA member airlines till at least February 2013, the DG has blamed ACAAI as being only responsible for continuation of this practice ignoring the fact that IATA members were following the recommendations of IATA Resolution 016aa and this fact was evident from the reference to 5% IATA commission in all air waybills and it continues as late as in March 2015 as per Annexure 13 of the Compendium of Additional Documents filed by ACAAI during its arguments on 26.03.2015 i.e. Singapore Airlines letter dated 18.03.2015 showing the freight rates for the period 1.04.2015 to 30.09.2015.

2.9 That DG has however completely ignored the evidence recorded by himself as well as the bona fides of ACAAI in first approaching the Hon'ble Commission and has put the entire blame on ACAAI.

C. <u>That it is not open for IATA now to oppose the consideration of the CASS issue by the Hon'ble Commission at the inquiry stage</u> –

2.10 That admittedly the Hon'ble Commission referred the issue of fixation of 5% commission only to the DG for investigation and the competition concerns in IATA's overall self-regulatory structure, including the CASS was not considered in the right perspective.

2.11 That the DG nevertheless included the limited issue of CASS in the scope of investigation and proceeded to evaluate it along with the other issue of 5% commission.

2.12 That IATA did not oppose the inclusion of the second issue of CASS in the scope of investigation by DG and joined ACAAI in answering to DG's questionnaires on both the issues as is evident from IATA's detailed submissions on the CASS issue made to the DG during the investigation as well as in their present reply to the DDG report filed on 17.03.2015. That further during oral submissions on 26-3-2015, IATA made detailed submissions as regards CASS without demur. Therefore, IATA is estopped under the law to oppose the consideration of the CASS issue by this Hon'ble Commission at the stage of the present inquiry under section 115 of the Indian Evidence Act, 1872.

D. <u>That the implementation of IATA Resolutions 801 series by IATA member airlines determining the similar terms and conditions of operation directly attracts the violation of Section 3(3)(b) of the Act in terms of the order of the Hon'ble Commission in the case titled "Jyoti Swaroop Arora vs. Tulip Infratech and Ors." dated 03.02.2015</u>.

2.13 That as pointed out by the counsel for ACAAI Shri M.M. Sharma during the hearing on 26.03.2015, the Hon'ble

Commission vide its recent order in the case titled “Jyoti Swarup Arora vs. Tulip Infratech and Ors.” exonerated all the 21 real estate builders and developers inspite of finding that the terms and conditions of flat buyer agreements were similar due to the reason that their trade association CREDAI, though provided a platform for interaction among the builders, was not found to have been a party to the adoption of the similar terms and conditions by them. On the other hand, the IATA Resolutions 801 Series and the implementation of the recommendations made in the said Resolutions by the IATA member airlines provide enough evidence to this effect. Therefore, the Hon’ble Commission, may in all fairness and equity hold IATA as the association providing a platform for adoption of anti-competitive agreements among the member airlines as responsible for the breach of Section 3(3)(b) of the Act.

E. <u>That there are glaring contradictions in the findings of the facts and conclusions based on those findings in the DG Report on both the 5% commission and the CASS issue</u>.

i) <u>On 5% commission issue</u> :

2.14 That whereas DG has found on the basis of evidence of airlines recorded during investigation that airlines continued to pay 5% commission pursuant to IATA Resolution 016aa till the date of filing of information by

the IP (ACAAI) in November 2012 and there is no doubt that the practice of 5% commission was followed without any bilateral negotiations between the airlines and the agents" and that the same continued till as late as February 2013, yet in the conclusion drawn it has been held that the same does not violate Section 3(3)(a) of the Act.

2.15 That the above conclusion in the DG Report is contrary to the established law laid down by the Hon'ble Commission in various orders that once a decision taken at the meetings of the association of enterprises is found to have been implemented by the enterprises, then the same is violative of Section 3(3) of the Act as the same is in evidence of an agreement between enterprises.

ii) <u>On CASS issue</u> :

2.16 That while the DG has acknowledged that IATA with 240 airlines membership, which constitutes 84% of the airlines worldwide enjoys a market power to control and regulate the industry and therefore IATA may be asked to undertake that the rules of CASS have to be prepared bilaterally by having balancing by-laws and in compliance to the provisions of the Act……., and yet DG surprisingly in the same para concludes to the contrary that investigation has not found any violation of

the provisions of Section 3(3)(b) of the Act by introducing CASS.

F. <u>That IATA continues to enforce the Resolution 801 series/ Resolution 851 in India and in rest of Asia although it purged the anti-competitive restraints of these Resolutions in the European Union and Australia by bringing modified Resolution 805 series etc. and therefore these Resolutions require serious review by the Hon'ble Commission</u>

2.17 That as pointed out by the Counsel for ACAAI Shri M.M. Sharma during the hearing on 26.03.2015, IATA continues with the old Resolution series of Resolution 801 [Resolution 801, Resolution 801r and Resolution 801a(ii)] in India and rest of Asia whereas it has modified these old resolution series with Resolution 805 series in the European Union. It was pointed out by counsel during submissions that while considering the Block Exemption request of IATA to Resolution 805 series, the European Commission vide its decision dated 30.7.1991 had compared the Resolution 801 series with Resolution 805 series and pointed out the number of restrictions which existed in the formed series on agents such as productivity criterion, staffing requirements, prohibition on non-cash payments, elongated accreditation procedures, prohibition of grating rebates to customers

by agents etc. and held that even the proposed IATA Resolution 805 Series could not be given negative clearance as requested by IATA since it violated Article 85(1) of the EC Treaty as IATA Resolution 805 series constitutes agreements and decisions of an association of undertakings with the object and effects of restricting competition such as firstly, restricting competition between individual IATA member airlines at the level of distribution of their air freight transport services, secondly, foreclosing other forms of distribution that could be adopted by individual airlines in the absence of the IATA Resolutions, thirdly, having greatest impact on the air freight forwarding business community by creating a more rigid structure than bilateral systems, fourthly, restricting competition between agents for sales and between specialist agents and finally, also distorting competition between IATA agents and non-IATA agents due to collective IATA agency systems giving more advantage over distribution of cargo in the former, which are considered as hard-core restrictions.

2.18 That the above decision of the EC should act as an eye opener for the Hon'ble Commission since IATA continues with the old Resolution 801 series in India. It is humbly submitted that unlike in the European Union, there is no provision for grant of Block/Individual exemptions to any decisions / agreement between

enterprises or between association of enterprises and enterprises under Section 3 of the Act and any such agreement if found to exist is deemed to be void ab initio unless the opposite parties are able to prove that the pro-competitive effects of such agreements/decisions in terms of clause (d) to (f) of Section 19(3) of the Act if any, greatly outweigh the anti-competitive effects of such agreements / decisions in terms of clause (a) to (c) of Section 19(3) of the Act.

G. That ACAAI submits that it is not against the introduction of CASS purely as an electronic mode of account settlement but is strongly against the unilateral character of CASS and the manner in which it is sought to be implemented by IATA in India even in pilot stage.

2.20 That as submitted by Mr. Jimmy Pochkhanawala, Sr. Advocate and Mr. M.M. Sharma during their arguments on 26.03.2015, in case the Hon'ble Commission does not come to the conclusion that IATA Resolution 801 series/ Resolution 851 relating to CASS are anti-competitive per se and therefore declare them as void under Section 3(3) of the Act, then and only then, ACAAI does not object to CASS implementation provided, (i) it operates merely as an electronic account settlement system between IATA member airlines and IATA accredited agents i.e. members of ACAAI without any control or supervision by

the CASS Manager of the ISS Management under Resolution 851/ Resolution 801 series and (ii) the restrictive conditions imposed such as severe penalties and/or default actions (including inter alia withdrawal of credit facilities as are customary of the trade and requiring immediate cash payments, imposition of draconian bank guarantee, withdrawal of air waybill stocks, etc.) on cargo agents under the present or proposed CASS are removed by the Hon'ble Commission in view of the precedence of other jurisdiction including the Israeli Antitrust Authority's decision dated 15.06.2011 on the Israeli CASS Programme which was also under Resolution 801 series/ 851.

2.21 That without prejudice to the above submission, ACAAI respectfully reiterates the Notes titled "Unilateral character of CASS" and "Penalties possible under CASS by IATA" circulated to the Members of the Hon'ble Commission with copies to the Counsels of the Opposite parties during the hearing held on 26.03.2015 and request that the same may kindly be read as part of these Notes/ Written Arguments.

H. That without prejudice to the submissions above, ACAAI reiterates that the Hon'ble Commission may consider constituting a Joint Council/ Committee consisting of equal number of airlines and ACAAI without any

interference from or supervision by IATA to allow a healthy discussion on the terms and conditions of CASS bilaterally between the airlines and the air cargo agents and the report of the said Council/ Committee may be submitted within three months to the Hon'ble Commission to consider incorporating the recommendations thereof in the CASS Programme before it is implemented in India.

I. <u>Dominant position of IATA-</u>

2.22 It is humbly submitted that airlines have assured themselves a dominant position in the relevant product market for the supply of airfreight/ air cargo services. In this market, the airlines are the suppliers and the cargo agents and shippers (in the case of direct consignments) are the customers. The geographic market extends to the whole of India. Therefore, the relevant market is the market for the "supply of airfreight/air cargo services in India".

2.23 By acting collectively to create IATA Resolution 801 series and CASS under Resolution 851 read with the proposed Resolution 815 (IACP), the airlines enjoy a dominant position in the relevant market, as virtually all air cargo service providers/carriers are members of IATA

and conduct bulk of their airfreight carriage transactions under IATA Resolutions.

2.24 As the freight forwarders/ cargo agents de facto have no choice but to operate within the IATA framework representing the airlines, IATA as well as IATA members airlines, constitute an “unavoidable trading partner” in the absence of sufficient alternatives.

2.25 Being in a dominant position, as per leading decisions on competition law relied upon by the Hon’ble Commission in its analysis in various cases, IATA as an association and the member airlines individually have a special responsibility to maintain competition in the relevant market which they have failed to observe. This aspect was elaborately set out in the initial complaint filed by ACAAI; however the same appears to have been ignored in the DG Report.

2.26 That instead of limiting IATA Resolution 801 series/ Resolution 851 as well as Resolution 815, i.e. the proposed IACP, to what is necessary to ensure the quality and safety of air cargo services, IATA has made the accreditation subject to acceptance by cargo agents of “supplementary obligations” that are not necessary and they would not otherwise have accepted under normal conditions of competition. For instance, while signing for accreditation with IATA, each cargo agents

has to agree that IATA is authorized, e.g. to unilaterally issue notices, give directions, and take actions against cargo agents such as giving notices of irregularity and default, imposing penalties, notifying the airlines of the cargo agents/ freight forwarders default etc. Under the proposed Resolution 815 for IACP, the cargo agents are made to agree to waive “any and all claims and causes of action against the Carrier (Airlines) and IATA and against any of their officers and employees for any loss, injury or damage arising from any act done or omitted in good faith in connection with the performance of any of their duties or functions under the Indian Air Cargo Program and to indemnify them against any such claims by the Intermediary’s officers or employees”.

2.27 That it is quite evident from a plain reading of the various IATA Resolutions, particularly, Resolution 801 series, Resolution 851 relating to CASS and the proposed Resolution 815 relating to IACP that IATA Acts both as a prosecutor and judge at the same time in relation to the freight forwarders and cargo agents. Moreover, in the event that an agent has a dispute with an airline, the only recourse for the agent is solely through Arbitration where the IATA Agency Arbitrator is the sole arbitrator.

2.28 This is in outright violation of the established principles of natural justice. Therefore, ACAAI respectfully submits that IATA as an “enterprise” under section 2(h) of the Act

is clearly abusing its dominant position against cargo agents/ freight forwarders in India by making accreditation of IATA subject to acceptance of supplementary obligations relating to qualifications, minimum staff requirement, financial standing etc. under Resolution 801 and relating to waiver of claims and indemnification etc. under the proposed Resolution 815, which would otherwise not have been possible under normal commercial dealings and have no connection with the accreditation itself.

2.29 That the above important aspect relating to abuse of dominant position by IATA of imposing unfair, one sided conditions for acceptance of CASS on Indian Air Cargo Agents and imposing supplementary obligations for accreditation with IATA are clearly violative of section 4(2)(a) and section 4(2)(e) of the Act has been completely ignored by the DG the during investigation.

2.30. ACAAI requests the Hon'ble Commission to kindly consider this aspect while deciding the matter."

Prayer

Based on the facts stated above and the analysis and legal submissions made, ACAAI hereby most respectfully prays before the Hon'ble Commission to :

(i) and (ii) xx xx xx

iii) To direct DG to conduct a fresh investigation into IATA Resolution 801 series/ Resolution 851 under Section 26(1) of the Act including investigation for possible abuse of dominant position by IATA under section 4 of the Act;

iv) Alternatively, in the event that this Hon'ble Commission is of the opinion, going by the material on record that the Hon'ble Commission is convinced that IATA by its very nature is an anti-competitive self-regulation association in India, this Hon'ble Commission may be pleased to declare that IATA's activities in India are anti-competitive in nature as other countries around the world have so declared with consequences to follow as may be directed by this Hon'ble Commission;

v) to vii) xx xx xx"

11. The Commission rejected the objections of the appellant and held that the findings and conclusions recorded by the DG are based on correct analysis of the material collected by him. This is evident from paragraphs 53 to 68 of the impugned order, which are reproduced below :

"Issues and Analysis

53. The Commission has carefully perused the information, the report of the DG and the replies/ objections/ submissions filed by the Informant and the Opposite Parties and other material available on record. The Commission also heard the arguments advanced by the

counsels who appeared on behalf of the Informant and the Opposite Parties on 26.03.2015.

54. On consideration of the above, the Commission is of the opinion that in order to arrive at a decision, the only issue that needs to be determined in the matter is as to whether the Opposite Parties have infracted any of the provisions of section 3(3) read with section 3(1) of the Act.

55. The Informant has alleged that the practice of the Opposite Party No. 1 in fixing the commission for the cargo agents and limiting and controlling the international air cargo transportation services through its various resolutions is in contravention of the provisions of section 3(3) of the Act read with the provisions of section 3(1) of the Act. The allegations of the Informant against the Opposite Parties, as emanated from the facts of the case, are threefold: (i) fixation of 5% commission for the cargo agents through 'Resolution 016aa', (ii) implementation of CASS in India through 'Resolution 851', and (iii) mandatory accreditation of cargo agents from IATA.

56. The Informant has alleged that through 'Resolution 016aa', the Opposite Party No. 1 had fixed the commission of the cargo agents as 5% which is in contravention of the provisions of section 3(3)(a) of the Act. As per the Informant, the same was continued in the air cargo industry in India till March, 2015.

57. However, the DG has reported that 5% commission to the cargo agents, after notification of section 3 of the Act in May 2009, was not because of ‘Resolution 016aa’ but because of the order of Ministry of Civil Aviation, Government of India, which was passed only upon the insistence of the Informant. It is revealed from the DG investigation that though ‘Resolution 016aa’ was rescinded on 04.02.2013, its very substratum was gone once ‘Resolution 815’ was introduced. Further, the practice of fixing 5% commission to the cargo agents was continued after 2006, which was only on account of the intervention of Ministry of Civil Aviation, Government of India. The DG has recorded evidence, including minutes of meetings of the Joint Council of IACP showing that the Opposite Party No. 1 was not in favour of the payment of a fixed rate of commission to the cargo agents stating that different airlines have different sale and distribution strategies. The DG has also recorded evidence showing that the Informant had pleaded before Ministry of Civil Aviation to continue with the system of 5% commission for the cargo agents. Accordingly, the DG concluded that the Opposite Party No. 1cannot be held liable for fixing 5% commission to the cargo agents after notification of the provisions of section 3 of the Act.

58. The Informant has contended that the system of 5% to the cargo agents in terms of the ‘Resolution 016aa’ was

continued till March, 2015, not till 04.02.2013. As per the Informant, the airlines continued to pay 5% commission to the cargo agents even after the provisions of section 3 of the Act came into force in May 2009. On the findings of the DG that the same was continued because of the order of Ministry of Civil Aviation on the insistence of the Informant, the Informant stated that it had requested Ministry of Civil Aviation to place a reservation for a minimum 5% commission to generate healthy competition amongst the cargo agents. The Informant has denied that 'Resolution 016aa' became redundant due to some airlines joining large alliances thereby obviating the necessity of preserving multilateral interline system under MITA.

59. The Commission perused the rival submissions on the issue and also considered the DG findings in this regard. Since the issue pertains to violation of section 3(3) of the Act, it is first necessary to determine whether there exists an agreement amongst the members of the Opposite Party No. 1 or amongst the members of the Opposite Party No. 2 or between the Opposite Party No. 1 and the Opposite Party No. 2 which can be considered as anti-competitive in terms of section 3(3) of the Act. In this regard, the DG has reported that the Opposite Parties are associations of enterprises within the meaning of section 2(c) and 2(h) of the Act and their members are engaged

in the business of providing air cargo transport services and any decision arrived at among its members at conferences would amount to an agreement amongst them. The Commission is also of the opinion that the trade associations like the Opposite Parties can be covered under the provisions of section 3(3) of the Act and any decision taken by the members of the Opposite Parties would amount to an agreement/ arrangement amongst them in terms of the Act.

60. On the issue of fixation of commission for the cargo agents, the Commission observes that the system of payment of fixed commission to the cargo agents through 'Resolution 016aa' by the airlines was in place till 04.02.2013. In 2006, a new resolution i.e., 'Resolution 815' was introduced which was approved by Ministry of Civil Aviation, Government of India with the reservations that a commission of 5% shall be payable to IATA accredited agents/ intermediaries and all agents/ intermediaries shall be given airway bills stocks by all the airlines. Thus, the system of 5% commission to the cargo agents was prevalent till 04.02.2013 i.e., during post-notification of the provisions of section 3 of the Act. However, from the DG investigation, it is revealed that though the system of 5% commission was prevalent after May, 2009 i.e., post-notification of the provisions of section 3 of the Act, it was because of the orders of

Ministry of Civil Aviation, Government of India. From the evidences collected by the DG in terms of letter dated 02.08.2006 sent by the Informant to Ministry of Civil Aviation, it is apparent that the Informant itself had requested the Ministry for 5% commission to the cargo agents. Further, from the letters dated 29.08.2007 from Ministry of Civil Aviation to Air India Ltd. and 03.12.2007 from Air India Ltd to IATA and the minutes of the 12th Joint Council meeting of IACP held on 17.08.2012 at Mumbai, it is revealed that airlines had raised concerns over Ministry of Civil Aviation's reservations that a commission of 5% shall be paid to IATA accredited agents/ intermediaries under 'Resolution 815' and all agents/ intermediaries shall be given airway bills stocks by all the airlines. The Commission also notes from the DG report that IATA and airlines wanted to do away with any commitment on fixed commission through 'Resolution 815'.

61. From the record available, it is evidenced that the Opposite Party No. 1 was not in favour of fixed commission system and the Commission finds force in the contention of the Opposite Parties that the system of 5% commission was due to lobby of the members of the Informant before the Government of India. Thus, based on the above evidences and circumstances, the Commission is of the opinion that the allegation of fixing

of the rate of commission for cargo agents by the Opposite Parties under 'Resolution 016aa' does not hold valid and therefore, the Opposite Parties have not contravened the provision of section 3(3)(a) of the Act.

62. As far as the issue of unilateral introduction of CASS by the Opposite Parties in India vide 'Resolution 801(r)/851' is concerned, the Informant has alleged that the rules of CASS are exhaustive and so worded that it would come within the mischief of anti-competitive activity. As per the Informant, through the introduction of CASS, the Opposite Parties have intended to impose stringent financial condition on the cargo agents which will lead to increase in their administrative cost, bring changes in credit period and impose discriminatory conditions and there will be no data protection. As per the Informant, introduction of CASS will adversely affect the interest of the cargo agents and drive them out of the business and it would unilaterally alter the financial relation between the airlines and the cargo agents and violate the long standing market practices.

63. The DG, having examined CASS, came to the conclusion that introduction of CASS in India is not violative of the provisions of section 3(3)(b) of the Act as it does not limit or restrict the services in the air cargo agency market. As per the DG report, CASS is not mandatory in India and it is a pilot project. Further, it is noted from the submission

of the Opposite Parties that CASS does not pose any financial burden upon the members of the Informant because the airlines have to pay the joining fees and not the cargo agents, i.e. the members of the Informant.

64. The Commission has considered all the contentions of the parties as well as the observations of the DG. The Commission observes that, vis-a-vis the current physical system of clearance in the air cargo industry, CASS is scientific and efficient. It is observed that CASS is a global phenomenon, having much advantage to both the carriers and agents and it will enhance administrative efficiencies as well as reduce operational costs. The benefits of economies of scale, standardization, and automation in the collection and distribution of revenue are also associated with CASS. It is also noted that having CASS programme would lead to creation of neutral settlement office, elimination of loss of invoice, enhanced financial control, reduced personnel and administrative costs, etc.

65. The Commission further notes that in India, CASS is not compulsory for the cargo agents and that entry and exit routes are available for every airline and agent. Moreover, CASS is not fully functional in India as it is still in pilot stage. It is observed from the minutes of the 61st meeting of the IATA Consultative Council that the Opposite Party No.1 has already clarified that collection

of surcharges was strictly bilateral issue between the airlines and the freight forwarder and that there was no unilateral decision to be taken by the parties unless jointly agreed. There is no extra cost to an agent as a result of CASS billing.

66. Considering the above, the Commission holds that the introduction of CASS is not anti-competitive in terms of section 3(3)(b) of the Act, as alleged by the Informant.

67. The Informant also alleged that IATA is controlling the market of the services of cargo agency by licensing and permitting this service to only those cargo agents who agree to become accredited to IATA by prescribing stringent financial guidelines under existing 'Resolution 801', the proposed 'Resolution 815' and 'Resolution 851' for CASS. In this regard, the Commission notes that IATA plays the role of self-regulator in the sector and as such the accreditation provided by IATA is not mandatory and hence, cannot per se be taken as anti-competitive. Further, it may also be observed that such accreditation helps the stakeholders in providing assurance about the quality of services provided by the cargo agents. Accordingly, it cannot be termed as anti-competitive within the meaning of section 3(3) read with section 3(1) of the Act.

68. The Informant, in its submission, alleged that the DG's conclusion was based on new facts put forth by the

> Opposite Party No. 1 and that Informant was not given any opportunity to respond to the same. It is further alleged that the DG report contained conclusions based on one-sided story giving new facts presented by the Opposite Party No. 1 without checking or verifying the veracity thereof from the Informant. In this regard, it is observed that the allegation of the Informant has no ground. It may be noted that the parties were provided the DG's report and thereafter were given adequate opportunities to defend their case. The Parties not only submitted their written submissions but were also given opportunities for oral hearings before the Commission. Therefore, the allegation of violation of natural justice does not hold any ground."

12. Shri Jimmy F. Pochkhanawalla, Senior Advocate and Shri M.M. Sharma, learned counsel appearing for the appellant argued that the impugned order is vitiated by a patent error of law and is liable to be set aside only on the ground that the DG failed to discharge his statutory obligation under Section 26(3) of the Act read with Regulation 20(4) of the Regulations. Shri Pochkhanawalla invited our attention to the allegations contained in the information filed under Section 19(1)(a) of the Act to show that even though the appellant had clearly alleged that Respondent Nos.2 and 3 are guilty of abuse of dominant position and violation of Section 4 of the Act and also placed sufficient evidence on record to substantiate the same, the DG neither adverted to that allegation nor recorded any finding. He then submitted that even though in the objections and the written submissions filed

pursuant to order dated 26.03.2015 passed by the Commission, the appellant had pointed out that the DG committed serious error by not examining the issue relating to abuse of dominant position by Respondent Nos. 2 and 3 and consequential violation of Section 4(2) of the Act and made arguments on that point, the impugned order is totally silent on this aspect. Learned senior counsel further submitted that while recording its opinion under Section 26(1), the Commission had not rejected the allegation of abuse of dominant position levelled by the appellant against Respondent Nos. 2 and 3 and, therefore, the mere fact that in paragraphs 12 and 13 of order dated 21.03.2013, reference was made only to Section 3(3) of the Act cannot lead to an inference that the DG was not required to investigate the allegation regarding violation of Section 4 of the Act and that too despite the fact that the Commission had given an unequivocal direction in paragraph 14 of its order to the DG to investigate the matter about violations of the provisions of the Act. He submitted that in the absence of an express rejection by the Commission of the allegation of abuse of dominant position by Respondents Nos. 2 and 3 and its refusal to direct an investigation into that allegation, the DG was under a statutory obligation to conduct an investigation and record finding on all the contained in the information including the one that Respondent Nos. 2 and 3 were guilty of abuse of dominant position within the meaning of Section 4(2) of the Act. Learned senior counsel emphasised that even in the absence of a direction by the Commission to make investigation into the allegations contained in the information, the DG is duty bound to do so in terms of Regulation 20(4) of the Regulations and failure of the DG and the Commission to consider and decide the issue relating to violation of Section 4 of the Act has caused serious prejudice to the appellant and on this ground the impugned order is liable to be set aside. In support of his argument that the DG and the Commission failed to consider the

appellant's plea of abuse of dominant position and violation of Section 4(2) of the Act by Respondent Nos.2 and 3, learned senior counsel relied upon paragraph 9.2 and 9.21 of the memo of appeal.

13. Shri Rajshekhar Rao, learned counsel appearing for Respondent Nos. 2 and 3 argued that while recording its opinion on the existence of a prima facie case, the Commission deliberately refrained from issuing a direction to the DG to conduct investigation into the allegation of abuse of dominant position levelled by the appellant against Respondent Nos. 2 and 3 and consequential violation of Section 4 of the Act and, therefore, the DG did not commit any error by not returning a finding on that issue. He emphasised that the DG is bound by the directive given by the Commission under Section 26(1) and he does not have the jurisdiction to enlarge the scope of the investigation beyond the contours and boundaries of an order passed under Section 26(1). Learned counsel submitted that the provisions of the Act and the Regulations are required to be harmoniously construed and if Section 26(1) of the Act read with Regulation 20(4) of the Regulations are so interpreted, the impugned order cannot be declared illegal on the ground of non-consideration of the issue relating to violation of Section 4 of the Act.

14. Shri Abhishek Malhotra, learned counsel for the Commission argued that the DG did not commit any illegality by not recording a finding on the allegation of abuse of dominant position levelled against Respondent Nos.2 and 3 because in the order passed under Section 26(1), the Commission did not give any such direction. Shri Malhotra submitted that by not adverting to the allegations of abuse of dominant position contained in the information, the Commission will be deemed to have rejected the same and the DG had no option but to confine the investigation to the issue of violation of Section 3(3) of the Act. He conceded that in paragraph

14, the Commission had directed the DG to investigate the matter about violations of the provisions of the Act on the part of Respondents Nos. 2 and 3 herein, but argued that in the absence of any explicit direction for investigation into the allegation of abuse of dominant position, the DG was not required to look into that aspect of the case, more so, when in paragraphs 12 and 13, the Commission had opined that there existed a prima facie case of violation of Section 3(3) of the Act. Shri Malhotra further submitted that the use of the words 'provisions' in line No.2 of paragraph 14 and the word 'provision' in line No.4 clearly shows that the Commission had deliberately refrained from directing the DG to conduct an investigation into the alleged contravention of Section 4(2) of the Act.

15. After Shri Abhishek Malhotra concluded his arguments, Shri M.M. Sharma learned Counsel for the appellant invited the Tribunal's attention to the averments contained in paragraph 4 of the reply filed on behalf of the Commission, which is supported by an affidavit of its Secretary and argued that when the Commission has itself come out with the case that the DG was directed to investigate the allegations of violations of the provisions of the Act against Respondent Nos. 3 and 4 *(sic) (Respondent Nos. 2 and 3),* the oral submission made by the counsel appearing on its behalf that the DG was not required to make investigation into the allegation of abuse of dominant position and violation of Section 4 should not be entertained.

16. We have considered the respective arguments and carefully scrutinized the record. The Act was enacted by Parliament for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest 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. Chapter II of the Act which is titled as “Prohibition of Certain Agreements, Abuse of Dominant Position and Regulations of Combinations’ contains four sections. Section 3 deals with anti-competitive agreements. Section 4 deals with abuse of dominant position. Chapter IV of the Act contains provisions relating to duties, power and functions of the Commission. Section 18 declares that subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India. Section 19(1) empowers the Commission to inquire into any alleged contravention of the provision of Section 3(1) or Section 4(1) either on its own motion or on receipt of any information from any person, consumer or their association or trade association or a reference made to it by the Central Government or State Government or a statutory authority. Sub-section (3) of Section 19 lays down that 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 factors enumerated in Clauses (a) to (f) thereof. Sub-section (4) lays down that 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 factors enumerated in Clauses (a) to (m) thereof. Sub-section (5) lays down that for determining whether a market constitutes a “relevant market”, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”. Section 19(6) and 19(7) lay down that the Commission shall, while determining the “relevant geographic market” and “relevant product market” have due regard to the factors enumerated in various clauses of those sub-sections. Section 26 carries the title ‘procedure for inquiry under Section 19’.

Sub-section (1) of Section 26 lays down that on receipt of a reference from the Central Government or State Government or a statutory authority or on its own knowledge or information received under Section 19, the Commission shall direct the General to cause an to be made into the matter, if it is of the opinion that there exists a prima facie case. If the Commission forms an opinion that there exists no prima facie case, then the case is required to be closed under Section 26(2). Section 26(3) lays down that 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. Section 41, which is the only section under Chapter V of the Act contains provisions relating to investigation by the DG. Section 41(1) lays down that the DG shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder. Sub-section (2) of Section 41 declares that the DG shall have all the powers as are conferred upon the Commission under Section 36(2) of the Act.

17. Section 26 of the Act and Regulations 16 to 20 of the Regulations, which have bearing on the decision of the issue raised by the appellant, read as under :

Section 26 :

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

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

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

Regulations 16 to 20 :

“16. Opinion on existence of prima facie case. – (1) The Secretary, after scrutiny and removal of defects, if any, in an information or reference, as the case may be, shall place the same before the Commission to form its opinion on existence of a prima facie case.

(2) In cases of alleged anti-competitive agreements and/or abuse of dominant position, the Commission shall, as far as possible, record its opinion on existence of a prima facie case within sixty days.

(3) The Commission shall, as far as possible, hold its first ordinary meeting to consider whether prima facie case exists, within fifteen days of the date of placement of the matter by the Secretary under sub -regulation (1).

17. Preliminary conference. – (1) The Commission may, if it deems necessary, call for a preliminary conference to form an opinion whether a prima facie case exists.

(2) The Commission may invite the information provider and such other person as is necessary for the preliminary conference.

(3) A preliminary conference need not follow formal rules of procedure.

18. Issue of direction to cause investigation on prima facie case – (1) Where the Commission is of the opinion that a prima facie case exists, the Secretary shall convey the directions of the Commission 1[within seven days,] to the Director-General to investigate the matter.

(2) A direction of investigation to the Director-General shall be deemed to be the commencement of an inquiry under section 26 of the Act."

"**19. Communication of order when no prima facie case found**.— If the Commission is of the opinion that there exists no prima facie case, the Secretary shall send a copy of the order of the Commission regarding closure of the matter forthwith to the Central Government or the State Government or the Statutory Authority of the parties concerned, as the case may be, as provided in sub-section (2) of section 26 of the Act."

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

(2) The Commission shall direct the Director-General to submit a report within such time [as may be specified by the

Commission which ordinarily shall not exceed sixty days from the date of receipt of the directions of the Commission].

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

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

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

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

(6) If the Commission, on consideration of the report, is of the opinion that further investigation is called for, it may direct the Director-General to make further investigation and submit a supplementary report on specific issues within [such

time as may be specified by the Commission but ordinarily not later than forty-five days."

18. A reading of Section 26(1) makes it clear that at the stage of forming an opinion that there exists a prima facie case which requires investigation, the Commission is required to consider the contents of the reference made by the Central Government or the State Government or the statutory authority or an information filed under Section 19(1)(a) and the documents, if any, received with the reference or information. The formation of the opinion about existence of a prima facie case by the Commission, which constitutes a condition precedent for issue of a direction to the Director General to cause an investigation to be made into the matter necessarily implies that while exercising power under Section 26(1), the Commission cannot adjudicate upon the merits and de-merits of the reference made by the Central Government or the State Government or the statutory authority or the averments/ allegations contained in the information. If after examining the contents of the reference or information, the Commission finds that the material produced along with it is not sufficient for forming an opinion about the existence or otherwise of a prima facie case or it wants some clarification on any particular aspect of the matter / issue, then it can call for a preliminary conference and invite the information provider and such other person as is considered necessary for the preliminary conference (Regulation 17). After considering the contents of reference or information and holding preliminary conference, if any, the Commission can pass an order under Section 26(1) briefly incorporating the reasons for forming an opinion that there exists a prima facie case which warrants investigation by the DG - Competition Commission of India Vs. Steel Authority of India Limited and Another (2010) 10 SCC 744. The direction given by the Commission under Section 26(1) is required to be communicated by the Secretary

to the DG along with a copy of the information or reference, as the case may be, with all other documents or materials or affidavits or statements, which may have been filed either along with the information or reference or at the time of preliminary conference [Regulation 20(1)].

19. If after considering a reference or an information and holding a preliminary conference under Regulation 17, the Commission forms an opinion that there does not exist any prima facie case, then it is required to close the matter under Section 26(2). The order passed under Section 26(2) is also required to be communicated to the Central Government or the State Government or the statutory authority or the informant, as the case may be. (Regulation 19).

20. If an information filed under Section 19(1)(a) or a reference made under Section 19(1)(b) of the Act contains multiple allegations of violation of Section 3 and/or 4, the Commission can, on a consideration thereof and after holding preliminary conference, if any, in terms of Regulation 17, form an opinion that there exists a prima facie case of violation of Section 3 and/or 4 and issue necessary direction to the DG. The Commission may also form an opinion that the prima facie case exists about violation only one of the provisions and no case is made out for investigation into the allegations regarding violation of the other provision. In that event, the Commission may issue direction to the DG to cause an investigation to be made only in respect of the allegations constituting the violation of the particular provision.

21. On receipt of the order passed by the Commission under Section 26(1), the DG is required to conduct investigation in accordance with the provisions of Section 41 read with the relevant provisions of the Regulations and submit report under Section 26(3) read with Regulation 20(4), which postulates that the report of

the DG shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation. If the DG accepts the request made by any party to the investigation for maintaining confidentiality of any document or commercially sensitive information, then the DG can submit report in two parts.

22. Where the Commission rejects the allegation constituting violation of the particular provision of the Act and directs investigation into the violation of the other provision, then the DG has no option but to confine the investigation only to such allegation. However, if the Commission does not specifically reject an allegation constituting violation of a particular provision of the Act and issues omnibus direction for investigation into the allegation of violation of the provisions of the Act, as has been done in the present case, then the DG is duty bound to record findings on each of the allegations made in the information or reference. In other words, in the absence of express negation by the Commission of any particular allegation made in the information / reference, the DG is under a statutory obligation to conduct investigation into all the allegations contained in the information or reference and record findings on each allegation.

23. In this case, the appellant had filed an information under Section 19(1)(a) of the Act making allegations of the violation of Sections 3 and 4 by Respondent Nos. 2 and 3 and prayed for investigation into the anti-competitive rules and conferences of Respondent Nos. 2 and 3. The information was accompanied by detailed written submissions with a specific prayer that the entire conduct of IATA and its resolutions be investigated from the perspective of the competition law and various provisions of Resolution 801 be declared as anti-competitive. The

Commission considered the information and written submissions filed by the appellant, heard the arguments of advocate as also its past three Presidents and passed detailed order dated 21.03.2013, whereby the DG was directed to investigate the matter about violations of the provisions of the Act by OP 1 and OP 2 (Respondent Nos. 2 and 3 herein). No doubt, paragraphs 11 to 13 of that order make a reference to Section 3 of the Act but there is nothing in the other paragraphs of the order from which it can even remotely be inferred that the Commission had formed an opinion that the allegation of abuse of dominant position constituting violation of Section 4 is without substance and does not call for investigation. Therefore, it was the bounden duty of the DG to make investigation into all the allegations contained in the information about violations of Sections 3 and 4 by Respondent Nos. 2 and 3 and record findings on each of the allegations.

24. In the course of the investigation conducted by the DG in compliance of order dated 21.03.2013 passed by the Commission, the appellant produced material to support of the allegations of violations of Section 3 as also Section 4 of the Act but the DG neither adverted to the allegations that Respondent Nos. 2 and 3 were in a dominant position in the relevant market and had abused the same nor recorded a finding on the said allegation. The concerned officer apparently felt constricted by the fact that the Commission had focussed its attention to the violation of Section 3(3) of the Act and order dated 21.03.2013 does not contain any reference to the allegation of abuse of dominant position by Respondent Nos.2 and 3 and, therefore, he did not record any finding on the specific allegation made by the appellant about violation of Section 4 of the Act.

25. On receipt of copy of the investigation report, the appellant filed objections and pointed out that the DG had failed to discharge his statutory duty under Regulation 20(4) of the Regulations read with Section 26(3) of the Act and failed to record finding on the allegation of abuse of dominant position by Respondent Nos. 2 and 3 and consequential violation of Section 4. At the hearing held by the Commission, this point was specifically argued by the learned counsel for the appellant but the Commission completely ignored the same and simply approved the negative finding record by the DG on the issue of violation of Section 3(3) of the Act.

26. The record produced before the Tribunal shows that from the very beginning, the appellant had made allegations of violations of Section 3 and also Section 4 of the Act by Respondent Nos. 2 and 3, produced material in support of all the allegations during the course of investigation. Unfortunately, the DG completely misunderstood the scope of the investigation which he was required to make in furtherance of order dated 21.03.2013 passed by the Commission and recorded finding only on the issue of violation of Section 3(3) of the Act and completely ignored that in the information filed under Section 19(1)(a), the appellant had made specific allegation of abuse of dominant position by Respondent Nos. 2 and 3 resulting in violation of Section 4 of the Act and in terms of paragraph 14 of the order passed by the Commission read with Regulation 20(4), he was under required to record findings on each of the allegations made in the information. The Commission too committed serious error by omitting to consider the specific plea taken by the appellant in the objections, which was also pressed during the course of oral hearing, that the DG had failed to make investigation into the allegation of abuse of dominant position and violation of Section 4 of the Act by Respondent Nos. 2 and 3.

27. Shri Abhishek Malhotra could not put forward any tangible argument as to why the Commission did not take note of the specific objection raised by the appellant regarding the DG's failure to make investigation into the allegation of abuse of dominant position made by the appellant against Respondent Nos. 2 and 3 and record finding on that aspect of the case. The argument of the learned counsel for the respondents that in the absence of a specific reference in order dated 21.03.2013 to the allegation of abuse of dominant position and consequential violation of Section 4 of the Act by Respondent Nos. 2 and 3, the Commission should be deemed to have impliedly rejected the said allegation at the stage of forming a prima facie opinion is too naïve to be accepted. In exercise of the powers vested in it under Section 26(1) read with Section 26(2) which has to be exercised by the Commission keeping in view the principles laid down by the Supreme Court in Competition Commission of India Vs. Steel Authority of India Limited and another (supra), the Commission is duty bound to record reasons, howsoever briefly, for closing a case under Section 26(2), which has admittedly not been done while dealing with the information filed by the appellant. If the Commission was to pass an order under Section 26(2) in respect of the allegation of abuse of dominant position levelled against Respondent Nos. 2 and 3, the appellant could have challenged the same by filing an appeal under Section 53B(2) read with Section 53A(1) of the Act. However, the fact of the matter is that no such order was passed by the Commission and as mentioned above, order dated 21.03.2013 does not contain any indication about negation of the allegation of abuse of dominant position levelled by the appellant.

28. On the basis of the above discussion, we hold that the DG committed serious illegality by not recording a finding on the allegation of abuse of dominant position

and consequential violation of Section 4 of the Act levelled by the appellant against Respondent Nos. 2 and 3 and the impugned order is liable to be set aside because the Commission failed to take cognisance and decide the plea raised by the appellant in the context of the said illegality committed by the DG.

29. In view of the above conclusion, we do not consider it necessary to deal with and decide the appellant's challenge to the negative finding recorded by the DG on the allegation of violation of Section 3 by Respondent Nos. 2 and 3, which have been approved by the Commission.

30. In the result, the appeal is allowed. The impugned order is set aside and the DG is directed to conduct fresh investigation into the allegations levelled by the appellant against the respondents and submit a report to the Commission under Section 26(3) of the Act read with Regulation 20(4) of the Regulations within a period of sixty days from the date of receipt of this order. If the DG is unable to submit fresh investigation report within sixty days, then he may approach the Commission for extension of time for submission of the fresh investigation report. After receipt of the report, the Commission shall give opportunity to the parties to file their reply/objections to the findings recorded by the DG, hear them and pass appropriate order in accordance with law.

[G.S. Singhvi]
Chairman

[Rajeev Kher]
Member

15th November, 2016