***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 27th April, 2015**

\+ **LPA No.733/2014**

**GOOGLE INC. & ORS. ….. Appellants**

Through: Mr. Gopal Subramaniam and Mr. Ramji Srinivasan, Sr. Advs. with Mr. Ravisekhar Nair, Mr. Sameer Gandhi, Ms. Hemangini Dadwal, Mr. Arjun Khera, Ms. Shivangi Sukumar, Ms. Sara Sundaram and Mr. Rishabh Kapur, Advs.

**Versus**

**COMPETITION COMMISSION OF INDIA & ANR. ….. Respondents**

Through: Mr. Pallav Saxena with Mr. Abhishek Kumar and Mr. Apurv Ranjan, Advs. for R-1.
Mr. Hrishikesh Baruah with Mr. Arjun Dewan, Mr. Pranav Jain, Mr. Ishan Das and Mr. Rishabh Gupta, Advs. for R-2.

**AND**

\+ **W.P.(C) No.7084/2014**

**GOOGLE INC. & ORS. ….. Petitioners**

Through: Mr. Gopal Subramaniam and Mr. Ramji Srinivasan, Sr. Advs. with Mr. Ravisekhar Nair, Mr. Sameer Gandhi, Ms. Hemangini Dadwal, Mr. Arjun Khera, Ms. Shivangi Sukumar, Ms. Sara Sundaram and Mr. Rishabh Kapur, Advs.

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**CORAM:-**
**HON'BLE THE CHIEF JUSTICE**
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J**

1. The intra-court appeal being LPA No.733/2014 was preferred against the order dated 15th October, 2014 of the learned Single Judge of this Court of, though vide the said order issuing notice for 9th March, 2015 of W.P.(C) No.7084/2014 preferred by the appellants but on the application of the appellants for interim relief merely directing that any information marked as confidential submitted by the appellants to the respondent No.1 Competition Commission of India (CCI) as well as to the Director-General, CCI (DG, CCI) shall not be disclosed to any party and shall be kept strictly confidential and not granting ad-interim stay of the investigation commenced by the DG, CCI in Case No.06/2014 of the CCI against the appellants. The said appeal came up before us first on 10th November, 2014 when the counsel for the respondent No.1 CCI appeared on advance notice; after hearing the counsels to some extent, it was felt that the writ petition itself could be decided along with this appeal; accordingly, with the consent of the counsels, we requisitioned the writ petition from the board of the learned Single Judge and listed the appeal as well as the writ petition for

hearing on 20th November, 2014. Since the respondent No.2 Vishal Gupta, on whose complaint under Section 19 of the Competition Act, 2002, Case No.06/2014 aforesaid against the appellants had been registered, did not appear inspite of advance copy stated to have been given, notice was also directed to be served on him.

2. On 20th November, 2014, the counsels stated that since the matter involves pure question of law, counter affidavits in the writ petition would not be necessary. The counsel for the respondent No.1 CCI on that date also assured that in the meanwhile investigation would not be concluded nor any precipitative steps be taken. The counsels were heard on 25th November, 2014, 12th January, 2015, 13th January, 2015 and 10th February, 2015 when judgment was reserved giving liberty to the appellants to file written submissions; the same have been filed by the appellants / writ petitioners.

3. The appeal in the circumstances, is now infructuous and is disposed of. We will thus take up the writ petition for adjudication though will be referring to the parties by their nomenclature in the appeal.

4. The three appellants i.e. i) Google Inc., California, United States of America (USA), ii) Google Ireland Ltd., Dublin 4, Ireland, and, iii) Google

India Pvt. Ltd., Bangalore, filed the writ petition impugning, a) the order dated 15th April, 2014 of the respondent No.1 CCI under Section 26(1) of the Competition Act directing investigation by DG, CCI into the Case No.06/2014 filed by the respondent No.2, b) order dated 31st July, 2014 of the respondent No.1 CCI dismissing the application filed by the appellants for recall of the order dated 15th April, 2014 as not maintainable, and c) for restraining the respondent No.1 CCI from carrying out any further proceedings against the appellants pursuant to the order dated 15th April, 2014.

5. It was the contention of the senior counsel for the appellants on 10th November, 2014 when the appeal had come up first before us that the investigation against the appellants ordered by the respondent No.1 CCI in all probability would be concluded by 9th March, 2015 for which date notice of the writ petition had been issued by the learned Single Judge, making the writ petition infructuous. It was further his contention that since the order dated 15th April, 2014 of the CCI ordering investigation against the appellants had been passed without hearing the appellants, the appellants were justified in applying to the CCI for recall of the said order and the CCI had erred in, instead of considering the said application for recall of the said

order on the ground of the actions of the appellants complained against being beyond the territorial jurisdiction of the CCI, holding the application to be not maintainable. It was contended that the CCI had thus failed to exercise the jurisdiction vested in it and the only question for adjudication in the writ petition was whether such an application for recall of an order under Section 26(1) of the Competition Act is maintainable or not inasmuch as if this Court were to hold that such an application is maintainable, the matter would have to be remanded back to the CCI to decide the said application on merits.

6. We had however on that date enquired from the senior counsel for the appellants whether not holding such an application for recall of an order under Section 26(1) of the Competition Act to be maintainable would tantamount to conferring a right of hearing to the person / entity complained against or reference against whom had reached the stage of Section 26(1) of the Act and which right the Supreme Court in ***Competition Commission of India Vs. Steel Authority of India Ltd.*** (2010) 10 SCC 744 has held does not exist.

7. The counsel for the respondent No.1 CCI, on that date, while opposing the said contention had drawn our attention to Section 37 of the

Competition Act which Section prior to its repeal by the Competition (Amendment) Act, 2007 with effect from 12th October, 2007 conferred a power on the CCI to review its order. It was his contention that the application filed by the appellants for recall was nothing but an application for review of the order dated 15th April, 2014 under Section 26(1) of the Act and the power of review though earlier conferred on the CCI having, expressly by repeal, been taken away, CCI was right in holding in the order dated 31st July, 2014 that the application filed by the appellants for recall of the order dated 15th April, 2014 was not maintainable.

8. We had however on 10th November, 2014 enquired from the counsels, that the Supreme Court in ***SAIL*** (supra) having held the power exercised by the CCI at the stage of Section 26(1) of the Act to be administrative in nature, whether not an authority / body exercising administrative power has an inherent right to review / recall its order, even in the absence of a specific power of review being conferred on it. It was *prima facie* felt by us on that date that it is only a person / body exercising judicial / *quasi*-judicial power who / which in the absence of the power of review being expressly conferred, is disentitled from exercising the said power.

9. It was for this reason only that it was felt as aforesaid that only this aspect needs to be adjudicated in these proceedings and for which reason, no counter affidavits were filed. The arguments thereafter also proceeded on this limited question only i.e. whether CCI has the power to recall / review an order passed by it of directing / causing investigation in exercise of powers under Section 26(1) of the Act.

10. Though in the light of the legal question aforesaid for adjudication, facts become irrelevant but still for the sake of completeness and to give a flavour of the grounds on which the appellants had sought recall of the order dated 15th April, 2014, we may record that it was the case of the appellants in the application for recall that the respondent No.2 complainant had procured the said order of investigation against the appellants by concealment and non disclosure of material facts that the advertisements run by and the services offered by the website (and which website had been suspended by the appellants) owned by a company namely M/s Audney incorporated in Delaware, USA, claimed to be controlled by the respondent No.2 complainant (based in India), were targeted to consumers in USA and Canada and were displayed only on domains with target users in USA and Canada and that users in India even if try to access these domains were

automatically redirected to other domains targeted to users in USA and Canada and CCI thus lacked territorial jurisdiction. It was further the case of the appellants in the said recall application that there was no connection between the suspension of M/s Audney's account by the appellants and the territory of India and the respondent No.2 complainant had failed to demonstrate effect thereof on competition in the relevant market in India.

11. The respondent No.1 CCI vide order dated 31st July, 2014 (supra) dismissed the said application of the appellants for recall as not maintainable observing, i) that the application is misconceived, ii) that the CCI vide order dated 15th April, 2014 had only *prima facie* formed a view after taking into consideration the material available on record, iii) when the investigations are pending before the DG, it would not be appropriate to deal with the issues raised by the appellants which can be effectively examined after the investigations are completed; iv) to accede to the prayers made in the application for recall would tantamount to review of the order dated 15th April, 2014 and which power had not been conferred upon the CCI, and, v) the appellants had failed to point out any provision of the Competition Act whereby such an application could be maintained before the CCI.

12. The contention of the senior counsel for the appellants in his opening arguments was:

(i) that the judgment of the Supreme Court in ***SAIL*** (supra) is not a bar to entertaining an application for recall of the order under Section 26(1) of the Act inasmuch as the Supreme Court itself in Para 31(2) of the said judgment has held as under:

> *"However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the party(s) concerned to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17 (2) of the Regulations (CCI (General) Regulations, 2009) to invite not only the information provider but even "such other person" which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be "preliminary conference", for whose conduct of business the Commission is entitled to evolve its own procedure."*

(ii) that a power to recall is different from a power of review and merely because by deletion of Section 37 of the Act, the power

of review has been taken away does not mean that the power to recall the order also has been taken away;

(iii) that the power of recall exists irrespective of whether the jurisdiction being exercised is judicial, quasi-judicial or administrative;

(iv) Reliance was placed on:

(a) ***Calcutta Discount Company Ltd. Vs. Income-Tax Officer*** AIR 1961 SC 372 where it was held in the majority judgment that though a writ of prohibition or certiorari will not issue against an executive authority (in that case Income Tax Officer) but the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction.

It was reasoned that where such action of the executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue

appropriate orders or directions to prevent such consequences.

(b) ***Arun Kumar Vs. Union of India*** (2007) 1 SCC 732 laying down that the existence of a jurisdictional fact is *sine qua non* or condition precedent for the exercise of power by a Court of limited jurisdiction.

(c) Judgment dated 13th April, 2012 of the Division Bench of this Court in W.P.(C) No.4489/1995 titled ***Samir Kohli Vs. Union of India*** where it was held that sans a statutory empowerment, a statutory or *quasi* judicial Tribunal cannot review or alter its decision but since the powers exercised by the Central Government under Section 41 of the Delhi Development Act, 1957 are not judicial or *quasi* judicial in nature but supervisory over the DDA and akin to a regulatory power, the same are not spent or exhausted with the passing of an order and lack of an express power in the Act to review does not bar the Central Government from doing so if the circumstances so warrant (We may notice that SLP(C)

No.15378/2012 preferred thereagainst is found to have been entertained with an ad-interim order of "*status quo*").

(d) ***Budhia Swain Vs. Gopinath Deb*** (1999) 4 SCC 396 reiterating that the Courts have inherent power to recall and set aside an order *inter alia* obtained by fraud practiced upon the Court or when the Court is misled by a party or when the Court itself commits a mistake which prejudices a party.

(e) ***M. Satyanandam Vs. Deputy Secretary to Government of A.P.*** (1987) 3 SCC 574 negativing / rejecting the contention that the Government cannot review its own order (in that case order rejecting release of premises was reviewed on ground of *bona fide* need under the Andhra Pradesh rent legislation).

(f) ***Reserve Bank of India Vs. Union Of India*** 128 (2006) DLT 41 where the question (before a Single Judge of this Court) was whether the Central Government exercising power as an appellate authority under the Banking

Regulation Act, 1949 has power of review. Reliance on Section 21 of the General Clauses Act, 1897 (providing that where by any Central Act or Regulations, a power to issue notifications orders, rules, or bye-laws is conferred, then that power includes a power to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued) was rejected by relying on ***Indian National Congress (I) Vs. Institute of Social Welfare*** (2002) 5 SCC 685 holding that the same was not applicable to *quasi* judicial authorities and Election Commission discharged *quasi* judicial power. It was held that in the absence of a rule authorizing Government to do so, reopening of closed proceedings was *ultra vires* and bad in law. It was however observed that the principle that the power to review must be conferred either specifically or by necessary implication is not applicable to decisions purely of an administrative nature as the Government must be free to alter its policy or its decision in administrative matters and cannot be hidebound by the

rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural justice where rights of parties may be affected.

(g) ***R.R. Verma Vs. Union of India*** (1980) 3 SCC 402 also holding that the principle that the power to review must be conferred by statute either specifically or by necessary implication is not applicable to decisions purely of an administrative nature.

(h) ***S. Nagaraj Vs. State of Karnataka*** 1993 Supp (4) SCC 595 laying down that the power to rectify an order stems from the fundamental principle that justice is above all and is to be exercised to remove the error and not for disturbing finality and that even when there is no statutory provision in this regard such power is to be exercised to avoid abuse of process or miscarriage of justice.

(i) ***State of Uttar Pradesh Vs. Maharaja Dharmander Prasad Singh*** (1989) 2 SCC 505 holding that the

Development Authority had competence to initiate proceedings to revoke the permission on the ground that permission had been obtained by misrepresentation and fraud and that the view that in the absence of authorization, the authority could not revoke or cancel the permission once granted is erroneous.

(j) ***Syngenta India Ltd. Vs. Union of India*** 161 (2009) DLT 413 laying down that administrative or statutory powers in aid of administrative functions imply flexibility and the need to review decisions taken and that unlike Courts, administrators and administrative bodies have to take decisions on the basis of broad, general policy considerations and that review as is understood in the functioning of the Courts is an entirely different concept. It was further held that importing elements from such concepts in administrative functioning would inject an avoidable rigidity in administrative process. It was yet further held that administrators and administrative bodies have power to make or change decisions, as the

circumstances warrant, having regard to the nature of the power and the purpose for which it is granted.

(k) ***Union of India Vs. Narendra Singh*** (2008) 2 SCC 750 where the mistake of a department in promoting a person though he was not eligible and qualified was held to be correctable and it was observed that mistakes are mistakes and they can always be corrected by following due process of law and that employer cannot be prevented from applying the rules rightly and in correcting the mistake.

(l) ***United India Insurance Co. Ltd. Vs. Rajendra Singh*** (2000) 3 SCC 581 where it was held that the remedy of moving the Motor Accident Claims Tribunal for recalling the order on the basis of newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation — no Court or Tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or

misrepresentation of such a dimension as would affect the very basis of the claim.

13. The counsel for the respondent No.1 CCI:

(a) contended that though earlier CCI had been conferred a power to review its order but the said power has been taken away with effect from 12th October, 2007;

(b) invited attention to our judgment in ***South Asia LPG Company Private Limited Vs. Competition Commission of India*** MANU/DE/2053/2014 (it was informed that till then no appeal thereagainst had been preferred to the Supreme Court) holding that reasons given by the Supreme Court in ***SAIL*** (supra) for holding that no notice or hearing is required to be given to the person / enterprise informed / referred against before forming a *prima face* opinion and directing investigation under Section 26(1) of the Act apply also to the stage under Section 26(7) of the Act which is also an initial stage and is not determinative in nature and substance and on the basis thereof contended that since investigation is but an initial stage and is not

determinative in nature and substance, the appellants will not suffer any prejudice;

(c) contended the appellants in the guise of an application for recall are wanting a complete hearing at the stage of Section 26(1) of the Act and which is impermissible;

(d) contended that whatever the appellants are contending in their application for recall can be contended at a subsequent stage also;

(e) contended that the appellants in the recall application have not taken any plea of fraud but only of suppression of facts by the respondent No.2 complainant;

(f) contended that the application for recall is in substance an application for review;

(g) invited attention to ***Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd.*** (2005) 13 SCC 777, in the context of a Court or a *quasi* judicial authority having jurisdiction to adjudicate on merits, laying down that its judgment or order can be reviewed on merit only if the Court or the *quasi*-judicial authority is vested with the power of review

by express provision or by necessary implication and it is only procedural illegality which goes to the root of the matter and invalidates the proceeding itself and consequently the order passed, which can be reviewed; on the basis thereof it was contended that a perusal of the application of the appellants for recall showed that the appellants were not seeking any procedural review but a review on merits;

(h) invited attention to para Nos.13 to 22 of one of the two opinions in the order dated 15th April, 2014 and to para Nos.13 to 29 of the other opinion in the order dated 15th April, 2014 and on the basis thereof contended that it is not as if the CCI at that stage was oblivious of the aspect of territorial jurisdiction over the appellants and further contended that from a perusal of the said paragraphs, it is evident that CCI formed a *prima facie* opinion that it had territorial jurisdiction and has in the said orders dealt elaborately with the aspect of territorial jurisdiction;

(i) contended that the question whether the appellants had violated any of the provisions of the Competition Act or not is different

from the question whether CCI has territorial jurisdiction over the appellants or not;

(j) contended that the issue of jurisdiction is a mixed question of law and fact;

(k) contended that the prejudice if any to the enterprise from being investigated against has to necessarily yield to larger public good;

(l) invited attention to Section 38 of the Competition Act conferring the CCI with the power to rectify any mistake apparent from the record in the orders passed by it, stipulating that while rectifying the mistakes, the order shall not amend any substantial part of the order and therefrom contended that it follows that the power of substantial review is expressly prohibited;

(m) to controvert the contention of the appellants that recall is different from review, placed reliance on:

(i) ***Asit Kumar Kar Vs. State of West Bengal*** (2009) 2 SCC 703 laying down that there is a distinction between a review petition and a recall petition; while in review

petition the Court considers on merits where there is an error apparent on the face of the record; in a recall petition, the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to the affected party;

(ii) ***Rajeev Hitendra Pathak Vs. Achyut Kashinath Karekar*** (2011) 9 SCC 541 laying down in the context of Consumer Protection Act, 1986 that Tribunals are creatures of the statute and derive their power from the express provisions of the statute and that the District Forums and the State Commissions have not been given any power to set aside *ex parte* orders and the power of review and the powers which have not been expressly given by the statute cannot be exercised;

(iii) ***Haryana State Industrial Development Corporation Ltd. Vs. Mawasi*** (2012) 7 SCC 200 laying down that a power of review is a creature of the statute and no Court or *quasi*-judicial body or administrative authority can review its judgment or order or decision unless it is

legally empowered to do so (we may however note that the Supreme Court in the said case was concerned with power of review of High Courts and the Supreme Court and which in civil cases is confined to grounds specified in Order 47 Rule 1 of the CPC);

(iv) ***Kalabharati Advertising Vs. Hemant Vimalnath Narichania*** (2010) 9 SCC 437 laying down that unless the statute / rules so permit, review application is not maintainable in case of judicial / *quasi*-judicial orders;

(n) contended that since the Supreme Court in ***SAIL*** (supra) has held that the person / enterprise informed / complained / referred against has no right of hearing at the stage of Section 26(1) of the Act, the question of the appellants being denied the right of hearing at that stage or seeking review on that ground does not arise;

(o) placed reliance on the judgment of the Full Bench of the High Court of Punjab and Haryana in ***Deep Chand Vs. Additional Director, Consolidation of Holdings*** MANU/PH/0572/1963 laying down that an application for recall of an order is only

another name for the power to review and a power to recall cannot be claimed as separate and distinct jurisdiction;

(p) made reference to the judgment of the Division Bench of the High Court of Bombay in ***Aamir Khan Productions Private Limited Vs. Union of India*** MANU/MH/1025/2010 where in the context of challenge under Article 226 of the Constitution of India to the notices issued by CCI under Section 26(8) of the Act, it was held that the question whether CCI has jurisdiction to initiate proceedings in the facts and situation is a mixed question of law and fact which CCI is competent to decide and that the matter being still at the stage of further inquiry and CCI yet to take a decision in the matter, there was no reason to interfere; on the basis thereof contended that same is the position here;

(q) placed reliance on ***Ramesh B. Desai Vs. Bipin Vadilal Mehta*** (2006) 5 SCC 638 to contend that a mixed question of law and fact cannot form a preliminary objection and on ***D.P. Maheshwari Vs. Delhi Administration*** (1983) 4 SCC 293 to contend that the Supreme Court had deprecated the practice of

entertaining challenge under Article 226 of the Constitution of India on preliminary objections and held that all questions should be allowed to be decided first;

(r) contended that investigation under Section 26(1) of the Act has been ordered against the appellants in as many as three other cases and the appellants have not assailed the said orders and there is no reason for the appellants to in the subject complaint case raise objection;

(s) invited attention to the definition of "consumer" in Section 2(f) of the Competition Act to contend that the respondent No.2 is a consumer of the appellants and the situs of the customers of the respondent No.2 is irrelevant;

(t) invited attention to Section 2(h) defining "enterprise" and to Section 32 of the Act to contend that the acts in violation of the provisions of the Act even if committed outside India have effect in India, the CCI would have territorial jurisdiction.

14. The counsel for the respondent No.2 complainant, besides contending that the CCI has rightly exercised territorial jurisdiction, has contended:

(aa) that there is a distinction between exercise of administrative power and exercise of statutory power, even if administrative in nature;

(bb) that the judgments cited by the senior counsel for the appellants, on decisions taken in exercise of administrative power being reviewable by the decision making authority even in the absence of any specific power, would not be applicable to exercise of statutory power inasmuch as the power of the authorities exercising statutory power is controlled by the statute itself;

(cc) that the scheme of the Competition Act does not permit any review / recall;

(dd) that the scheme of the Competition Act does not permit any interference in the investigation once set in motion pursuant to an order under Section 26(1) thereof, not even by the CCI itself;

(ee) placed reliance on:

(i) ***Lal Singh Vs. State of Punjab*** 1981 CriLJ 1069 where the question for consideration before the Full Bench of the Punjab and Haryana High Court was whether State Government can review or recall its decision under Section 378 of the Code of Criminal Procedure (Cr.P.C.), 1973 to prefer an appeal against an order of acquittal, before its actual presentation in the High Court. It was held:

(A) that the power is administrative in nature and not *quasi*-judicial.

(B) that there is a distinction between decisions of the State Government which are purely administrative in nature, passed under the umbrella of executive power vested in it by Article 162 of the Constitution of India, and the exercise of power though administrative in nature but conferred by a specific provision of the statute itself.

(C) while the decisions in exercise of power of the former category are purely and inherently administrative and involve no sanctity or finality and are thus reviewable and recallable but a decision in exercise of power of the second category cannot be recalled or reviewed except in accordance with the provisions of the statute from which they derive their source – if such a provision provides expressly or by necessary intendment for a review and recall, then alone and in accordance therewith can the earlier exercise of the statutory power be reconsidered – in the absence of such a provision, there is no inherent power to repeatedly review or recall such a statutory administrative order or decision as the power once exercised exhausts itself.

(D) exercise of statutory power must be necessarily governed by the provisions of the statute itself and must carry with it a degree of finality;

(ii) ***State of Madras Vs. C. P. Sarathy*** AIR 1953 SC 53 and ***State of Bihar Vs. D. N. Ganguly*** AIR 1958 SC 1018 laying down that the power of the Government under Section 10 of the Industrial Disputes Act, 1947 (I.D. Act) is administrative in nature and since the said Act does not expressly confer any power on the Government to cancel or supersede a reference, no such power exists. It was further held that Section 21 of the General Clauses Act cannot be attracted and on a perusal of the provisions of the I.D. Act it was held that once a reference had been made, it is the Labour Court / Industrial Tribunal only which can exercise jurisdiction over the dispute referred.

(iii) ***Neelima Misra Vs. Harinder Kaur Paintal*** (1990) 2 SCC 746 laying down that an administrative function is called *quasi*-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice; where there is no such obligation, the decision is called purely administrative.

(iv) ***Kazi Lhendup Dorji Vs. Central Bureau of Investigation*** 1994 Supp (2) SCC 116 where the question for consideration was whether it is permissible to withdraw the consent given by the State Government under Section 6 of the Delhi Special Police Establishment Act, 1946. It was held that even if Section 21 of the General Clauses Act was held to be applicable, the same did not enable issuance of an order having retrospective operation and the revocation of consent could be prospective in operation only and would not affect matters in which action had been initiated prior to the revocation. It was further held that the investigation which was commenced by Central Bureau of Investigation (CBI) prior to withdrawal of consent had to be completed and it was not affected by the said withdrawal of the consent order and that the CBI was competent to complete the investigation and submit the report under Section 173 Cr.P.C. in the competent Court. On the basis of this judgment, it was contended that the

investigation by the DG, CCI once ordered, has necessarily to be completed.

(v) ***Barpeta District Drug Dealers Association Vs. Union of India*** MANU/GH/1052/2012 where a Single Judge of the Gauhati High Court was also concerned with the order of CCI of dismissal of applications for recall of the notices issued by the DG, CCI pursuant to the order under Section 26(1) of investigation, but on the ground of the CCI having not found any merit in the said applications; the writ petitions were dismissed in view of the dicta of the Supreme Court in ***SAIL*** (supra).

(vi) ***Dharmeshbhai Vasudevbhai Vs. State of Gujarat*** (2009) 6 SCC 576 laying down that when an order is passed under Section 156(3) Cr.P.C., an investigation must be carried out and interference in the exercise by the police of statutory power of investigation, by the Magistrate, far less direction for withdrawal of any investigation which is sought to be carried out, is not envisaged under the

Cr.P.C.; the Magistrate's power in this regard is limited and he has no power to recall his order.

(vii) ***State of Madhya Pradesh Vs. Ajay Singh*** (1993) 1 SCC 302 holding that the power under Section 21 of the General Clauses Act cannot permit replacement or reconstitution of a Commission under the Commissions of Inquiry Act, 1952;

(ff) that prior to the amendment with effect from 12th October, 2007 creating the Competition Appellate Tribunal (CompAT), the powers exercised by CCI were judicial; however with the creation of the CompAT, the powers exercised by CCI are purely administrative; hence the legislature did not deem it necessary to vest a power of review in the CCI exercising administrative powers only; reference in this regard is made to ***Brahm Dutt Vs. Union of India*** (2005) 2 SCC 431;

(gg) that provisions in the form of Sections 43A, 44 and 45 exist in the Competition Act for penalizing the complainant / informant for making a misleading / false statement;

(hh) that once investigation has been ordered in exercise of power under Section 26(1) and till the submission of the report by the DG, CCI under Section 26(3) of the Act, there is no power with the CCI to interfere with the investigation;

(ii) ***S. Nagraj*** (supra), ***Budhia Swain*** (supra) and ***United India Insurance Co. Ltd.*** (supra) relied upon by the appellants have no application as the same were concerned with exercise of adjudicatory and not purely administrative powers as under Section 26(1) of the Competition Act.

We may record that the compilation of judgments handed over by the counsel for respondent No.2 / complainant also contains copies of judgments in (i) ***New Central Jute Mills Co. Ltd. Vs. Deputy Secretary, Ministry of Defence*** AIR 1966 Calcutta 151; (ii) ***Rohtas Industries Vs. S.D. Agarwal*** 1969 (1) SCC 325; (iii) ***Emperor Vs. Khwaja Nazir Ahmad*** AIR (32) 1945 PC 18; (iv) ***Clariant International Ltd. Vs. Securities & Exchange Board of India*** (2004) 8 SCC 524; (v) ***T.N. Seshan, Chief Election Commissioner of India Vs. Union of India*** (1995) 4 SCC 611; (vi) ***Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd.*** (1996) 5 SCC 550; and (vii) ***Shaikh Mohammedbhikhan Hussainbhai Vs. The Manager, Chandrabhanu***

***Cinema*** AIR 1986 Gujarat 209 but neither was any reference thereto made during the hearing nor is any reference thereto found in the written synopsis filed and it is not clear as to in what context these have been included. We thus do not feel the need to go into the same.

15. The counsel for the respondent No.1 CCI added that Section 26(1) of the Competition Act is a unique provision and order whereunder has not even been made appealable and is merely a preparatory stage and the Supreme Court in ***SAIL*** (supra) has held that there is no right of hearing also to the person / enterprise complained / referred against at that stage. It was further contended that none of the judgments cited by the senior counsel for the appellants was concerned with such a statutory provision.

16. The senior counsel for the appellants in rejoinder contended:

(i) that in some other petitions under Article 226 of the Constitution of India particularly by Indian Oil Corporation Ltd. (IOCL) and by the Delhi Development Authority (DDA) against the orders under Section 26(1) of the Act, the learned Single Judge has granted stay of investigation.

(ii) that the Government, upon exercise of power of reference of dispute under Section 10 of the I.D. Act, becomes *functus*

*officio*; the same is not the position under the Competition Act, where the CCI remains seized of the dispute even during investigation.

(iii) that the judgment of the Full Bench of the Punjab High Court in ***Lal Singh*** (supra) is contrary to the judgment of the Division Bench of this Court in ***Samir Kohli*** (supra) .

(iv) that a statutory administrative power remains administrative in nature and cannot take a different hue.

17. We have weighed the position in law in the light of contentions aforesaid and particularly in the light of the judgment of the Supreme Court in ***SAIL*** (supra). The position which emerges may be thus crystallized.

(A) In the light of the judgment of the Supreme Court in ***SAIL*** (supra), the power exercised by CCI under Section 26(1) is administrative.

(B) A decision taken in exercise of administrative powers can be reviewed / recalled by the person / authority taking the said decision even in the absence of any specific power in that regard.

The only question is, whether the said rule is not applicable to decisions taken, though in exercise of administrative power, but conferred under a statute.

The ancillary question is, whether there is anything in the statute which indicates that an order under Section 26(1) ought not to be reviewed / recalled.

18. We, for the following reasons conclude that order of the CCI/direction to the DG, CCI in exercise of power under Section 26(1) of the Act, to cause investigation, is capable of review / recall:

(A) The CCI, before it passes an order under Section 26(1) of the Act directing the DG to cause an investigation to be made into the matter, is required to, on the basis of the reference received from the Central or the State Government or a statutory authority or on the basis of the information/complaint under Section 19 or on the basis of its own knowledge, form an opinion that there exists a *prima facie* case of contravention of Section 3(1) or Section 4(1) of the Act. Without forming such an opinion, no investigation by the DG can be ordered to be made. However, while forming such an opinion, as per ***SAIL***

(supra), CCI is not mandated to hear the person/enterprise referred/informed against.

(B) The statute does not provide any remedy to a person / enterprise, who / which without being afforded any opportunity, has by an order / direction under Section 26(1) been ordered / directed to be investigated against / into. Though ComPAT has been created as an appellate forum against the orders of CCI but its appellate jurisdiction is circumscribed by Section 53A of the Competition Act and no appeal is prescribed against the order of CCI under Section 26(1) of the Act. The said person / enterprise, in the absence of any remedy, has but to allow itself to be subjected to and participate in the investigation.

(C) The DG, during the course of such investigation, by virtue of Section 41(2) read with Section 36(2) of the Act has the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit in respect of, (i) summoning and enforcing the attendance of any person and examining him on oath, (ii) requiring the discovery and production of documents, (iii) receiving evidence on affidavit,

(iv) issuing commissions for the examination of witnesses and documents, and (v) requisitioning public records or documents from any public office. The DG is further empowered by Section 41(3) read with Sections 240 and 240A of the Companies Act, 1956 to keep in its custody any books and papers of the person/enterprise investigated against / into for a period of six months and to examine any person on oath relating to the affairs of the person/enterprise being investigated against / into and all officers, employees and agents of such person/enterprise are also obliged to preserve all books and papers which are in their custody and power.

(D) Failure to comply, without reasonable cause, with any direction of the DG, under Section 43 of the Act has been made punishable with fine extending to rupees one lakh for each day of failure, subject to a maximum of rupees one crore.

(E) It would thus be seen that the powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on the Police under the Code of Criminal Procedure. While the Police has no power to record

evidence on oath, DG has been vested with such a power. Our experience of dealing with the matters under the Competition Act has shown that not only statement on oath of witnesses summoned during the course of investigation is being recorded but the said witnesses are being also permitted to be cross-examined including by the informant / claimant and which evidence as part of the report of the DG forms the basis of further proceedings before the CCI. Thus while in investigation by Police under the Cr.P.C., the rule of *audi alteram partem* does not apply, there is no such embargo on the DG, CCI.

(F) Thus, investigation by DG, CCI tantamount to commencement of trial / inquiry on the basis of an *ex parte prima facie* opinion. Though the Supreme Court in Para 116 of ***SAIL*** (supra) has held that inquiry by CCI commences after the DG, CCI has submitted report of investigation but, in the facts of that case, had no occasion to consider that the DG, CCI in the course of investigation has powers far wider than of the Police of investigation. Para 29 of the judgment also notices that the counsels had addressed arguments on issues not strictly arising

for adjudication in the facts of that case; however since it was felt that the said questions were bound to arise in future, the Supreme Court proceeded to deal with the said contentions also.

(G) The investigation by the DG ordered by the CCI thus stands on a different pedestal from a show cause notice, the scope of judicial review whereof, though lies, is very limited and from investigation/inquiry pursuant to an FIR by the Police which in some cases has been held to be not causing any prejudice and thus furnishing no cause of action for a challenge thereto.

(H) Before registration of an FIR the concerned Police Officer is not to embark upon an inquiry and is statutorily obliged (under Section 154(1) of the Cr.P.C.) to register a case and then, if has reason to suspect (within the meaning of Section 157(1) Cr.P.C.) to proceed with the investigation against such person. Per contra, as noticed above, investigation by the DG under the Competition Act commences not merely on the receipt of reference/information but only after CCI has formed a *prima*

*facie* opinion of violation of the provisions of the Act having been committed.

(I) In the absence of any statutory remedy against investigation commenced on the basis of a mere reason to suspect in the mind of the Police, writ petition under Article 226 of the Constitution of India for quashing of FIR has been held to be maintainable albeit on limited grounds. Reference in this regard may be made to ***State of Haryana Vs. Bhajan Lal*** 1992 Supp (1) SCC 335 arising from a writ petition for quashing of the entire criminal proceedings including the registration of the FIR. It was held, (i) that the Police do not have an unfettered discretion to commence investigation and their right of inquiry is conditioned by reason to suspect and which in turn cannot reasonably exist unless the FIR discloses the commission of such offence; (ii) that serious consequences flow when there is non-observance of procedure by the Police while exercising their unfettered authority; (iii) in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which,

if the High Court is convinced that the power of investigation has been exercised by a Police Officer *mala fide*, the High Court can always issue a writ of mandamus restraining the Police Officer; (iv) the fact that the Cr.P.C. does not contain any provision giving power to a Magistrate to stop investigation by the Police, cannot be a ground for holding that such power cannot be exercised under Article 226; (v) the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen except in accordance with the procedure established by the Constitution and the laws - the history of personal liberty is largely the history of insistence on observance of procedure – observance of procedure has been the bastion against wanton assaults on personal liberty over the years - under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law; (vi) that though investigation of an offence is the field exclusively reserved for the Police, whose powers in that field are unfettered so long as the power

to investigate into the offences is legitimately exercised in strict compliance with the provisions falling under Chapter XII of the Code of Criminal Procedure and the Courts are not justified in obliterating the track of investigation when the investigating agency is well within its legal bounds; though a Magistrate is not authorized to interfere with the investigation or to direct the Police how that investigation is to be conducted but if the Police transgresses the circumscribed limits and improperly and illegally exercises investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the Court on being approached has to consider the nature and extent of the breach and pass appropriate orders without leaving the citizens to the mercy of Police since human dignity is a dear value of our Constitution; (vii) no one can demand absolute immunity even if he is wrong and claim unquestionable right and unlimited powers exercisable up to unfathomable cosmos – any recognition of such power will be tantamount to recognition of divine power which no authority on earth can enjoy; (viii) if the

FIR discloses no cognizable offence or the allegations in the FIR even if accepted in entirety do not constitute the offence alleged, the Police would have no authority to undertake an investigation and it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person and in such an eventuality the investigation can be quashed; (ix) in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 and if the High Court is convinced that the power of investigation has been exercised by the Police *mala fide*, the High Court can always issue a writ; (x) the High Court can quash proceedings if there is no legal evidence or if there is any impediment to the institution or continuance of proceedings but the High Court does not ordinarily inquire as to whether the evidence is reliable or not; (xi) if no offence is disclosed, an investigation cannot be permitted as any investigation, in the absence of offence being disclosed, will result in unnecessary harassment to a party whose liberty and property may be put to jeopardy for nothing; (xii) where there is an express legal bar

engrafted in any of the provisions of the Cr.P.C. or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Cr.P.C. or the concerned Act, providing efficacious redress for the grievance of the aggrieved party, power under Article 226 could be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice; (xiii) Similarly, where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, power under Article 226 of the Constitution of India can be exercised; (xiv) whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case; (xv) however, the power of quashing should be exercised sparingly and with circumspection.

(J) Supreme Court, in Para 87 of ***SAIL*** (supra) has held that the function discharged by CCI while forming a *prima facie*

opinion under Section 26(1) is inquisitorial / regulatory in nature.

(K) We are of the opinion that once petitions under Article 226 for quashing of investigation under the Cr.P.C. have been held to be maintainable, on the same parity a petition under Article 226 would also be maintainable against an order/direction of the CCI of investigation under Section 26(1) of the Competition Act particularly when the powers of the DG, CCI of investigation are far wider than the powers of Police of investigation under the Cr.P.C.

(L) However, a petition under Article 226 of the Constitution of India against an order under Section 26(1) of the Act would lie on the same parameters as prescribed by the Supreme Court in ***Bhajan Lal*** (supra) i.e. where treating the allegations in the reference/information/complaint to be correct, still no case of contravention of Section 3(1) or Section 4(1) of the Act would be made out or where the said allegations are absurd and inherently improbable or where there is an express legal bar to the institution and continuance of the investigation or where the

information/reference/complaint is manifestly attended with *mala fide* and has been made/filed with ulterior motive or the like.

(M) Just like an investigation by the Police has been held in ***Bhajan Lal*** (supra) to be affecting the rights of the person being investigated against and not immune from interference, similarly an investigation by the DG, CCI, if falling in any of the aforesaid categories, cannot be permitted and it is no answer that no prejudice would be caused to the person/enterprise being investigated into/against or that such person/enterprise, in the event of the report of investigation being against him/it, will have an opportunity to defend.

(N) The Supreme Court, in ***Rohtas Industries*** (supra) and the Calcutta High Court in ***New Central Jute Mills Co. Ltd.*** (supra), cited by the counsel for the respondent No.2 / complainant, also has held that an investigation against a public company tends to shake its credit and adversely affects its competitive position in the business world even though in the end it may be completely exonerated and given a character

certificate and that the very appointment of Inspector (in that case under Section 237(b) of the Companies Act to investigate the Company's affairs) is likely to receive much press publicity as a result of which the reputation and prospects of the Company may be adversely affected.

(O) When the effect of, an order of investigation under Section 26(1) of the Competition Act can be so drastic, in our view, availability of an opportunity during the course of proceedings before the CCI after the report of the DG, to defend itself cannot always be a ground to deny the remedy under Article 226 of the Constitution of India against the order of investigation. Though we do not intend to delve deep into it but are reminded of the principle that in cases of violation of fundamental rights, the argument of the same causing no prejudice is not available (see ***A.R. Antulay Vs. R.S. Nayak*** (1988) 2 SCC 602).

(P) Though the Supreme Court in Para 30 of ***SAIL*** (supra) has observed that an order of investigation does not entail civil consequences for any but had no occasion to consider the effect

of such an order or the aspect of challenge under Article 226 of the Constitution to an order under Section 26(1) of the Competition Act.

(Q) The reason which prevailed in ***SAIL*** (supra) for holding that a person / enterprise sought to be investigated into has no right to be heard at the stage of Section 26(1) of the Competition Act as is evident from paras 92 and 125 of the judgment, was that an order of investigation when called for is required to be passed expeditiously and without spending undue time. The view which we are taking, does not impinge on the said reasoning of the Supreme Court. Moreover, if there is found to be a right to approach the High Court under Article 226, the said right cannot be defeated on the ground of the same causing delay; human failings cannot be a ground for defeating substantive rights. The Supreme Court in ***Madhu Limaye Vs. State of Maharashtra*** (1977) 4 SCC 551 held that the bar introduced by sub-section (2) of Section 397 of the Cr.P.C. limiting the revisional power of the High Court, to bring about expeditious disposal of the cases finally would not be a bar to the exercise

of the inherent power under Section 482 of the Cr.P.C. by the High Court. The same principle was reiterated in ***B.S. Joshi Vs. State of Haryana*** (2003) 4 SCC 675, though subsequently in ***Manoj Sharma Vs. State*** (2008) 16 SCC 1 it was stated that the same is permissible in rare and exceptional cases.

(R) Again, as aforesaid, CCI can order/direct investigation only if forms a *prima facie* opinion of violation of provisions of the Act having been committed. Our Constitutional values and judicial principles by no stretch of imagination would permit an investigation where say CCI orders/directs investigation without forming and expressing a *prima facie* opinion or where the *prima facie* opinion though purportedly is formed and expressed is palpably unsustainable. The remedy of Article 226 would definitely be available in such case.

(S) Even otherwise, the remedy under Article 226 of the Constitution of India has been held to be a part of the basic structure of our constitution. Reference if any required in this regard can be made to ***L. Chandra Kumar Vs. Union of India*** (1997) 3 SCC 261, ***Nivedita Sharma Vs. Cellular Operators***

***Association of India*** (2011) 14 SCC 337 and ***Madras Bar Association Vs. Union of India*** (2014) 10 SCC 1. The rule of availability of alternative remedy being a ground for not entertaining a petition under Article 226 is not an absolute one and a petition under Article 226 can still be entertained where the order under challenge is wholly without jurisdiction or the like.

(T) A Division Bench of the Madras High Court also recently in ***The Tamil Nadu Film Exhibitors Association Vs. Competition Commission of India*** MANU/TN/0689/2015 held that the bar in Section 61 of the Competition Act to the jurisdiction of Civil Courts in respect of any matter which the CCI or CompAT is empowered to determine does not apply to the jurisdiction of the High Court under Article 226 of the Constitution and which has been held to be part of the basic structure.

(U) We find a Division Bench of the Bombay High Court also, in ***Kingfisher Airlines Limited Vs. Competition Commission of India*** MANU/MH/1167/2010, to have held a writ petition under Article 226 of the Constitution of India to be

maintainable against an order/direction for investigation under the Competition Act albeit for compelling reason or when the reference / information / complaint does not disclose any contravention of Section 3(1) or Section 4(1) of the Act. However in the facts of that case no case for quashing of the order/direction for investigation was found to have been made out. We may notice that SLP(C) No.16877/2010 preferred by Kingfisher Airlines Limited was dismissed as withdrawn on 24th September, 2010 in view of the judgement in ***SAIL*** (supra).

(V) A Single Judge of this Court in ***Asahi Glass India Vs.Director General of Investigation*** MANU/DE/2568/2009 held a writ petition under Article 226 to be maintainable against an order/direction for investigation by the DG under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) (which the Competition Act repeals vide Section 66 thereof), of course in cases of inherent lack of jurisdiction or abuse of process of law or jurisdictional issues.

(W) One of the modes in which an inquiry under Section 19 read with Section 26 can be set in to motion is on receipt of

reference from the Central Government or State Government or a statutory authority. Under Section 31 of the erstwhile MRTP Act also the Government was empowered to make a reference to the MRTP Commission. A Division Bench of this Court in ***Colgate Palmolive India (P) Ltd. Vs. Union of India*** MANU/DE/0181/1979 though held that the Government before making such a reference was not required to give an opportunity of hearing to the party against whom reference was made but also held that it did not mean that reference could be made on any whimsical ground and will be immune from challenge. It was held that if it can be shown that there was no material before the Government on the basis of which it could appear that a monopolistic trade practice was being practiced, the order of reference would be bad.

(X) We may notice that the Division Bench of the High Court of Bombay also in ***Aamir Khan Productions Private Limited*** supra cited by the counsel for the CCI did not hold a petition under Article 226 against the notices of CCI under Section 26(8) to be not maintainable and only in the facts of the case

found no reason to interfere. Moreover, the said Division Bench also relied on ***Kingfisher Airlines Limited*** supra.

(Y) We are of the opinion that rather than this Court in exercise of jurisdiction under Article 226 of the Constitution of India in the first instance investigating whether an *ex parte* order under Section 26(1) of investigation can be sustained or not, without any findings of the CCI in this respect in the absence of the person / enterprise complained / referred against being present before the CCI at the time of making of the order under Section 26(1), it would be better if the said exercise is undertaken in the first instance by the CCI and this Court even if approached under Article 226, having the views of CCI before it.

(Z) Reference in this regard may be made to ***Vinod Kumar Vs. State of Haryana*** (2013) 16 SCC 293 where it was held that if a wrong and illegal administrative act can in the exercise of powers of judicial review be set aside by the Courts, the same mischief can be undone by the administrative authority by reviewing such an order if found to be *ultra vires* and that it is

open to the administrative authority to take corrective measure by annulling the palpably illegal order.

(ZA) Deletion of Section 37 of the Competition Act as it stood prior to the amendment with effect from 12th October, 2007 cannot be a conclusive indication of the legislature having intended to divest the CCI of the power of review or an argument to contend that the power of review if found to be existing in the CCI *de hors* Section 37 has been taken away by deletion of Section 37. It is well nigh possible that the legislature deleted Section 37 finding the same to be superfluous in view of the inherent power of the CCI to review/recall its orders. The Supreme Court in ***K.K. Velusamy Vs. N. Palanisamy*** (2011) 11 SCC 275 negatived such a contention in the context of deletion from the Civil Procedure Code of Order XVIII Rule 17A for production of evidence not previously known or evidence which could not be produced despite due diligence. It was held that the deletion of the said provision does not mean that no evidence can be received at all after a party closes evidence and

that it only means that the amended Civil Procedure Code found no need for such a provision.

(ZB) The counsels for the respondents have not been able to controvert that an order / direction issued in the exercise of administrative powers (as the order of CCI under Section 26(1) has in ***SAIL*** (supra) been held to be) is inherently reviewable / recallable and have not brought to our notice / argued that there exists any specific bar in the Act or the Regulations framed thereunder to preclude the invocation of the inherent power to recall / review.

(ZC) The judgment of the Full Bench of the Punjab and Haryana High Court in ***Lal Singh*** (supra) carving out a distinction between administrative powers conferred by a statute and administrative powers conferred by Article 162 of the Constitution of India is indeed contrary to the judgment of the Division Bench of this Court in ***Samir Kohli*** (supra).

(ZD) The said judgment of the Full Bench of the Punjab and Haryana High Court is with reference to Section 378 of the Cr.P.C. and which is akin to Section 10 of the I.D. Act. The Government

after taking the decision to prefer an appeal has nothing further to do in the matter. It is for this reason that it was held that the power of the Government under Section 378 exhausts itself upon a decision being taken. It is not so under Section 26(1) of the Competition Act. While the decision of the Government under Section 378 of the Cr.P.C. is final, the decision of the CCI under Section 26(1) to order investigation is on a *prima facie* view of the matter and on which CCI is yet to take a final decision. Thus the chief reason which prevailed with the Full Bench of the Punjab and Haryana High Court for holding that the competent authority in the Government after taking the decision having exhausted the power does not apply to Section 26(1) of the Competition Act. The same was the position in ***Ajay Singh*** (supra) cited by the counsel for the respondent No.2 complainant.

(ZE) Moreover the political backdrop of the judgment of the Punjab and Haryana High Court cannot be lost sight of; there, a political party in power had taken a decision to prefer an appeal against the order of acquittal of a leader of the opposite political

party and which came in power and sought to recall the said decision. The Court stepped in to prevent such change in decision for political considerations; however legal reasons were given.

(ZF) We have however considered whether even in the case of a decision under Section 378 of the Cr.P.C., converse would be true i.e. whether a decision not to prefer an appeal even if erroneous can attain finality. We shudder to think the consequences of holding so. The same would lead to a push and pull for having such a decision taken and thereby preventing the right minded in the Government from reversing the same.

(ZG) Per contra, the Division Bench of this Court in ***Samir Kohli*** (supra) was directly concerned with the power of the Central Government to review an order / decision in exercise of powers under Section 41(3) of the Delhi Development Act, 1957 in the absence of any provision thereof in the said statute. One of the contentions there also was that once such power had been exercised, the Central Government could not invoke it again

and had been rendered *functus officio* and ceased to have jurisdiction to deal with the matter or to arrive at a different conclusion and that DDA being a subordinate authority to the Central Government could not question the decision of the Central Government or refuse to obey it. It was however held:

(i) that the power of the Central Government under the said provision was a supervisory one and not *quasi*-judicial in the sense traditionally understood.

(ii) there can be no doubt that whatever be the character of the order, it would be reviewable under Article 226 of the Constitution of India.

(iii) that the Supreme Court in ***U.P. Power Corporation Ltd. Vs. National Thermal Power Corporation Ltd.*** (2009) 6 SCC 235 had held that the power of regulation conferred upon an authority with the obligations and functions that go with it and are incidental to it are not spent or exhausted with the grant of permission.

(iv) reliance was placed on ***R.R. Verma*** and ***Maharaja Dharmander Prasad Singh*** (supra).

(v) reference was made to Section 21 of the General Clauses Act which empowers every authority clothed with any statutory power to issue orders rescinding, varying or altering previous orders or notifications.

(vi) that lack of an express mention in the statute to review or modify a previous order under Section 41(3) does not bar the Central Government from doing so if the circumstances so warrant.

(ZH) We have no reason to disagree with the judgment of the Co-ordinate Bench of this Court and qua which no argument also was made and hence are unable to accept the view of the Full Bench of the High Court of Punjab and Haryana.

(ZI) there is nothing in the scheme of the Competition Act to suggest that the CCI, after ordering investigation is *functus officio*; on the contrary as aforesaid the order of investigation is on a *prima facie* one sided view of the matter and even if report of the investigation finds contravention of provisions of the Act, the CCI under Section 26(8) of the Act is to give an opportunity of hearing to the person / enterprise against whom

such report has been made and to at that stage conduct a two sided inquiry.

(ZJ) The report of the DG, CCI is not binding on the CCI. The decision whether there is contravention or not is admittedly to be taken after notice and it is well nigh possible that the CCI may finally reject the report of the DG, CCI.

(ZK) The DG, CCI under Section 16 of the Competition Act, is only investigative arm of the CCI with the decision, whether there is any contravention of the provisions of the Act being required to be taken under Section 27 of the Act by the CCI.

(ZL) It is also not as if the investigative powers of the DG are unlimited. The DG, CCI in conducting the investigation is bound by the confines of investigation set out in the order of the CCI under Section 26(1) of the Act and is not empowered to conduct a roving and fishing inquiry. This is also evident from Section 26(7) of the Act empowering the CCI to direct the Director-General to cause further investigation into the matter and from Regulation 20(6) of the Competition Commission of India (General) Regulations, 2009, empowering CCI to direct

DG to make further investigation. It is thus not as if once an order under Section 26(1) of the Act of investigation has been made, the investigation goes outside the domain of CCI.

(ZM) ***SAIL*** (supra) is a judgment only on the right of hearing of the person / enterprise complained / referred against at the stage of Section 26(1) of the Act. What it lays down is that CCI at that stage is not required to issue notice to such a person / enterprise. The question whether CCI is entitled to recall / review the order so made did not arise for consideration therein. It is settled principle of law (see ***Bhavnagar University Vs. Palitana Sugar Mill P. Ltd.*** (2003) 2 SCC 11, ***Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate*** (2005) 2 SCC 489, ***Inderpreet Singh Kahlon Vs. State of Punjab*** AIR 2006 SC 2571) that a judgment is a precedent on what falls for adjudication and not what can be logically deduced or inferred therefrom.

(ZN) The fact that said judgment holds that CCI is not required to hear the person complained / referred against before ordering investigation cannot lead to an inference that such a person

even if approaches the CCI for recall / review of such an order is not to be heard.

(ZO) The senior counsel for the appellant is correct in his contention that the Supreme Court also in the said judgment has recognized the jurisdiction of the CCI to if so deems necessary give notice to the person / enterprise complained / referred against and hear him also before ordering investigation. It is thus not as if there is any lack of power or jurisdiction in the CCI to hear the person / enterprise complained / referred against at the stage of Section 26(1) of the Act.

(ZP) Mention in this regard may also be made of Section 29 of the Act providing procedure for investigation of combinations and which requires the CCI to before causing investigation by the DG, issue a notice to show cause to the parties to the combination as to why investigation should not be conducted. We have not been able to fathom any difference in the violations of Section 3(1) or 4(1) for inquiring into which procedure is provided under Section 26 and violations under Section 5 for inquiring into which procedure of inquiry under

Section 29 is provided or to understand as to why a notice to show cause before investigation has been provided in Section 29 and not even an opportunity of hearing before investigation has been interpreted in Section 26. Unfortunately Section 29 remained to be noticed in this context in ***SAIL*** (supra).

(ZQ) Just like it is in the discretion of the CCI to hear or not to hear the person / enterprise complained / referred against at the stage of Section 26(1) of the Act, CCI cannot be held to be without jurisdiction to recall / review the order.

(ZR) Notice in this regard may also be taken of Section 36 which empowers the CCI to in the discharge of its functions regulate its own procedure. The same also permits CCI, even if were to be held to be inspite of exercising administrative power under Section 26(1) having no inherent power of review/recall, to if so deems it necessary, entertain an application for review/recall.

(ZS) CCI having dismissed the application of the appellants for review / recall under the assumption that the same was not maintainable, we refuse to go into the question, whether while doing so it also made some observations on the merits of the

grounds urged for review / recall. It is now for the CCI to consider whether the application of the appellants discloses any grounds to, without requiring any investigation dislodge the *prima facie* opinion earlier formed by the CCI, while ordering investigation.

(ZT) In our view, a mere filing of an application for review / recall would not stall the investigation by the DG, CCI already ordered. Ordinarily, the said application should be disposed of on the very first date when it is taken up for consideration, without calling even for a reply and without elaborate hearing inasmuch as the grounds on which the application for recall / review is permissible as aforesaid are limited and have to be apparent on the face of the material before the CCI. Even if CCI is of the opinion that the application for recall / review requires reply / further hearing, it is for the CCI to, depending upon the facts order whether the investigation by the DG, CCI, is to in the interregnum proceed or not.

(ZU) In the light of the view which we have taken, the judgment cited by the counsel for CCI carving out a distinction between review and recall are of no avail.

(ZV) The existence of a provision in the Competition Act for penalizing the complainant / informant for making a misdealing / false statement leading to investigation being ordered cannot take away the right of the person / enterprise ordered to be investigated against / into to apply for review / recall of the order of investigation, if in law found to be entitled thereto.

19. However having said that, we are not to be understood as conveying that in every case in which CCI has ordered investigation without hearing the person / enterprise complained / referred against, such person/enterprise would have a right to apply for review / recall of that order. Such a power though found to exist has to be sparingly exercised and ensuring that the reasons which prevailed with the Supreme Court in ***SAIL*** (supra) for negating a right of hearing to a person are not subverted.

20. Such a power has to be exercised on the well recognized parameters of the power of review / recall and without lengthy arguments and without the investigation already ordered being stalled indefinitely. In fact, it is up

to the CCI to also upon being so called upon to recall / review its order under Section 26(1) of the Act to decide whether to, pending the said decision, stall the investigation or not, as observed hereinabove also. The jurisdiction of review / recall would be exercised only if without entering into any factual controversy, CCI finds no merit in the complaint / reference on which investigation had been ordered. The application for review / recall of the order under Section 26(1) of the Act is not to become the Section 26(8) stage of the Act.

21. We therefore answer the question framed hereinabove for adjudication in affirmative and hold that respondent No.1 CCI has the power to recall / review the order under Section 26(1) of the Act but within the parameters and subject to the restrictions discussed above.

22. The respondent No.1 CCI in the present case dismissed the application of the appellants for review / recall being of the opinion that it is not vested with such a power. The matter has thus to be remanded to the respondent No.1 CCI for consideration of the application of the appellants for review / recall afresh.

23. We have considered whether during the said time, the investigation already ordered should remain stayed. We intend to direct the respondent No.1 CCI to dispose of the said application within a definite time schedule and since during the pendency of these proceedings, the respondent No.1 CCI had assured that in the meanwhile investigation would not be concluded and no precipitative steps would be taken, we deem it appropriate that the said arrangement continues till the fresh decision of the said application for review / recall by the respondent No.1 CCI.

24. We accordingly dispose of the appeal and the writ petition by directing the respondent No.1 CCI to consider the application of the appellants for review / recall afresh, however within two months hereof. The parties to appear before the Secretary, CCI on 12th May, 2015 at 1100 hours for fixing a date of hearing of the said application for recall / review.

No costs.

**RAJIV SAHAI ENDLAW, J**

**CHIEF JUSTICE**

**APRIL 27, 2015**
'gsr'