NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Competition Appeal (AT) No. 06 of 2017

(Arising out of Order dated 14th June, 2017 passed by the Competition Commission of India in Case Nos. 36 & 82 of 2014)

IN THE MATTER OF:

Hyundai Motor India Ltd. ...Appellant

Vs

Competition Commission of India & Ors. ....Respondents

Present:

For Appellant: **Mr. Karan S. Chandhiok, Senior Advocate with Mr. Vikram Sobti, Ms. Kalyani Singh and Mr. Mehul Parti, Advocates.**

For Respondents: **Mr. Salman Khurshid, Senior Advocate assisted by Mr. Vaibhav Gaggar, Ms. Neha Mishra, Ms. Sweta Rath, Mr. Adarsh Chamoli, Ms. Aaushi Sharma, Ms. Anindita Sengupta, Mr. Zafar Khurshid, Ms. Gitanjali Kapur, Ms. Sakshi Kotiyal, Mr. Arpit Shukla and Ms. Azra Rehman, Advocates for Respondent No.1 (CCI).**

Mr. Kaushal Kumar Sharma, Mr. Bunmeet Singh Grover and Ms. Anubha Dhulia, Advocates for Respondent No.3.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal under Section 53B of the Competition Act, 2002 (hereinafter referred to as "Act, 2002") has been preferred by the Appellant- 'Hyundai Motor India Limited' (hereinafter referred to as "Hyundai Motor") against order dated 14th June, 2017 passed by the Competition Commission

of India (hereinafter referred to as "Commission") under Section 27 of the Act, 2002.

2. In the impugned order, the 'Commission' held that 'Hyundai Motor' has contravened the provisions of Section 3(4)(e) read with Section 3(1) of the Act, 2002 through arrangements which resulted into Resale Price Maintenance.

3. The 'Commission' further held that 'Hyundai Motor' has contravened the provisions of Section 3(4)(a) read with Section 3(1) of the Act, 2002 in mandating its dealers to use recommended lubricants and oils.

4. The 'Commission' has issued direction of cease and desist on the 'Hyundai Motor' from indulging in conduct that has been found to be in contravention of the provisions of the Act, 2002 and imposed penalty at the rate of 0.3% of its average relevant turnover of the last three financial years which has been rounded off at Rs. 87 Crores with direction to deposit the same within the stipulated period.

5. The Information in Case No. 36 of 2014 was filed by Fx Enterprise Solutions India Pvt. Ltd. ('1st Informant') against 'Hyundai Motor' alleging contravention of the provisions of Section 3 of the Act, 2002.

6. Another Information in Case No. 82 of 2014 was filed by St. Antony's Cars Pvt. Ltd. ('2nd Informant') against 'Hyundai Motor' alleging *inter alia* contravention of the provisions of Section 3 of the Act, 2002.

7. The brief facts of the case are as follows:

8. 'Hyundai Motor' was incorporated under the provisions of the Companies Act, 1956, on 6th May, 1996, for manufacturing and distribution of motor vehicles and their parts.

9. '1st Informant'- 'Fx Enterprise Solutions India Pvt. Ltd.' had a Hyundai dealership for sale and service of Hyundai cars (being cars manufactured by the OP from May 2006 to May 2014) of which Shri Ankit Agrawal is the Managing Director. Pursuant to 'Hyundai Motor' advertisement calling for applications for Hyundai dealership in Faridabad territory in 2005, '1st Informant'- 'Fx Enterprise Solutions India Pvt. Ltd.' responded to the advertisement and submitted its application. After multiple meetings held with the officers of 'Hyundai Motor', '1st Informant'- 'Fx Enterprise Solutions India Pvt. Ltd.' purchased a plot in Faridabad to meet the standards required by 'Hyundai Motor' and commenced a dealership for sales and services of spare parts of Hyundai cars from May 2006. '1st Informant'- 'Fx Enterprise Solutions India Pvt. Ltd.' submitted a notice of termination of dealership to 'Hyundai Motor' on 25th April, 2014.

10. The allegation of '1st Informant'- 'Fx Enterprise Solutions India Pvt. Ltd.' was that the Opposite Party No-1 enters into exclusive dealership arrangements with its dealers, and dealers are required to obtain prior consent of the Appellant before taking up dealerships of another brand.

11. It was further alleged that 'Hyundai Motor' dealers are forced to procure spare parts, accessories and all other requirements, either directly from the 'Hyundai Motor' or through vendors approved by the 'Hyundai Motor'.

12. It was further alleged that the 'Hyundai Motor' also imposed a "Discount Control Mechanism" through which dealers are only permitted to provide a maximum permissible discount and the dealers are not authorised to give discount which is above the recommended range, which amounts to "resale price maintenance" in contravention of Section 3(4)(e) of the Act, 2002.

13. It was also alleged that 'Hyundai Motor' is responsible for price collusion amongst competitors through a series of "hub - and - spoke" arrangements. '1st Informant'- 'Fx Enterprise Solutions India Pvt. Ltd.' has alleged that 'Hyundai Motor' perpetuates hub and spokes arrangement, wherein bilateral vertical agreements between supplier and dealers and horizontal agreements between dealers through the role played by a common supplier, results in 'price collusion and unwanted cars' to its dealers and 'Hyundai Motor' designates sources of supply for complementary goods for

dealers, which results in a "tie-in" arrangement in violation of Section 3(4)(a) of the Act, 2002.

14. '2nd Informant'- 'St. Antony's Cars Pvt. Ltd.' is a private limited company involved in, *inter alia*, distribution of passenger cars, having its registered address at XII/268, Mundakkal, S. N. College Junction, Kollam Main Post Office, Kollam, Kerala -69100. Under the terms of the said agreement, '2nd Informant'- 'St. Antony's Cars Pvt. Ltd.' was appointed as a non-exclusive dealer of 'Hyundai Motor' in the territory of Kollam, Trivandrum. The term of the Dealership Agreement (Dealership Agreement) was initially for a period of three years from the date of execution. It is alleged that Clause 5(iii) of the agreement prohibited the dealer from investing in any other business, particularly in dealerships with competitors of the 'Hyundai Motor'.

15. It was further alleged that, pursuant to the said clause, the dealers of the 'Hyundai Motor' could not take dealerships of competitors of the 'Hyundai', even if the dealership was a completely separate entity from the dealership of the 'Hyundai Motor'. Therefore, according to '2nd Informant'- 'St. Antony's Cars Pvt. Ltd.', Clause 5(iii) of the Dealership Agreement amounts to "refusal to deal" and is in contravention of the provisions Section 3(4)(d) of the Act, 2002.

16. In Case No. 36 of 2014 filed by '1st Informant'- 'Fx Enterprise Solutions India Pvt. Ltd.', after considering the information and material

available on record, the 'Commission' by its order dated 12th September, 2014 passed order under Section 26(1) of the Act, 2002 and held that a *prima facie* case of contravention of the provisions of Section 3 of the Act, 2002 has been made out against the 'Hyundai Motor' and directed the Director General ('DG' for short) to cause an investigation to be made into the matter and submit a report.

17. The 'Commission' by an order dated 20th November, 2014 passed under Section 26(1) of the Act, 2002, also held that a *prima facie* case has been made out against the 'Hyundai Motor' in Case No. 82 of 2014 for alleging violation of provisions of Section 3(4) read with Section 3(1) of the Act, 2002 and directed the DG to cause an investigation to be made into the matter and to submit a report. The 'Commission' further ordered to club both the cases.

18. The 'DG' after investigation while observed that passenger cars manufactured and sold by different players are interchangeable and substitutable by consumers in view of their utility, defined a 'broad relevant market' as "Sale of Passenger Cars in India". The 'DG' further sub-divided this 'relevant market' and defined 'separate relevant market(s)' for each of the contraventions identified as follows:

> *"(i) Refusal to Deal: For analysing Clause 5(iii) of the Dealership Agreement concerning refusal to deal contravention, the DG defined the relevant*

market as "Inter-Brand Sale of Passenger cars in India";

(ii) Resale Price Maintenance (RPM): For the purposes of analysing whether the OP imposes a (maximum) resale price, the DG defined the relevant market as "Intra Brand Sale of Hyundai Brand of Cars in Delhi and NCR";

(iii) Tie-in arrangements:

(a) *In determining whether the OP imposes a tie-in arrangement with respect to the sale of CNG kits, the DG defined the relevant market as "Sale of CNG Kits for Hyundai Brand of Cars in Delhi and NCR";*

(b) *For determining whether the OP imposes a tie- in arrangement for lubricants, the DG defined the relevant market as "Sale of Lubricants for Hyundai Brand of Cars in India"; and*

(c) *To analyse whether the OP imposes a tie-in arrangement in relation to obtaining car insurance, the DG defined the relevant market as "Insurance for Hyundai Brand of Cars in India".*

(iv) Finally, relying upon the Commission's decision in Shri Shamsher Kataria v. Honda Siel Cars India Limited & Ors. (Case No. 03 of 2011), the DG stated that the Commission has defined 3 segments of the automobile market, viz.: (a) the primary market consisting of manufacturing and sale of passenger vehicles; (b) the secondary market or aftermarket for each brand of spare parts; and (c) an aftermarket for each brand of repair services. As the issue of tie-in arrangement of the OP with regard to the sale of CNG Kits, lubricants and insurance policies and services also falls within the scope of aftermarket services, the DG defined the product aftermarket as "after sales services of Hyundai Brand of Cars". However, for this relevant product market, the DG defined two different relevant geographic markets:

a) *For CNG Kit: Geographic market is defined as "Delhi & NCR", as such Kits are primarily used in Delhi & NCR; and*

b) *For lubricant and insurance policy: Geographic market is defined as "entire territory of India", as the arrangement has pan-India ramifications."*

19. The 'DG' held that the 'Hyundai Motor' is 100% dominant in the aftermarket for after sale services of Hyundai brand of cars. The 'DG' also held that the 'Hyundai Motor' has 'entered into tie-in arrangements' with regard to sale of cars and: (a) supply and retrofitting of CNG kits; (b) sale and supply of lube oils; and (c) sale of insurance policies and services incidental thereto. The 'DG' held that the aforesaid tie-in arrangements amount to exclusive supply agreement and refusal to deal and therefore, it found the 'Hyundai Motor' to have violated the provisions of Sections 3(4)(b) and 3(4)(d), respectively, read with Section 3(1) of the Act, 2002.

20. In addition to the finding that the 'Hyundai Motor' has tied the manufacture and sale of cars to supply and retrofitting of CNG kits, supply of lube oils, and provision of insurance policies, the 'DG' held that the aforesaid actions also amount to abuse of dominance, in contravention of Section 4 of the Act, 2002. The 'DG' held that the 'Hyundai Motor' is dominant in the aftermarket for service of its cars and has:

(i) imposed unfair and discriminatory conditions in the sale of CNG kits and prefixed the prices of CNG Kits and retrofitting thereof at discriminatory higher prices and also indulged in practices resulting in denial of market access to other duly approved CNG kits suppliers, in contravention of Sections 4(2)(a)(i), 4(2)(a)(ii) and 4(2)(c) of Act, 2002, respectively; and

(ii) imposed unfair and discriminatory conditions in the sale and supply of lubricants and also indulged in practices resulting in denial of market access to other oil companies dealing with recommended grade of lube oils, in contravention of Sections 4(2)(a)(i) and 4(2)(c) of Act, 2002, respectively.

21. Based on the evidences/material/statements of parties the 'DG' held that the 'Hyundai Motor' has violated the provisions of Sections 3(4)(a), 3(4)(b), 3(4)(d) and 3(4)(e) read with Section 3(1) of the Act, 2002 and Sections 4(2)(a)(i), 4(2)(a)(ii) and 4(2)(c) of the Act, 2002.

22. The 'Commission' in its ordinary meeting held on 7th June, 2015 considered the investigation report submitted by the 'DG' and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto and after taking into consideration of the aforesaid facts passed the impugned judgment.

23. Learned Senior Counsel appearing on behalf of the Appellant submitted that the 'Commission' though disagreed with the report of the 'DG' with regard to 'relevant market' but failed to provide a notice of disagreement to the Appellant.

24. The 'DG' in its report noticed different (five sets) of 'relevant market', for contravention of different clauses of Section 3(4) of the Act, 2002, as follows:

(i) **Exclusive Supply Agreement/ Refusal to Deal**: Market for "*Inter-Brand Sale of Passenger cars in India*";

(ii) **Resale Price Maintenance (RPM)**: Market for "*Intra Brand Sale of Hyundai Brand of Cars in Delhi and NCR*";

(iii) **Tie-in arrangement for CNG kits**: Market for "*Sale of CNG Kits for Hyundai Brand of Cars in Delhi and NCR*";

(iv) **Tie-in arrangement for lubricants**: Market for "*Sale of Lubricants for Hyundai Brand of Cars in India*"; and

(v) **Tie-in arrangement for car insurance**: Market for "*Insurance for Hyundai Brand of Cars in India*".

25. The 'Commission' rejected the aforesaid 'relevant markets' with the following observations:

> *"51. Thus, the DG has not considered the market(s) according to the characteristics of the products and services under investigation or the demand-side substitutability of the product/service from the point of view of the customer. Instead, the DG has taken each market according to the area of perceived competitive harm caused by each alleged*

infringement. For example, in a resale price maintenance case, suppliers control or restrict the price at which their distributors/dealers can sell the product or service to the final consumers. Thus, different distributors/dealers of a supplier are prevented from competing on price of the same goods, causing harm to intra-brand competition. For the RPM allegation, the DG has defined the market as "Intra Brand Sale of Hyundai Brand of Cars in Delhi and NCR".

26. The 'Commission' observed that the main purpose of market delineation is to identify in a systematic way the competitive constraints that the enterprises involved face and the objective of defining a market (in both its product and geographic dimensions) is to identify the actual competitors (to the enterprise involved) that are capable of constraining an enterprise's behaviour. While observing so, the 'Commission' delineated two markets namely – (a) 'upstream product market'; and (b) 'downstream product market', as evident from the following observations made by the 'Commission':

"56. Accordingly, the Commission is of the view that the upstream product market is the market for all passenger cars.

xxx xxx xxx

60. For the purposes of determining demand-side substitutability, if a consumer wishes to purchase a Hyundai car, the consumer would visit a Hyundai dealership. While a customer may consider different brands for one segment of cars as substitutable (for example, a Maruti Swift, Honda Brio or Hyundai i20), a consumer would visit a Hyundai dealer to test drive and purchase only a Hyundai car – as new Hyundai cars can only be purchased at a Hyundai showroom. Further, a majority of Hyundai's dealerships (and majority of all car dealers in India) do not stock or sell vehicles of competing brands (though the same family or company may own dealerships of multiple brands). In India, there are only an insignificant number of multi-brand dealerships. Accordingly, the product market would be the market for the dealership and distribution of Hyundai cars."

27. We are not going into the question of violation of principles of natural justice on the ground that the 'Commission' while differed with the findings in the 'DG' report with regard to 'relevant market' has not given any notice to the Appellant, for the reasons as discussed in the subsequent paragraphs.

28. With regard to the 'anti-competitive vertical agreements', the 'Commission' noticed that the 'DG' has identified the three types of 'anti-competitive agreements, as quoted below:

> *"(i) Exclusive Supply Agreement & Refusal to Deal;*
>
> *(ii) Resale Price Maintenance;*
>
> *(iii) Tie-in arrangements for the sale of :*
>
> *(a) CNG kits;*
>
> *(b) Lubricants; and*
>
> *(c) Car Insurance.*

29. The 'Commission' while dealt with Section 3 (4)(d) as discussed in the 'DG's' report with regard to the Appellant, it noticed Clause 5(iii) of the 'Dealership Agreement', which reads as follows:

> *"65. Clause 5(iii) of the Dealership Agreement provides that "except with prior written permission, the dealer shall not invest in any new or existing business not relating to Hyundai dealership……".*

30. Thereafter, the 'Commission' discussed as to what 'DG' has noticed during deposition of the Appellant about the 'Dealership Agreement'.

31. The 'Commission' thereafter discussed the provisions as under:

> *"69. The Commission notes that Explanation (b) to Section 3(4) of the Act defines an "exclusive supply" agreement as including "any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person". Further, Explanation (d) to Section 3(4) of the Act defines "refusal to deal" as including "any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought".*

32. The 'Commission' thereafter dealt with clause 5 of the 'Dealership Agreement' and observed:

> *"70. Clause 5 of the Dealership Agreement states that without the prior written permission of the OP, a dealer shall not "(iii) Invest in any new or existing business not relating to Hyundai dealership; or (iv) Amalgamate with any business entity or absorb/be absorbed by any business entity or enter into compromise or arrangements with any business entity". Thus, Clause 5 does not strictly set out an exclusivity*

obligation or prevent a dealer from dealing with competing dealerships or other businesses; it only requires the prior written permission of the OP in order for the dealers to do so. Thus, Clause 5 does not provide for de jure exclusivity. However, if OP does not, in practice, provide such permission to its dealers to operate competing dealerships or other businesses, Clause 5 may result in imposition of de facto exclusivity."

33. From plain reading of the impugned judgment, we find that the 'Commission' of 'its own has not' discussed any evidence, much less the agreements such as 'Dealership Agreement' including the date of agreement to reach conclusion about violation of one or other provisions of the Act, 2002.

34. For example, with regard to the 'Resale Price Maintenance' (Section 3(4)(e)), the 'Commission' only referred to 'DG' report, as follows:

"78. The DG has noted that the ex-showroom price of the cars sold by the OP to its dealers and by the dealers to the consumers, is fixed by the OP. The dealer's margin is included in the ex-showroom price, which is also fixed by the OP. However, dealers are permitted to grant discounts to consumers also. Thus, while the

maximum price at which a car can be sold is fixed by the OP from time to time, the dealer is permitted to charge a price lesser than the maximum selling price so fixed.

79. The DG has found that the OP has established an admitted "Discount Control Mechanism", by which the maximum discount which a dealer can offer to its end consumers is maintained. Accordingly, by fixing the maximum resale price as well as the maximum amount of discount that can be granted to customers, the OP has been effectively found to have fixed the minimum resale price. The DG has found that the OP itself maintains certain schemes through which various discounts are offered to the customers (such as on Diwali or schemes for teachers). It has been found that the maximum discount which can be offered by a dealer to the end-customer during the operation of the schemes launched by the OP from time to time is also fixed by the OP."

35. While observing what 'DG' has held or observed, the 'Commission' held that, the Appellant has admitted to have engaged in various mystery shopping agencies for policing its dealers and monitoring the

abovementioned arrangement, but has not cited any evidence for coming to such conclusion.

36. Mere reference of one or other provisions such as Explanation (e) to Section 3(4) of the Act, 2002 will not constitute any offence, till it is found proved by the 'Commission' with the help of any evidence.

37. The 'DG's' report is merely an opinion primarily to assist the 'Commission' for appreciation of evidence in arriving at a final conclusion during the inquiry. The 'DG's' report is not binding on the 'Commission'. The 'Commission is expected to analyse the evidence and the report and required to read it in conjunction with other evidence on record and then to form its final opinion as to whether such report is worthy of reliance or not. The 'Commission while making inquiry under Section 26 for passing the order under Section 27 cannot merely depend the finding of the 'DG' to hold alleged violation of Sections 3 and 4 of the Act.

38. Learned Senior Counsel for the 'Commission' referring to 'relevant market' submitted that the market as delineated by the 'DG' for 'Resale Price Maintenance' was "intra brand sale of Hyundai brand of cars in Delhi and NCR" as also for "Tie-in Arrangement for lubricants" and "Sale of lubricants for Hyundai brand of cars in India". However, it has not been disputed that the 'relevant market of the relevant product has not been considered though so-called 'upstream market' and 'downstream market' has been taken into consideration by the 'Commission'.

39. In ***"Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors.— (2017) 5 SCC 17"***, the Hon'ble Supreme Court referring to Section 3(4) of the Act, 2002 observed:

> *"32. While inquiring into any alleged contravention, whether by the Commission or by the DG, and determining whether any agreement has an appreciable adverse effect on competition under Section 3, factors which are to be taken into consideration are mentioned in sub-section (3) of Section 19, which are as follows:*
>
> > ***"19. Inquiry into certain agreements and dominant position of enterprise****.—(1)-(2) * * **
> >
> > *(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under Section 3, have due regard to all or any of the following factors, namely—*
> >
> > *(a) creation of barriers to new entrants in the market;*
> >
> > *(b) driving existing competitors out of the market;*

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

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

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

33. The word "market" used therein has reference to "relevant market". As per sub-section (5) of Section 19, such relevant market can be relevant geographic market or relevant product market. The factors which are to be kept in mind while determining the relevant geographic market are stipulated in sub-section (6) of Section 19 and the factors which need to be considered while determining the relevant product market are prescribed in sub-section (7) of Section 19. These two sub-sections read as under:

"19. (6) The Commission shall, while determining the "relevant geographic

market", have due regard to all or any of the following factors, namely—

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

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

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

(a) physical characteristics or end use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers;

(f) classification of industrial products."

It is for this reason, the first and foremost aspect that needs determination is: "What is the

relevant market in which competition is affected?"

34. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.

35. Therefore, the purpose of defining the "relevant market" is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market.

The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned.

37. The relevant market within which to analyse market power or assess a given competition concern has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. The relevant product and geographic market for a particular product may vary depending on the nature of the buyers and suppliers concerned by the conduct under examination and their position in the supply chain. For example, if the questionable conduct is

concerned at the wholesale level, the relevant market has to be defined from the perspective of the wholesale buyers. On the other hand, if the concern is to examine the conduct at the retail level, the relevant market needs to be defined from the perspective of buyers of retail products.

38. It is to be borne in mind that the process of defining the relevant market starts by looking into a relatively narrow potential product market definition. The potential product market is then expanded to include those substituted products to which buyers would turn in the face of a price increase above the competitive price. Likewise, the relevant geographic market can be defined using the same general process as that used to define the relevant product market.

39. Bearing in mind the aforesaid considerations, we concur with the conclusion of the Tribunal. It is the notion of "power over the market" which is the key to analysing many competitive issues. Therefore, it becomes necessary to understand what is meant by the relevant market. This concept is an economic one."

40. In the present case, the 'DG' as well as the 'Commission' has failed to decide the 'relevant geographic market' as also the 'relevant product market'. As per the aforesaid decision of the Hon'ble Supreme Court for inquiring into an alleged contravention, the factors mentioned in sub-section (3) of Section 19 is required to be taken into consideration. The 'Commission' has failed to inquire into the agreement in the light of sub-section (3) of Section 19. It has not taken into consideration whether the agreement creates any barrier to new entrants in the market; driving existing competitors out of the market or foreclosure of competition by hindering entry into the market. It has also failed to consider whether the said agreement accrual of benefits to consumers and improvements in production or distribution of goods or provision of services. The 'relevant geographic market' and the 'relevant product market' having not been taken into consideration, the inquiry is incomplete being violation of sub-section (6) of Section 19. The 'DG' as well as the 'Commission' has not taken into consideration the regulatory trade barriers; local specification requirements and other factors for determining the 'relevant geographic market' nor has taken into consideration the physical characteristics or end use of goods, including price of goods or service; consumer preferences as required to be taken under sub-section (7) of Section 19 for determination of 'relevant product market'.

41. Section 26 of the Act, 2002 prescribes 'procedure for inquiry under Section 19' but in the present case no such inquiry has been made in terms of Section 19 as noticed above.

42. The 'Commission' though directed the 'DG' to cause an investigation but thereafter, the matter having not closed by the 'Commission', the 'Commission' was required to make inquiry in terms of Section 27 to find out whether any agreement referred to in Section 3 or action of an enterprise, is in contravention of the provision.

43. The procedure for inquiry under Section 19 is not a mere formality rather the inquiry by the 'Commission' into an agreement under Section 27 cannot be completed without appreciation of relevant evidence.

44. The 'DG' report is merely an investigation report, in terms of sub-section (3) of Section 26 but 'DG's' report alone cannot be relied upon or cited for finding and the 'Commission' which is required to make independent analysis based on evidence brought on record.

45. In the impugned judgment, it will be evident that no specific evidence has been discussed including the evidence relied on by the Appellant. The impugned order is only based on findings of the 'DG's' which is not permissible.

46. The impugned order is also contradictory will be evident from the fact that in Paragraph No. 108 the 'Commission' held that cancellation of warranty upon use of non-recommended oils/ lubricants does not amount to contravention of Section 3(4) (a) read with Section 3(1) of the Act, 2002, as quoted below:

> *"108. Accordingly, in so far as the OP mandates its dealers to use particular oil/ lubricants and penalises its dealers where non recommended oils are used, it would amount to "tie-in arrangement" in contravention of Section 3(4)(a), read with Section 3(1) of the Act. However, for the reasons given in the context of CNG kits (objective justification and legitimate business interest), cancellation of warranty upon use of non-recommended oils/ lubricants does not amount to contravention of Section 3(4)(a), read with Section 3(1) of the Act."*

47. However, in the conclusion, the 'Commission' held that the Appellant has contravened the provisions of Section 3(4) (a) read with Section 3(1) of the Act, 2002 in mandating its dealers to use recommended lubricants/ oils and penalising them for use of non-recommended lubricants and oils.

> *"116. In view of the above discussion, the Commission is of the considered view that HMIL has contravened the provisions of Section 3(4)(e) read with Section 3(1) of the Act through arrangements which resulted into Resale Price Maintenance. Such arrangements also included monitoring of the maximum permissible discount levels through a Discount Control Mechanism.*

Further, HMIL has contravened the provisions of Section 3(4)(a) read with Section 3(1) of the Act in mandating its dealers to use recommended lubricants/ oils and penalising them for use of non-recommended lubricants and oils."

48. The finding that the Appellant has mandated its dealers to use recommended lubricants/ oils and penalised them for use of non-recommended lubricants and oils is also not based on any evidence. Nothing brought on the record by the 'DG' or the 'Commission' to suggest that the Appellant penalised one or other dealer for not utilising the recommended lubricants and oils.

49. At this stage, we may observe that normally car dealers of all companies recommend use of a particular quality of lubricants and oils which are mere suggestion keeping in mind the types of vehicle. The 'Respondents' have also failed to consider the aforesaid fact.

50. We have noticed that the 'Commission' has failed to appreciate the evidence and the impugned order not based on any specific evidence and has been passed merely on the basis of opinion of 'DG'. The 'DG' as well as the 'Commission' also failed to decide 'relevant geographic market' or a 'relevant product market' as required under Section 19 (6) & (7) of the Act, 2002. The finding is against the law laid down by the Hon'ble Supreme Court in "***Coordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors (Supra)"***.

51. In view of such infirmity, we have no other option but to set aside the impugned order dated 14th June, 2017. It is accordingly set aside. The Appellant will be entitled to refund of the amount, if any, deposited pursuant to the interim order dated 18th July, 2017. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Balvinder Singh)
Member(Technical)

NEW DELHI
19th September, 2018

AR