

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL
BENCH, NEW DELHI**

Competition Appeal (AT) No. 19 of 2017

IN THE MATTER OF:

Meru Travels Solutions Pvt. Ltd.

....Appellant

Through its Chief Executive Officer,
Office at:
F-17, IV Floor, Pinnacle Business Park,
Mahakali Caves road, Shanti Nagar,
Andheri (E), Mumbai-400093.
Maharashtra

Vs.

Competition Commission of India

.... Respondent No.1

Through its Secretary,
Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110001.

ANI Technologies Pvt. Ltd.

....Respondent No. 2

Registered office at:
4th Floor, 'A' Wing,
Sunteck Centre, 37-40, Subhash Road,
Off. Western Express Highway,
Vile Parle (East), Mumbai.
Maharashtra.

With

Competition Appeal (AT) No. 20 of 2017

IN THE MATTER OF:

Fast Track Call Cab Pvt. Ltd.

.... Appellant

Competition Appeal (AT) No. 19 & 20 of 2017

Through its Managing Director,
Office at:
26, Jayalakshmipuram, Third Street,
Nungambakkam, Chennai, Tamil Nadi-600034

Vs.

Competition Commission of India , Respondent No.1

Through its Secretary,
Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi – 110001.

ANI Technologies Pvt. Ltd.

....Respondent No. 2

Registered office at:
4th Floor, 'A' Wing,
Sunteck Centre, 37-40, Subhash Road,
Off. Western Express Highway,
Vile Parle (East), Mumbai.
Maharashtra.

Present:

For Appellant:

Ms. Sonal Jain, Mr. Udayan Jain, Mr. Abir Roy, Mr. Ishkaran Singh, Ms. Kajal Sharma and Ms. Riya Dhingra, Mr. Vivek Pandey, Mr. Raj Surana, Mr. Ishaan Chakrabarti, Advocates.

For Respondents:

**Ms. ShamaNargis, Deputy Director, CCI.
Mr. Ajay Kumar Tandon for R-1, CCI.
Ms. Purnima Singh, Ms. Neha Bhardwaj, Ms. Shivani Malik, Ms. Astha Baderiya, Advocate for R-1.
Mr. Rajshekhar Rao, Sr. Advocate with Ms. Nisha Kaur Uberoi, Mr. Gautam Chawla, Mr. Raghav Kacker, Ms. Sonal Sarda and Mr. Samriddha Gooptu, Ms. Sakshi Agarwal, Mr. Ishan Arora, Mr. Madhav Kapoor, Advocates for R-2.**

JUDGMENT

**(Date: 07.01.2022)
(Virtual Mode)**

[Per.: Dr.Alok Srivastava, Member (Technical)]

The two appeals, viz. (i) Competition Appeal No. 19 of 2017 filed by Appellant Meru Travel Solutions Pvt. Ltd., and (ii) Competition Appeal No. 20 of 2017 filed by Fast Track Call Cab Pvt. Ltd. assail the common order dated 19.7.2017 passed by the Competition Commission of India (hereinafter called "Commission") under section 26(6) of the Competition Act, 2002 (hereafter called the "Act") in Case No. 06 of 2015 and Case No. 74 of 2015.

2. The Commission has decided by the impugned order that, on the basis of information submitted by Fast Track Call Cab Pvt. Ltd. (which is Informant 1 called "Fast Track" hereafter) and Meru Travel Solutions Pvt. Ltd. (which is Informant 2, called "Meru" hereafter) and analysis of DG's investigation report, the dominant position of Ola (which are radio taxi services operated by ANI Technologies Pvt. Ltd.) in the relevant market and abuse of its dominant position is not established and Ola has not been found to have anti-competitive agreements with drivers which are in Competition Appeal (AT) No. 19 & 20 of 2017

violation of the provisions of the Act.

3. We are disposing off both the appeals, viz. Competition Appeals No. 19/2017 and 20/2017 through this common judgment. The averments included in both the appeals relate to the allegations regarding abuse of dominant position and anti-competitive agreements concerning Ola. As the Impugned Order of the Competition Commission of India and the pleadings, including subject matter is the same in both the appeals, they are being disposed off by this common judgment. For the purpose of this judgment we will refer to the pleadings and documents of Competition Appeal No. 20/2017 and wherever necessary due reference will be made to the material submitted in Competition Appeal No. 19/2017.

4. The facts of the case as provided by Informant 1 Fast Track and Informant 2 Meru are that the informant companies are engaged in the business of providing radio taxi services to customers from point to point movement in the geographical market of Bengaluru. The Respondent company M/s ANI Technologies Pvt. Ltd. providing Radio Taxi services under brand Competition Appeal (AT) No. 19 & 20 of 2017

name Ola Cabs (hereafter called “Ola”) entered the Bengaluru market towards the end of 2011. Its market growth till early 2014 was modest, but soon after, Ola Cabs started predatory pricing by way of offering discounts to customers and incentives to drivers with the sole intention to monopolize the radio taxi services market in Bengaluru. The Informants¹ and 2 have claimed that Ola Cabs received large scale funding through four series of investments starting from March 2013 upto September 2015 amounting to Rs. 4676.91 crores from various foreign investors. The Appellant has further stated that flush with such huge funding, Ola unleashed a series of abusive practices by virtue of its dominant position in the Bengaluru market of Radio Taxi Services through predatory pricing to establish its monopoly and eliminate otherwise equally efficient competitors, who could not indulge in such predatory pricing. As a result, Informant 1 Fast Track, which is one of its competitors, started losing its business and got on the verge of elimination from the market. Informant 2 has also felt the pinch due to predatory pricing practices of Ola. Both Informants have, therefore, urged the Commission to intervene before it was late and take action against Ola for violation of sections 3 and 4 of the Act and stop its abuse of dominant position and curb its anti-competitive practice.

5. On receipt of information from Fast Track, the Commission considered the matter and formed a *prima-facie* opinion that the conduct of Ola (Opposite Party in the case before the Commission) amounted to abuse of dominant position within the meaning of section 4 of the Act. In accordance with the provisions of section 26(1) of the Act, the Commission directed the Director General (hereafter called “DG”) to cause an investigation into the matter and to complete it within a period of 60 days from the date of receipt of the order. It also directed the DG to investigate the conduct of officials of Ola in order to fix liability with respect to contravention of the Act’s provisions in case Ola was found to have violated them. Later in another case where Meru was Informant (on which Competition Appeal No. 19 of 2017 is under consideration in this judgment), the Commission passed a preliminary order and directed DG to investigate both cases together and submit report.

6. Thereafter, the DG completed investigation as directed by the Commission and submitted report to the Commission. The Commission after considering the report of the DG and hearing the parties passed an order dated 19.7.2017 under section 26(6) of the

Act holding the view that evidence on record does not establish the Competition Appeal (AT) No. 19 & 20 of 2017

dominance of Ola in the relevant market of radio taxi services in Bengaluru and its consequent abuse within the provisions of section 4 of the Act, and thus closed the two cases against Ola.

7. The grounds urged by Appellants Fast Track and Meru in Competition Appeal No. 20/2017 and Competition Appeal No. 19/2017 are as follows: –

- (i) The Commission has been unduly swayed by incorrect understanding of the impact of "disruptive technology" and the business model introduced by Ola contrary to the facts and findings in the DG's report. The evidence suggests that since its entry in the market in 2011 Ola did not enjoy rapid growth and it was only after it started putting in a large amount of money as incentives and discounts was it able to dislodge its competitors from their positions in the market.
- (ii) The Impugned Order also attributes Ola's success to the incorrect assessment of superior technology –drive, platform based model as against asset-based model, which is not correct.

- (iii) The inference in Impugned Order that the entry of Ola changed the market dynamics Ola leveraged technology to expand the market is erroneous because DG's report clearly states that Ola entered the market in 2011 but had only a modest market share till 2014 (paragraph 6.20.33 of DG's report) and that it was only after 2014 that the market share of Ola increased due to its providing large quantum of driver incentives and customer discounts.
- (iv) Ola's decision to resort to aggressive pricing in the radio taxi services market in Bengaluru by introducing and spending heavily in drivers' incentives from May 2014 onwards and a huge increase in customer discounts from June 2014 onwards can be directly attributable to the level of funding in the intervening period (observation of DG in paragraph 6.20.27 of his report). Also by adopting predatory pricing to edge out competitors from the relevant market, Ola violated Section 4 of the Act (abuse of its dominant position).
- (v) Ola entered into agreements with drivers which were anti-competitive in nature, and therefore violative of Section 3 of the Act.

- (vi) The rationale of the Commission in not holding Ola to be a dominant entity in the relevant market is also based on the fact that since there are two dominant players in the market instead of just one, there is no violation of section 4 by Ola.

8. The Appellants have sought the following reliefs in their appeals:-

- (i) To set aside the impugned order passed by the Commission and hold Ola guilty of violation of sections 3 and 4 of the Act.
- (ii) To pass an order directing Ola to cease and desist from its anti-competitive practices/activities.
- (iii) If the Appellate Tribunal approves the possibility of more than one dominant party in the relevant market, then it may hold Ola to have abused its position of dominance and remand the matter back for investigation against Uber.
- (iv) To set aside the confidentiality order passed by the DG and Commission.

9. Detailed arguments were heard from the Learned Senior Counsel/Counsel for Appellants (including Ola and Meru) and Respondents No. 1 and 2. We have also considered the DG's report, Impugned Order, pleadings and written submissions submitted by the parties in both the appeals.

10. **Arguments of Ld. Counsel for Appellant Fast Track:**

(i) The information filed by Informant 1 Fast Track against Ola highlighted violations under sections 3 and 4 of the Act.

(ii) Ola's market share as on January 2015 was a staggering 75–76% and before it started adopting predatory pricing from June 2014, the market share of Ola was just 20% and their brand was already well known. The Commission, therefore, ought to have kept in mind two separate time frames and given separate findings for the two timeframes viz. one timeframe upto January 2015 when Fast Track filed the information and the other timeframe from January 2015 to September 2015 when Meru filed its information.

(iii) The COMPAT has ruled in the case of National Stock Exchange that market shares should be considered only for the

time when the abuse took place and the dominance analysis is an ex-post analysis which the Commission should have taken note of.

(iv) The DG's report found that the below cost pricing adopted by Ola and the effect of huge drivers' incentives and customer discounts which led to surge in Ola's market share upto 75 – 76%, compelling its competitors like Meru, Mega Cabs, Easy Cabs etc. to also increase their discounts and incentives leading them to incur heavy losses and getting ultimately marginalized due to their limited financial resources. This predatory pricing by Ola should have been considered by the Commission.

(v) The justification provided by Ola of the incentives and discounts it provided were because they were new player in the market and their initial losses are justified because large amount of money was spent on creating awareness about the new enterprise and promotion of its business model - does not appear to be true because large-scale losses evident from June 2014 onwards were much after Ola had attained positive margin and viability.

(vi) Ola is not a technology company because the consumers only know brand Ola which controls all aspects of the taxi services. Uber has also not been held as a technology platform by multiple

authorities and therefore, the same would apply to Ola, and hence, the growth of Ola is not due to its technological edge but because of its predatory, below-cost pricing.

(vii) Meeting competition defense is not available to a dominant player in an unfair pricing case and competition defense is only applicable to discriminatory pricing case, as has been held In **France Telecom SA v. Commission of European Communities (Case T-340/3 dated 20.1.2007, of the Court of First Instance of Commission of European Communities) judgment.**

(viii) The Commission ought to have taken into consideration the below cost pricing by Ola vis-à-vis other competitors than just Uber to record its findings to judge its dominant position. It has been held **Wanadoo judgment** (Case COMP/38.233, at pg. 151; Convenience Compilation of Appellant) as also in **MCX-SX Stock Exchange Limited vs. National Stock Exchange of India Limited** (case no. 13/209, at pg. 39, Convenience Compilation of Appellant) that actions of the offending party in the relevant market determine to a large extent whether is in dominant position.

(ix) Ola had market share of more than 60% for two years, which is sufficient indication of its dominant position till January

2015 while the presence of Uber in the same market was only from February, 2015 onwards. Moreover, it managed to log over 73% in number of trips from 13.6 lakhs trips in February, 2015 to 23.18 lakhs trips in September, 2015 despite competition from Uber in this period.

(x) The comparison of the financial strength of Uber Group globally to Ola's in India is a fallacious argument of the Commission, especially when the Commission was considering their operation only in the Bengaluru market.

(xi) Ola has operated at loss from 2012-13 onwards, when it suffered a loss of Rs. 6.59 crores and in 2013-14 its loss was 7.54 crores. The DG's report has not considered overheads in cost calculation and if that had been factored in, Ola would have been found to operate at a much higher figure of below average comparable cost which would clearly show predatory pricing.

(xii) Offer and acceptance of incentives by drivers constituted an anti-competitive agreement under the Act and is therefore, in violation of Section 3. A specific exclusivity clause in the contract between drivers of Ola for lock-in, and imposing penalty for breach of contract, leave little or no choice with the driver but to remain tied to Ola platform. Such a contract causes

Appreciable Adverse Effect on Competition (AAEC) as is contained in **EU Guidelines on Vertical Restraints** (pp. 117-119 of Convenience Compilation of Appellant).

(xiii) The use of words “an enterprise” in the Explanation (a) of Section 4 definition of dominant position does not mean that only one enterprise can be in dominant position, but implies that any enterprise can be said to enjoy dominant position in market, when it has ability to impose conditions or price which are unfair and discriminatory as enumerated in section 4(2)(a) of the Act. Hon’ble Supreme Court of India in the case of **Competition Commission of India vs. Steel Authority of India Ltd. [2010 10 SC 74]** has noted that the primary purpose of competition law is to remedy some of those situations where activities of one or two firms lead to breakdown of the free market.

(xiv) The Commission has mentioned in the Impugned Order that it is hesitant to interfere in the market, since any interference at this stage will disturb market dynamics and also give rise to sub-optimal solution in the market. The duty cast upon the Commission under Section 18 of the act is “to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers” which requires Commission’s interference. Hence intervention is necessary in the Competition Appeal (AT) No. 19 & 20 of 2017

case of Ola too, as was done in the case of **MCX-SX Stock Exchange Limited vs. National Stock Exchange of India Limited (case no. 13/209)** when the Commission sought it fit to intervene.

11. On the basis of information provided, the Commission has *prima facie* found that the allegation of dominant position within the meaning of section 4 of the Act against Ola to be correct, and accordingly under provisions of section 26(1) of the Act, directed the DG to investigate matter and also investigate the conduct of officials of Ola Cab for fixing liability in case Ola Cab is found to have violated the provisions of the Act. Since the investigation ought to cover all allegations made in the information provided, we are of the clear opinion that the provisions of the Act under sections 3 and 4 insofar as they have been contravened by Ola, are to be covered under the investigation.

12. We rely on the decision of Hon'ble COMPAT in the matter of **The Air Cargo Agents Association of India v. CCI and Ors. in Company Appeal No. 98 of 2015 in COMPAT [2016 CompLR 1223 (COMPAT)]** wherein it was held that on receipt of the order passed by the Commission under Section 26(1), the DG is required to conduct investigation in accordance with the provisions of Section 41 read with the relevant provisions of the Regulations and Competition Appeal (AT) No. 19 & 20 of 2017

submit report under Section 26(3) read with Regulation 20(4), which postulates that the report of the DG shall contain findings on each of the allegations made in the information or reference, as the case may be. On this issue the North California District Court has also ruled in a case involving Uber titled **Douglas O'Connor v. Uber Technologies Inc [Case 3: 13-cv-034260 EMC, dated 11 March 2015]** Uber was in the business of providing transportation and not a technology company.

13. **Arguments of Ld. Counsel for Appellant Meru**

The Ld. Counsel for Meru adopts the arguments put forth on behalf of Fast Track. In addition, he has submitted to following arguments:

(i) The Commission's order absolving Ola of abusing its dominant position relies on a comparison of the market behaviour of Ola with Uber. It implies that if both the entities are in dominant position and indulging in abusive practices then Ola's predatory pricing can't be held abusive since Uber is also indulging in such pricing.

(ii) Hon'ble Supreme Court has held that if the condition of either Explanation (a)(i) or (a)(ii) of Section 4 are met, it is sufficient to show dominant position and abusive behavior. Ola Competition Appeal (AT) No. 19 & 20 of 2017

has large scale funding and therefore can set prices even after incurring a loss of Rs. 320-Rs.340 per trip which is predatory pricing.

(iii) Hon'ble Supreme Court has held in CCI v. SAIL (supra) the objective of competition law is to promote consumer welfare by ensuring that the players in a market play by the rules of competition and so it does not matter whether one or two enterprises indulge in unfair practice owing to their dominant position. Delhi High Court has also observed in **Mahindra Electric Mobility v CCI & Anr. (2019 SCC Online Del 8032** at pg. 296 of Convenience Compilation of Appellant) that there can be market dominance by a few enterprises.

(iv) It is not correct to justify the pricing behavior and its large market share obtained through such pricing by Ola a result of efficiency but it is actually anti-competitive.

14. **Arguments of Learned Senior Counsel for Respondent No.2 (Ola)**

The Learned Senior Counsel of Respondent No. 2 has submitted the following arguments:-

(i) If it is found that the enterprise does not enjoy dominant position, then its conduct cannot be further investigated or analyzed for any abuse under section 4 of the Act.

(ii) The Appellants are trying to mislead this Hon'ble Tribunal by constantly harping on the abusive pricing strategy of Ola, label it as predatory pricing, and diverting from the critical and primary issue of establishing whether Ola was in a dominant position in the relevant market. Since the Commission has not found Ola to be in dominant position in the market, there is no need to examine any abuse due to pricing strategy of Ola.

(iii) The Commission has correctly concluded that Ola does not hold dominant position in the relevant market, because the market is evolving and growing rapidly, competitor like Uber has entered into market in the relevant period and therefore, the entry barriers are not insurmountable. It was correctly held by the Commission in the Impugned Order that Ola and Uber both cannot be considered dominant under the scheme of the Act.

(iv) No evidence was led to show that access to funding was inequitable and the market for financing is not competitive. In fact, the mere fact that some business models are found to be attractive by investors does not imply that the market for financing

is inequitable, more so in the context of judging dominance of an enterprise.

(v) Ola leveraged technology very effectively and sufficiently and the emergence of platform based model, which connected riders with drivers owned taxis, thus obviating the need for capital investment in acquiring and maintenance of exclusive fleet, as was done by Asset owned taxi service providers.

(vi) Ola utilized technology to develop a nascent market through internet and smart phone technology, which facilitate match making drivers and consumers in real time through a software application designed by Ola and accessed by consumers on one side and drivers on the other. This platform based model of Ola competed with the labour-intensive system of matching taxi drivers with riders through telephones and call centres/websites.

(vii) Ola's growth of market share in a short span of time is due to its promotional pricing strategy, which helped it to develop a network to provide sufficient positive externalities to the drivers and riders, who were part of the network.

(viii) The Appellants allegation regarding Ola's dominance in the relevant market is solely on the basis of market share, disregarding other factors that are enshrined in section 19(4) of the Competition Appeal (AT) No. 19 & 20 of 2017

Act, which are also extremely relevant in deciding whether the enterprise is in dominant position. Pertinently, the market share of Meru was itself in the range of 59-60% in 2012-13 and 50-51% in 2013-14 (as stated in para 6.30.14 of DG's Report at pg. 719 of Company Appeal No. 19 of 2017, Appeal paperback. Vol. -3).

(ix) The DG has also noted that the customers in radio taxi market have option of choosing between various players and the growing network of Uber also gives Ola a strong competition. Therefore, even if Ola has a higher market share, it is not able to act independently of its competitors, when customers have sufficient number of substitutable options. (para 6.33.1 of DG Report pp.732-733 of Appeal paperback, Vol.III in CA No. 19 of 2017).

(x) Section 4 of the Act talks about "an enterprise" in a particular relevant market, and therefore, the scheme of the Act does not contemplate two or more independent enterprises being dominant in the same market. Section 4 of the Act does not recognize the concept of "collective dominance" by enterprises as has also been recorded in the Report of Competition Law Review Committee, 2019 (pp. 13-15 of the Convenience Compilation of Respondent No. 2).

(xi) The Commission has duly appreciated market conditions and other factors enshrined in section 19 of the Act in assessing whether the Ola is in a dominant position. In a technology driven market, “market conditions” should be looked into and given due importance while analyzing the dominance of enterprise. Further, the Commission has noted the following:-

“As apparent from the figures available in the investigation report, the market has seen a growth nearly 1900% in terms of number of trips between June 2012 and September 2015. In a span of none year between September 2014 and September 2015, in terms of number of trips, the market in Bengaluru witnessed a growth of about 555%. Thus, though the operators under the platform-based model provided the same product/service (taxi services), the technology enabled them to expand the market at both ends (i.e., the consumer and driver base) immensely. It is against this backdrop that the market position of OP need to be evaluated.”

(xii) The Learned Senior Counsel for Respondent No. 2 has cited the judgment of Competition Commission of India in **MCX Stock Exchange Limited v. National Stock Exchange of India** (Case

Competition Appeal (AT) No. 19 & 20 of 2017

No. 13 of 2009, pg. 18 of the Convenience Compilation of Respondent No. 2), wherein the Commission concluded the dominance of National Stock Exchange based on multiple factors under section 19 (4) of the Act. In the **Raghavan Committee Report** (pp. 2-3 of the Convenience Compilation of Respondent No. 2, Dy. No. 31902 dated 6/12/2021) and the matter of **Ramakant Kini vs. Dr. L.H. Hiranandani** (Case No. 139 of 2012, attached at pp. 21-23 of the Convenience Compilation of Respondent No. 2, Dy. No. 31902 dated 6/12/2021), it is held that dominance requires market power to be substantial and durable. In the present case, the market share of Ola reduced considerably upon the entry of Uber into the market and therefore the pre-requisite of dominance, that an enterprise can operate independent of the market force, fails to be established in the present case.

(xiii) Appellant's contention that the Impugned Order of the Commission does not go into the alleged violation under section 3 of the Act is untenable for the reason that no prima-facie case was made out for violation of section 3 of the Act. Yet DG and the Commission did examine the allegation pertaining to violation of Section 3 of the Act and concluded that a driver was not exclusively tied to one entity/platform but was free to be on both the Uber and Ola platforms or any other such entity. Thus drivers

were utilizing different platforms at different points of time, and not bound by any driver's agreement of Ola, which could be labelled as anti-competitive under section 3 of the Act.

15. **Arguments of Ld. Counsel for CCI**

Competition Act is a welfare legislation and protection of the interests of the consumers has been enshrined therein. New, advanced technology has resulted in greater efficiency of operation and lower costs for the consumer. Moreover the use of platform-based model that uses technology effectively and efficiently has provided the facility to track movement of vehicle including its arrival at starting point and movement during the ride. Since drivers own their vehicles this model also provides a certain security of earnings to the drivers and ease of travel to the riders. CCI has passed a detailed order and there is no perversity on the order.

16. The informants Fast Track and Meru have alleged abuse of dominant position and use of anti-competitive agreements to the disadvantage of competitors by Ola. Section 3(3) alongwith explanation and sub-sections 3 and 4 of section 19 of the Competition Act, 2002, which are provisions relevant to these appeals, are reproduced below for ready reference:-

“3. Anti-competitive agreements.-

Xx xxx xxx xxx

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

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

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

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

(d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in the sub section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation. – For the purposes of this sub-section, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, trade in goods or provision of services, including –

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.”

17. The Commission has noted in the Impugned Order that the ‘relevant product market’ under section 2(t) of the Act means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. It has agreed with the contention of the Informants that services offered by Ola are radio taxi services. The Appellant has not raised any issue regarding delineating of the relevant product market and relevant geographic

market, which are “market for radio tax service” and “Bengaluru” respectively and thus the relevant market in the present case would be “market for radio taxi service in Bengaluru”. We agree with this delineation of relevant market.

18. It is noted by us that the information provided in case No. 6 of 2015 was looked into by the Commission first and the DG was directed to investigate the allegations included in the information. Later information in case No. 74 of 2015 was also presented to the Commission and vide order dated 30.9.2015, DG was directed to carry out investigation in both the cases together. We agree with the Commission that the proceedings before the Commission are *in rem* and not *in personam*, and therefore, we agree with the finding of the Commission that there is no infirmity in the period of investigation being upto September, 2015. Hence the objection of Fast Track that the period of investigation was unnecessarily extended upto September, 2015 is not found tenable. The Hon’ble Supreme Court has held in the **Excel Corp vs. CCI** case that while examining the conduct of parties, DG can look into past and subsequent conduct of parties to ascertain trend of behaviour even though findings will be confined to a period post investigation of the relevant proceedings of the Act.

19. In examining the allegation of Informants Fast Track and Meru that Ola indulged in abuse of its dominant position by adopting predatory pricing in the market, we shall first look at what constitutes ‘dominant position’ and “predatory price” in a market. They are defined in Explanation provided in Section 4 of the Act which is as follows:

“Abuse of dominant position. –

(a) xxxxx xxxxxxxx

(b) xxxx xxxxxxx

(c) xxxx xxxxxx

(d) xxxx xxxxxx

(e) xxxx xxxx

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

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

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

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

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

20. Section 19 of the Act gives the factors that are relevant for inquiry into the issue of adverse appreciable effect on competition and dominant position of an enterprise. It is reproduced below:

“19. Inquiry into certain agreements and dominant position of enterprise –

Xxx xxx xxx

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

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

- (a) market share of the enterprise;*
- (b) size and resources of the enterprise;*
- (c) size and importance of the competitors;*
- (d) economic power of the enterprise including commercial advantages over competitors;*

- (e) vertical integration of the enterprises or sale or service network of such enterprises;*
- (f) dependence of consumers on the enterprise;*
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;*
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;*
- (i) countervailing buying power;*
- (j) market structure and size of market;*
- (k) social obligations and social costs;*
- (l) relative advantage by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;*
- (m) any other factor which the Commission may consider relevant for the inquiry.”*

21. We have seen that the market share of Ola increased from 5-6% in 2012-13 to about 75-76% in January, 2015, and thereafter it saw a significant decline. Ola, that started services in the year 2011, uses a platform-based aggregator model in which it uses technology in an effective manner to provide ease of booking to riders, security during rides through tracking of taxis and easy post-ride payment of fares. The claim of Ola that it is basically a technology company has a big element of truth in that it leverages smart phone/internet-based technology to provide the riders not just ease of booking and payment for the ride, but also facilitate booking taxi at a very short notice and almost anywhere in its area of operation. This 'end to end' provision of service from booking till alighting from the taxi with GPS-based tracking system of the taxi – all provide a high degree of reliability and assurance of availability of taxis anywhere including security to riders and enough demand to drivers. This is a new way of doing business and Ola could translate this concept into reality. It must also be recognized that before the advent of technology-leveraged, network-based aggregator models, taxi services such as Meru, Fast Track, Easy Cab, Taxi For Sure etc. also leveraged technology to provide ease of booking and taxi ride, yet Ola's model differed from them in many ways, particularly its use of smart phone-based

application (“App”) which could be used with remarkable ease by the riders and provide taxi services anywhere in the area within minutes of ‘hailing’ through the mobile phone. Therefore, it would not be incorrect to say that Ola employed a technology in a much more effective and enabling fashion to provide services which previous radio taxi operators were not able to.

22. The Appellant Fast Track (in CA No. 20 of 2017) has vehemently argued that Ola enjoyed a dominant position by virtue of its large market share in the radio taxi service market in Bengaluru in January 2015. In terms of annual active fleet size, with active fleet size defined by the number of vehicles that have atleast one booking from the relevant taxi service supplier in a day, Ola’s market share has seen approximately six-fold increase during the period 2012-13 to 2015-16.

23. After January, 2015, the active fleet share of Ola has seen a gradual decline. In this context, the DG has observed that just looking at the active fleet size may not give a true picture of market share of each taxi provider since there would be problem of multiple counting. Therefore, the DG has used the number of trips/rides by a taxi service operator in a given time period. When

we look at the number of trips, clocked by a particular taxi service provider, Ola market share is seen to increase from 5-6% in 2012-13 to 59-60% in 2014-15 and to 61% in 2015-16. Thus there is significant rising trend upto January 2015, whereafter Ola market share has been plateauing or witnessing a gradual decline. While Ola's active fleet size registered a large increase from 2012-13 to January 2015, we are of the opinion that merely the size of fleet does not decide the dominant position of a particular radio taxi service provider.

24. Section 19 of the Act provides a list of factors that are relevant in adjudging whether any taxi service provider is in dominant position. Particularly pertinent factors mentioned in Section 4(4) are size and resources of enterprise, size of competitors, commercial advantage of enterprise over competitors, vertical integration of enterprise, dependence of consumer on the enterprise, technical entry barrier and market structure and size. We note that the technological edge that the platform created by Ola which provide ease of taxi bookings, rider security, payments, drivers welfare made many riders comfortable with the network of Ola. The customer incentives worked in conjunction with these facilities and conveniences to attract riders to Ola and a certain brand image was created and reinforced over a period of time. The

market also expanded in size and Ola was able to grab a big chunk of this new addition to market size. Apart from the leveraging of technology by Ola, it went full throttle in attracting riders and drivers to its network and combined it with customer discounts and drivers' incentives to increase its market share. Most of these factors are subjective and there is no quantitative description available in DG's report, yet the impact of these subjective factors can be inferred by the more than normal increase in market size which Ola was able to generate and then grab much of it in a short period of time. The presence of Uber in the market around the same time provided competition to Ola and it had to calibrate and change its market strategy including pricing to respond to competition of Uber. Thus we see that Ola was itself facing competition in the relevant market from established players such as Meru and Fast Track and later from Uber while it was trying to establish its brand, and it would not be correct to infer that Ola enjoyed a dominant position in the market for radio taxi services in Bengaluru and was trying push out new competitors by using abusive practices by virtue of enjoying dominant position. We thus don't think that the finding in the case **Astra Zeneca Plc. V. European Union [Case T-321/05]** held dominant position during the period 1995-1997 in the market, as between 1995-97 Astra

Zeneca's market share remained far above those of its closest competitors, but fell below 50% in 1999.

25. We now look at the findings in the Commission's order and DG's investigation regarding below-cost pricing employed by Ola which is alleged to be predatory pricing by the Informants Fast Track and Meru and also whether that would indicate whether Ola enjoyed dominant position in the relevant market. The DG has found that the average margin per trip of Ola from June 2012 to February 2013 was mostly negative, which means loss on trips, which could be attributed to the fact that Ola was a relatively new player in the relevant market and it continued to bear losses from its inception to achieve minimum viable scale of operation. Then, from March 2013 to May 2014, it enjoyed positive margin on trips and till this time the market share of Ola based on number of trips was in the range of 20 – 21%. The DG has found in the investigation that Ola offered small discounts to customers from September 2012, but did not offer any incentive to the drivers till April 2014. From May 2014 onwards, Ola started to increase customer discounts and also introduced incentives to drivers, which it kept on increasing till it touched peak in January 2015. It is further found in the investigation by DG that this strategy of Competition Appeal (AT) No. 19 & 20 of 2017

aggressive discounts and incentives resulted in per trip loss of Ola which went up to Rs. 320 to Rs. 340 per trip in January 2015. As a result, in the relevant period between September 2014 and January 2015, Ola's market share jumped from 42-43% to around 75-76%.

26. Quite obviously the system of customer discounts and drivers' incentives was working in Ola's favour with its market share registering a significant increase between September 2014 and January 2015. This is also the period when Ola received a large quantum of foreign funding which certainly helped Ola to provide customer discounts and drivers' incentives. The details of funding received by Ola is as follows (included in Para 6.20.26 of the DG's report, pg. 692 of Appeal Paperbook Vol.-3 in CA no. 19 of 2017):

Period	Investment (Rs. In Crore)
March-Nov 2013	76.23

July-2014	209.77
Sep-2014	145.99
Nov-2014	150.94
March-2015	2034.97
Apr-2015	580.72
Sep-2015	1478.29
Total	4676.91

27, Hence while Ola received regular funding from March 2013 onwards, it received two major chunks of funding in March 2015 and September 2015. DG's report also notes (Para 6.20.29) that while no drivers' incentives were offered to drivers during FY 2012-13 and 2013-14, Ola did offer customer discounts totaling Rs. 49.78 Lakhs and Rs. 34.90 Lakhs respectively during the same period. It is also stated in DG's report that Ola incurred negative

operating margin of Rs. 158.11 Lakhs in 2012-13 it was able to register positive margin of Rs. 181.64 Lakhs in 2013-14. In FY 2014-15 and first six months of 2015-16 Ola's operating losses again went negative – Rs. 12412.85 Lakhs and 6118.46 Lakhs respectively which were mainly due to extra spending on incentives and discounts.

28. Therefore, it is not difficult to see that the major discounts and incentives offered by Ola coincided with these spurts when its market share grew rapidly. It is also clear that Ola first went for expansion of market share by generating demand in FY 2012-13 and 2013-14 and when there was good increase in its demand, it started offering drivers' incentives from FY 2014-15 onwards. Thus Ola's pricing strategy was in response to market conditions, helped by heavy infusion of foreign funding. We are of the opinion that there was no below-cost pricing by Ola for any sustained period of time by Ola which could be labeled as predatory pricing and abuse of its dominant position in the market.

29. The large quantum of customer discounts and/or drivers' incentives which were introduced from April/May 2014 (much Competition Appeal (AT) No. 19 & 20 of 2017

after OLA started operations in 2011) and continued till September 2015 were instrumental in increasing the market share of Ola by responding to demand generation and increasing supply to meet the demand. We are inclined to agree with the finding in the DG's report that the below cost pricing adopted by Ola from May-June 2014 onwards could be treated as variable cost which, as argued by the Ld. Senior Counsel of Respondent Ola, was the expenditure that Ola undertook to establish/consolidate its brand in the market and also increase its market share simultaneously.

Moreover, Uber which entered the market of radio taxi in Bengaluru from mid-2013 onwards also adopted an almost similar network approach for provision of radio taxi and an almost similar below-cost pricing strategy which is evidenced in the data included in Paras 6.20.42, 6.20.43 and 6.20.44 of the DG's report (pp.700-703 of Appeal Paper Book Vol. -3 in CA no. 19 of 2017). A comparison of monthly indexed margin provided in Para 6.20.44 of DG's report shows that while Ola was operating at negative monthly indexed margin from June 2014 onwards, Uber was actually operating at negative monthly indexed margin from October 2013 onwards. Therefore, we are inclined to agree with

Ola's arguments that Uber was a significant competitor in the Competition Appeal (AT) No. 19 & 20 of 2017

relevant market and it (Ola) was responding to pricing actions of Uber while trying to establish itself in the Bengaluru market of radio tax services. Available data in DG's report (on pg. 702 of Appeal Paperbook Vol-3 of CA no. 19 of 2017) shows that Meru operated at positive indexed margin adopting aggregator model from February 2014 onwards and hence it was present in the market. It is of course true that it could not get enough market share in total number of trips because of funding constraint.

30. The Ld. Counsel of Appellant has cited the following judgments in support of his contentions:

(i) **Uber India Systems Pvt. Ltd. v. CCI & Ors [2019 8 SCC 697]** wherein it is held that if there is a loss for trips made, Explanation (a)(ii) of Section 4 would be attracted inasmuch as this would certainly affect the dominant party's competitors in its favour or the relevant market in its favour.

(ii) **Meru Travel Solutions Pvt. Ltd. v. CCI & Ors [2017 CompLR 43 (COMPAT)]** wherein it is held that it could not be said definitively that there is an abuse inherent in the business practices adopted by the operator, but the size of discounts and incentives show that there are either phenomenal efficiency

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improvement which are replacing existing business models or there could be an anti-competitive stance it, and only investigation would be able to show whichever is true.

In both the above cases it is noted that they pertain to preliminary orders given by the CCI and have been given prior to investigation. In the present case the investigation is now complete and many facts have come to light and hence the conditions under which prima facie order was given by the CCI have been replaced by the investigation report and the decision of the CCI thereon. Hence we are of the opinion that the context in this case becomes entirely different.

(iii) Excel Crop Care Ltd. v. CCI & Anr [2017 8 SCC 47] wherein it is held that the Statement of Objects and Reasons of the Act that this law was foreseen as a tool against unjust monopolistic powers at the hands of private individuals. We are aware of this purpose behind enactment of the Competition Act and are clear that any order under the Act must be imbued with such noble objective which upholds public good.

(iv) United Brands Company & United Brands Continental

B.V. v. Commission of the European Communities [Case 27/76

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decision dated 17/12/1975] wherein it is held that even if competitors of the dominant company use the same methods of production and distribution, they could still face insuperable practical and financial obstacles and which are directed against new competitors trying to establish themselves in the relevant market, and therefore, the cumulative effect of all the advantages enjoyed by UBC ensures it has dominant position in the market. The situation in this case is that the competitors are not new, and who enjoy a position of strength in the market including access to funds. Thus they do not face any entry barrier due to financial constraints.

31. We find that in the present case the situation is quite akin to that in the matter **CCI v. Fast Way Transmission Private Limited and Ors. Civil appeal No. 7215 of 2014 (2018 3 SCC 316)** wherein Hon'ble Supreme Court has held that when an enterprise enjoys dominant position in the relevant market, it is enabled to operate independently of competitive forces or affect its competitors or consumers or the relevant market in its favour. We do not think Ola could operate independently of other competitors in the relevant market, and hence it did not enjoy a dominant position in the market.

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32. The Ld. Senior Counsel of Respondent No. 2 has rebutted the reliance placed on **Uber India Systems case** (supra) stating that the reasoning provided by Hon'ble Supreme Court was only a qualifier for a prima facie view, and full investigation was later carried out to see if the prima facie view was correct. We tend to agree with Ld. Sr. Counsel's understanding. He has also referred to the **Report of Competition Law Review Committee, 2019** (pp. 13-15 of the Convenience Compilation of Respondent No. 2) in support of his contention that Section 4 of the Act does recognize the concept of "Collective Dominance" by enterprises.

33. The finding in case of **Wanadoo Interactive** (pg. 24-26 of the Convenience Compilation of Respondent No. 2) is that the dominance analysis must be carried out considering the "market dynamics" and not just "market shares" which is applicable in the present case.

34. Therefore, we are of the opinion that the below cost pricing by Ola was not predatory pricing with a view to dislodging any

competitor from the market but towards establishing itself as an effective and reliable brand in the market and also opening up a latent market to its advantage through awareness generation about its brand and network/platform through promotional initiatives like discounts and incentives and attracting new customers and gaining riders' confidence. As Ola started from a low market share of about 20%, we cannot agree that it was at that initial time in a dominant position in the market and was trying to push out competitors from the market by employing below-cost, predatory pricing. Increase in its market share over a period of time, we feel, was due to a combination of factors, of which below-cost pricing was one. Since this pricing strategy was combined with other actions like ease of booking using a smooth and functional technology platform accessible on mobile phones, visible branding, riders' security, benefits to drivers, all of which were quite effective in earning the riders' and drivers' confidence, Ola could become their radio taxi service of preference. We, therefore, consider the below cost pricing Ola as part of a broader strategy to open up latent market and establish itself firmly as a reliable radio taxi service and agree with the inference of DG that it was a part of variable cost.

35. When seen in the light of the factors mentioned in the previous paragraph, mere market share of the enterprise will not truly exhibit its dominant position, but size of the enterprise, its economic power, dependence on consumes, market structure in size and vertical integration of the market and service or service of such enterprises also have an important role in deciding whether an enterprise enjoys a dominant position in the market.

36. The Informants Fast Track and Meru have also alleged that Ola has entered into agreements with drivers that are anti-competitive, and therefore, violative of Section 3 of the Act. They have alleged that the Master Services Agreement dated 6 December 2014 with drivers has clause 28 (i) and clause 31 that penalize drivers for not conforming to certain norms of behavior which forces them to remain connected to Ola for fear of imposition of penalties. He has also pointed out to sub-clauses 7 & 8 and other clause included in the Breach Cases of the Master Services Agreement as anti-competitive. Clause 28(i), Clause 31 and Sub-Clauses (7) & (8) in regard to Zero Tolerance Policy(leave 2) of the Master Services Agreement are reproduced below:-

“28(i) The Service provider agrees that he shall not enter into any same or similar agreements with competitors of Olacabs shall include any all entities or individual so partnerships or any other persons, who are caring on the same or similar business as that of OLACABS, directly or indirectly.

xx xx xx xx

31. Refusal of Duty: Driver shall not refuse a duty assigned to him by Olacabs or by avoiding communication with Olacabs by switching off the GPS firmware, switching of his mobile phone or by any other means whatsoever. Any refusal of duty will attract a fine of Rs. 2500/- per instance, whatsoever. Any refusal of duty will attract a fine of Rs. 2500/- per instance.

<i>Zero Tolerance Policy. Leave 2</i>			
<i>Sr. #</i>	<i>Breach Cases</i>	<i>Breach Consequences</i>	<i>Fine</i>
<i>7</i>	<i>Driver shall not reject the booking on his own at the time of allotment under any circumstances (unless</i>	<i>Warning shall be given and fine shall be imposed.</i>	<i>INR 1000/-</i>

	<i>permitted by Olacabs).</i>		
8	<i>Driver shall not reject or report for the duty once he accepted to duty and logged in and shall not switch off his mobile under any circumstances.</i>	<i>Warning shall be given once along with the fine, for any subsequent even if found guilty the agreement shall be terminated with immediate effect.</i>	<i>INR 1500/-</i>

37. In reply, Ola has stated that the norms and standards that the drivers are expected to follow are because they represent the brand's name and as customers recognize the brand which is associated with high quality, reliable services, compliance with the standards and norms is voluntary as they work to drivers' advantage. Ola's Ld. Senior Counsel has also argued that there is no coercive effort to make the driver get attached full time with Ola's network and they are free to log-in or log-out of Ola's network as they please. Moreover, DG's report in Para 5.3.5 has mentioned many initiatives that the drivers benefit from, which is reproduced as follows:

“5.3.5 On the facilities being provided to the drivers by Ola is stated that it runs following programmes –

a. ‘Ola Star’: It is operational in select cities and its main features are:

- Medical Insurance for drivers and its families.*
- Life and accidental death insurance cover for drivers.*
- Health and fitness check camps once every year.*
- Personal and home loans.*
- Employment assistance for family members and drivers*
- Partnership with NGOs to provide education assistance (after school classes for drivers’ children.*

b. Ola Pragati: Under this programme, Ola has tied up with various banks and Non-Banking Financial Institutions (NBFC) to provide car loans to drivers at a concessional rate(s). However, it does not provide any kind of guarantee on behalf of the drivers and the loans are given by the banks to drivers without any recourse

to Ola. The vehicles are hypothecated by the respective banks.”

38. Thus we find that the agreements that Ola has with drivers covers many aspects, which concern welfare measures for drivers and helping them source credit for buying vehicles. It does stand guarantee for the loans thus there is no binding for the drivers to remain loyal to Ola because of financial lock-in. The incentives provided to drivers are dynamic and not constant in time. The drivers have the option to shift to other network depending on their requirement and convenience. Hence the driver's agreement that Ola has with drivers with entirely optional and does not in any way bind the drivers to Ola's network in any way. The option to move away from Ola's network is always there in case the drivers so want. We, therefore, do not find the drivers agreements anti-competitive in violation of section 3 of the Act.

39. We are of the opinion that the competitors of Ola could have accessed funds from venture capital investors and angel investors, who would have provided funds if they (the investors) saw good potential in the enterprise and good return on investment. We are

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also of the clear opinion that Ola used the funds so obtained to carry out multifarious tasks such as upgradation of its network and technology, promoting riders and drivers awareness, broadening its rider and driver base and creating awareness regarding its brand amongst its consumers (who would create a demand) and the drivers (who are suppliers) about the ease of using App and also using a end to end solution to their benefit and advantage. Pricing including discounts and incentives were part of an integral part of overall strategy and not a standalone action to target its competitors through predatory pricing. Moreover, while Ola was rolling out its strategy it was not in a dominant position in the market for any long period of time but it was itself a relatively new entrant in the relevant market.

40. We tend to agree with the contention of the Ld. Senior Counsel of Ola that Ola offers discounts to customers for spreading awareness about its brand and presence in the market and increasing demand for its services. In the same way incentives that are provided to drivers are either in monetary form or in the shape of schemes which are dynamic in nature and change with market conditions. Moreover, participation in these schemes are completely optional for the drivers. Its strategy is that

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once demand rises Ola has to bring in more drivers in its network, and therefore Ola's incentives to drivers are engineered to attract them to its network. These incentives are developed and offered with a view to offering advantageous terms of engagement so there are enough suppliers to take care of increasing demand. Therefore, we are of the view that Ola is working on generating demand through customer discounts and then bringing in more drivers to cater to the increased demand. Ola tries to create a win-win for the riders and drivers, and of course to its enterprise. We do not think this cycle of demand generation and its satisfaction through sufficient supply of drivers through discounts and incentives should be viewed as predatory pricing employed to oust competitors from the market.

41. Looking to the market behavior of Ola, as discussed in the preceding paragraphs, we hold a clear view that Ola was providing a mobile-app based solution to the riders and drivers in a new and easy way for taxi rides which includes taxi booking and payment. It was not enjoying a dominant position in the relevant market in violation of Section 4 of the Act as it was itself a new entrant in the market. It employed a pricing strategy to establish its brand and network to provide much more efficient and user-friendly services

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to customers in real time at any place and anytime, to edge out the competitors who were already present in the radio taxi market in Bengaluru, which cannot be faulted as being predatory pricing. Moreover since Ola is not in dominant position the question of abuse of dominant position through predatory pricing also does not get attracted. In sum, we do not think the orders of the Commission dated 19.7.2017 passed in case No. 06/2015 and Case no. 74/2015 require any interference. Both the appeals are, therefore, dismissed.

42. There is no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
7th January, 2022

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