

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition App. (AT) No. 20 of 2021
& I.A. No. 2843, 2844 of 2021 & 3768 of 2023

(Arising out of the Order dated 28.06.2021 passed by the Competition Commission of India in Case No. 35 of 2019).

Manoj K. Sheth,

Male Aged 57 Years, R/O - 1c, Kg Spring Manor, 23,
1st Main Road, Sastri Nagar, Adyar, Chennai, Tamil
Nadu –600 020.

...Appellant

Versus

**1. The Secretary Competition Commission Of
India**

9th Floor, Office Block-1 Kidwai Nagar (East),
Opposite Ring Road New Delhi -110 023.

cci-chairman@nic.in, secy@cci.gov.in

...Respondent No. 1

2. National Stock Exchange Of India Exchange

Plaza Block G,C1, Bandra Kurla Complex, G Block,
Bkc, Bandra Kurla Complex Mumbai,

Maharashtra – 400 051. ignse@nse.co.in

...Respondent No. 2

Present

For Appellants:

Mr. Nityaesh Natraj, Mr. Vaibhav R Venkatesh, Mr.
Udian Sharma, Mr. Akash Srinanda, Mr. Anirudh A
Sriram, Ms. Harsha Sadhwani, Mr. Manav Mitra,
Ms. Subhika Joshi & Mr. Sahil Saraswat, Advocates

For Respondent:

Mr. Neeraj Malhotra Sr. Adv. with Mr. Aman Singh
Sethi, Ms. Manika Brar, Mr. Parteek Yadav, Mr.
Shivek Sahai Endlaw, Mr. Rohan Dembani & Mr.
Nimish Gupta, Advocates for R-2
Mr. Rahul Ajatshatru & Ms. Aashima Gautam,
Advocates Ms. Sunaina Dutta, Advocate for CCI

J U D G E M E N T

(06 .02.2026)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed under Section 53(b) of the Competition Act, 2002 (the “**Competition Act/Act**”) by Manoj K. Sheth who is the Appellant herein, challenging the Impugned Order dated 28.06.2021 in Case No.35 of 2019 passed by the Competition Commission of India under Section 26(2) of the Competition Act.

Competition Commission of India is the Respondent No.1 herein.

National Stock Exchange of India is the Respondent No.2 herein.

2. The Appellant submitted that he initiated a complaint before the Competition Commission of India (CCI) under Section 19(1)(a) of the Competition Act, 2002, against the National Stock Exchange of India Limited (NSE) for indulging in practices of granting preferential market access to select brokers through "Co-location Facilities", thereby disadvantaging the rest of the market via front-running, artificial information asymmetry, and market manipulation on a consistent basis.

3. The Appellant submitted that the co-location facility permitted select brokers to locate trading systems within NSE premises, enabling access to granular 'tick-by-tick' data (including orders, cancellations, modifications, prices,

and trades) ahead of other market participants, thereby benefiting such brokers with lower latency and faster execution, distorting market competition. The Appellant further contended that NSE's practices in relation to these facilities violated Sections 4(2)(a)(i), 4(2)(b)(ii), and 4(2)(c) of the Competition Act, as NSE, being a dominant enterprise in the securities market, granted unfair preferential access to select trading members, limiting and restricting services to others, resulting in denial of equal market access and elimination of competition among participants.

4. The Appellant submitted that NSE qualifies as an "enterprise" under Section 2(h) of the Competition Act, engaged in activities relating to the business of acquiring, holding, underwriting, or dealing with securities, either directly or through units/divisions/subsidiaries. It was further contended that the co-location services constitute a "service" under Section 2(u) of the Competition Act, made available to potential users (trading members) on payment of fees for full or half racks, with consumers (availing brokers) gaining advance access to critical data, creating a market divide between payers and non-payers, fostering exploitation and exclusion.

5. The Appellant argued that NSE holds a "dominant position" in the relevant market, evidenced by its substantial market share, consumer dependence, and high regulatory entry barriers for new stock exchanges, rendering its preferential treatment exploitative (one-sided terms favouring select brokers), exclusionary

(removing players from the market), and discriminatory (preferential access), warranting investigation under Section 26 of the Competition Act.

6. The Appellant submitted that, notwithstanding uniform fees charged for co-location services, equal benefits were not extended to all paying trading members; instead, NSE provided preferential access to order, trade, and price data to select brokers, granting them a further competitive edge and virtually ensuring they would not incur losses, thereby eliminating competition and creating a monopoly-like structure among market participants.

7. The Appellant contended that complaints by a whistle-blower to the Securities and Exchange Board of India (SEBI) revealed NSE's illegal practices, including: (i) preferential access to data dissemination servers for select brokers; (ii) permission for non-empanelled ISPs to lay fibre for certain brokers; and (iii) collusion with specific brokers.

8. These allegations were confirmed by SEBI's Technical Advisory Committee (TAC) Report, which found that select brokers possessed insider information on server activation timings and speeds, enabling login to faster servers first, facilitating front-running and trading on insider data about impending buy/sell orders, distorting investor interests and stock pricing principles.

9. The Appellant highlighted SEBI's findings in para 8.3.3.7 of the TAC Report, evidencing inequities in: (i) IP allocation without equitable distribution across servers/ports; (ii) absence of load balancers for even IP arrays and equitable

login rank distribution; (iii) lack of randomizer in Normal TBT feed for fair data receipt; and (iv) failure to monitor frequent secondary server access by certain trading members (TMs) to bypass primary server loads, with NSE issuing only emails/advisories despite repeated violations. Further, para 8.1.19(a) of the TAC Report underscored the significance of microsecond variances in TCP-IP data dissemination for algo-trading by co-located brokers, necessitating evaluation of NSE's architecture.

10. The Appellant submitted the following prima facie evidence of preferential access: Whistle-blower letters to SEBI (August and October 2015), extracted in Mydigitalfc.com report titled "Letter from a whistle-blower to SEBI on NSE rot", alleging daily benefits to select brokers and clients over five years, involving trading volumes of 2-3 lakh crores per day, TAC investigation confirming charges, discussed in Parliament on 09.12.2016, NSE's internal probe by Deloitte (initiated per SEBI's 28.11.2016 letter), finding differential treatment in IP allocation and server movements, with faster tick dissemination to less-crowded servers benefiting select brokers, "The Week" report (18.11.2017) on Deloitte's forensic audit of NSE's equity derivatives platform, revealing emails instructing against unjustified server movements, Whistle-blower's letter to Ministry of Finance (14.12.2017), published in Money Life as "NSE whistle-blower's 4th letter" (10.08.2018), detailing NSE's role in currency market rigging for overseas entities,

CBI FIR No. RC AC1 2018 A0011 (28.05.2018) confirming prima facie market abuse.

11. The Appellant contended that these distortions via information asymmetry and early access caused trillions in investor losses, denied fair market access, and skewed the competitive structure, enabling select brokers to skim profits from mispricing and order book data. The Appellant further submitted that NSE's unfair practices granted trading members preferential access to order books, price feeds, and data, reaping undue benefits. Detailed evidence, including Annexures and statements by Minister of State in Parliament, was furnished to CCI, establishing sufficient material for action under the Competition Act, 2002.

12. The Appellant contended that CCI's 14.01.2020 order required NSE's response by 20.02.2020 and set a 25.02.2020 hearing, at which the Appellant appeared and argued while NSE defaulted, securing a three-week extension per 25.02.2020 order; the Appellant filed written arguments on 03.03.2020 amid NSE's continued non-compliance, resulting in hearing cancellations and five further opportunities via CCI orders dated 30.06.2020, 30.07.2020, and 09.09.2020, all ignored, until NSE's belated 04.12.2020 response under 20.10.2020 order led to a 17.12.2020 virtual hearing featuring NSE's two-hour submissions; the Appellant sought rebuttal chances, but the 17.12.2020 procedural order omitted the next date, necessitating W.P. No. 877/2021 before Madras High Court (allowed 10.03.2021, mandating Appellant's hearing), after which the

Appellant submitted rejoinder and additional briefs both disregarded prior to 19.03.2021 arguments, reserved orders, and impugned dismissal on 29.06.2021.

13. The Appellant contended that while Section 26(1) imposes no obligation to hear the opposite party before forming prima facie opinion, NSE was afforded over five opportunities, including extensive oral and written submissions, effectively converting proceedings into final hearing. Conversely, the Appellant was compelled to approach Madras High Court for effective hearing, evidencing procedural infirmity.

14. The Appellant submitted that the CCI erred in determining that the NSE co-location facility is not anti-competitive in nature, as such facility inherently grants preferential market access to select brokers, fostering front-running, artificial information asymmetry, and market manipulation, thereby distorting competition in violation of Sections 4(2)(a)(i), 4(2)(b)(ii), and 4(2)(c) of the Competition Act, 2002.

15. The Appellant submitted that the CCI failed to consider that NSE's bye-laws impose a responsibility on NSE to determine functional details of trading systems, including system design, user infrastructure, and operations, to ensure smooth trading while safeguarding larger public interest, which NSE breached through inequitable co-location allocations.

16. The Appellant submitted that, in the absence of a randomizer and load balancer, the NSE failed to ensure free and equitable access to all brokers,

rendering its TCP/IP protocol vulnerable to abuse through inequitable access, as select brokers exploited less-crowded servers for faster tick dissemination and prior information on server activations.

17. The Appellant contended that the NSE's dominant practices enabled select brokers to trade on advance order data, distorting pricing and eroding investor confidence, constituting abuse that the CCI erroneously deemed non-violative.

18. The Appellant submitted that the NSE's violation of Regulations 41(2) and 42(2) of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 pertaining to equitable access and non-discrimination by a dominant stock exchange, also amounts to a violation of Section 4(2)(a)(i) of the Competition Act, limiting technical services unfairly. The Appellant further contended that these regulatory breaches evidence direct denial of market access, reinforcing anti-competitive conduct that the CCI failed to link with the Competition Act's provisions. The Appellant contended that this selective access, unaddressed in the Impugned Order, constitutes clear discriminatory practice, bolstering claims of market manipulation.

19. The Appellant submitted that the CCI failed to observe that the NSE's co-location facility serves as a mechanism for market abuse, wherein limited rack space was rented to select brokers enabling front-running of other brokers and clients, inherently violating the Competition Act through abuse of dominance. The Appellant contended that this structural favouritism creates a monopoly-like edge

for privileged entities, distorting competition and necessitating the CCI's intervention.

20. The Appellant submitted that the CCI erred by overlooking that there was no evidence suggesting NSE's activities, particularly the co-location facility, are non-anti-competitive in nature, and this error renders the Impugned Order liable to be set aside for perversity. The Appellant contended that the onus at prima facie stage required scrutiny of Appellant's materials, not unsubstantiated exoneration, highlighting the CCI's misdirection.

21. The Appellant submitted that the CCI failed to observe that the co-location facility offered by NSE constitutes a mechanism for market abuse, as limited rack space was rented exclusively to select brokers, enabling them to front-run other brokers and clients, thereby inherently violating the Competition Act, 2002, through abuse of dominant position. The Appellant contended that this selective access to proximity-based advantages and granular data fosters information asymmetry, allowing privileged brokers to earn extraordinary proprietary profits at the expense of the broader market, distorting competition and warranting CCI intervention under Section 4.

22. The Appellant contended that such evidential oversight at the prima facie stage under Section 26(1) reflects a failure to appreciate the gravity of anti-competitive conduct, rendering the dismissal arbitrary and unsustainable. The Appellant contended that the onus required evaluation of the Appellant's materials,

not unsubstantiated exoneration, especially absent any countervailing proof from the NSE, highlighting the CCI's flawed prima facie assessment. The Appellant submitted that the CCI's failure to appreciate the evidence on record, coupled with findings contrary thereto, renders the Impugned Order unsustainable and liable to be set aside, as it disregards corroborated instances of discrimination, collusion, and inequitable access.

23. The Appellant submitted that the CCI failed to observe discrimination between brokers, as select few, through connivance and collusion with NSE officials, secured faster access and login to systems ahead of the market, arising from NSE's lack of policy on tick-by-tick data access, resulting in preferential and unfair treatment at the rest of the market's cost. The Appellant contended that this undocumented manipulation, unaddressed by the CCI, exemplifies abuse under Section 4(2)(c) of the Competition Act, denying market access and fostering exclusionary practices.

24. The Appellant submitted that scientific transparent price discovery and equal access opportunity are sine qua non for an exchange, with trades placed on the hope of a level playing field; the NSE's co-location facility violates this by allowing few to benefit at the market's cost, breaching the principle of equal access and constituting a clear violation of the Competition Act, 2002.

25. The Appellant contended that the NSE, established to remedy opaque functioning of other exchanges, has betrayed its foundational ethos through this

facility, which per se results in abuse of dominant position and is inherently anti-competitive, as it divides the market into privileged and disadvantaged segments.

26. The Appellant submitted that the present complaint under Section 19(1)(a) of the Competition Act, 2002, highlights anti-competitive practices from the co-location facility, whereby NSE offers brokers placement of trading systems within exchange premises, enabling select few using rack space to obtain information ahead of the market, benefiting immensely from lower latency and faster execution. The Appellant contended that this design inherently limits services under Section 4(2)(b)(ii), prejudicing consumers and warranting investigation into NSE's dominant practices.

27. The Appellant submitted that a key feature of the co-location facility is provision of complete order book data up to "n" depth to co-located recipients, unavailable to external brokers, rendering it unfair among the same class of traders with no justification for such discrimination; retail clients, reliant on brokers, suffer penalization, as a poor pensioner in southern India is disadvantaged against top-tier Bombay brokers and corporates viewing the entire order book ahead. The Appellant contended that this facility divides the market, placing co-located participants better positioned than outsiders, violating equal access under Section 4(2)(c) of the Act and eroding investor trust.

28. The Appellant submitted that the NSE holds a dominant position in the securities market, with February 2020 shares of 92.6% in cash and 99.79% in

derivatives vis-à-vis BSE, where retailers contribute 70% volume unlike BSE's institutional focus; launched without SEBI approval in a regulatory vacuum, the co-location facility is a mechanism for market abuse, as select brokers rented limited rack space unavailable to others, enabling front-running and extraordinary proprietary profits from preferential price and order data.

29. The Appellant submitted that within co-location space, discrimination occurred as select brokers, through connivance and collusion with NSE officials, gained faster system access ahead of others, resulting in preferential treatment; SEBI's TAC Report and Deloitte Report clearly establish this, yet remain unconsidered by the CCI, with absence of documented systems enabling manipulation and market abuse. The Appellant contended that this selective favouritism breaches Section 4(2)(b)(ii), limiting technical development to prejudice consumers.

30. The Appellant submitted that further intra-co-location discrimination favoured select brokers with arbitrary preferential access to less-congested secondary/back-up servers for data dissemination, contrary to NSE emails limiting such to primary server failures; documents reveal select access granted while barring others, with Deloitte Report (Section 4) noting OPG Securities' first connection on secondary server for 357 of 364 trading days.

31. The Appellant contended that NSE's TCP/IP protocol, without randomizer or load balancer, was vulnerable to inequitable access abuse, failing to ensure free

and equitable broker access under Section 4(2)(c) of the Competition Act distorting market integrity.

32. The Appellant submitted that the issue surfaced via anonymous complaints by Kim Fong (January, August 10, and October 20, 2015), alleging preferential data dissemination server access to few brokers via NSE officials' collusion; SEBI constituted an expert committee under TAC guidance, which reported: (a) NSE's TCP/IP tick-by-tick dissemination architecture prone to manipulation and abuse; (b) preferential broker access via multiple servers/protocols; (c) static mapping enabling login to fastest servers.

33. The Appellant submitted that in Case No. 47 of 2018, CCI's order (January 7, 2019) affirmed jurisdiction but deemed Section 26(1) order premature pending SEBI investigation; SEBI's final orders (April 30, 2019) now conclusively hold NSE and officials guilty under SEBI Act, SCRA, and regulations, discharging the caveat in para 21 of that order. The Appellant further contended that CCI exercises independent jurisdiction under the Competition Act, 2002 distinct from SEBI's regulatory role; SEBI proceedings are irrelevant, and prima facie material now exists via these orders for Section 26(1) action, yet the Impugned Order ignores this precedent for final exoneration.

34. The Appellant submitted that assuming sequential data dissemination to brokers as normal like exam question distribution not affecting results is incorrect,

as exams are non-time-critical while trade execution is extremely so, with data travel distance critically determining broker success/failure vis-à-vis others.

35. The Appellant contended that in modern financial markets, time-to-execution and data flow distance are decisive; NSE's undue advantages impose not only financial but larger economic/social costs, weakening India's financial market fabric involving its premier exchange, a factor overlooked by the CCI.

36. The Appellant submitted that the CCI miserably failed to observe that NSE's inaugural circular for co-location facilities operated on a patently illegal first-come-first-serve basis, enabling arbitrary allocation that entrenched dominance and excluded broader participation. It was contended that, driven by profit motives, NSE imposed prohibitively high charges of Rs. 22.50 lakhs per annum for a full rack and Rs. 10 lakhs for a half rack from August 2009, sustaining these for three years despite its market dominance, only reducing them by nearly 50% to Rs. 12 lakhs and Rs. 6 lakhs respectively effective 01.01.2013 following broker complaints; consequently, numerous member-brokers initially barred by such exorbitant fees later applied, yet even presently, only 188 members—less than 20% of NSE's total avail the facility, undermining any claim of its widespread success or equitable adoption. The Appellant further contended that the NSE's model starkly diverges from NASDAQ's open-access approach for all customers, as the NSE's rationed, first-come-first-serve regime perpetuated exclusionary practices violative of fair market access under Section 4 of the Competition Act.

37. The Appellant submitted that the NSE deliberately withheld from the CCI the critical fact that co-location services from 2008 to 2015 were proffered without SEBI's regulatory approval, in direct contravention of Regulation 41(2) of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012, which mandates equal, unrestricted, transparent, and fair access to all persons without bias toward associates or related entities. It was contended that this regulatory vacuum exacerbated the NSE's abusive conduct, as the facility's discriminatory design inherently prejudiced non-privileged participants, warranting the Commission's scrutiny under Section 19(1)(a) of the Competition Act to unearth such violations.

38. The Appellant contended that the NSE's co-location facility is intrinsically anti-competitive, operating to the detriment of retail investors by skewing market dynamics; a targeted case study from NSE's records on retail participation in co-location and algorithmic trading would expose this inequity, necessitating an investigation under Section 26(1) of the Competition Act. In contrast, international exchanges like NASDAQ uniformly extend co-location to all brokers and customers, as evidenced by its policy offering proximity to US markets' speed and liquidity without rationing; NSE's circulars dated 31.08.2006, 04.03.2010, and 21.04.2011 explicitly cited limited availability and rationing for multi-rack requests, a constraint omitted only in the 12.11.2012 circular, thereby limiting

access to a select few for at least three years post-inception, with current uptake remaining opaque despite claims of 188 users.

39. The Appellant submitted that co-location engendered artificial information asymmetry, affording proximate servers a premature view of the entire order book ahead of others, enabling first-mover execution before counter-bids from the wider market, thus institutionalizing front-running opportunities for privileged brokers at the expense of equitable participation. It was contended that while theoretical efficient price discovery benefits the market, here it accrues solely to co-located entities via lagged dissemination for others, rendering it inefficacious absent fair, simultaneous information access for all; this differentiated price-dissemination regime, coupled with TCP/IP vulnerabilities, attracts Section 4's prohibitions on abuse of dominance, including denial of market access under Section 4(2)(c) and limitation of technical services under Section 4(2)(b)(ii).

40. The Appellant submitted that the CCI's order failed to note that SEBI's order dated 30.04.2019 operates against NSE's interests, categorically finding the co-location facility prone to manipulation and market abuse, violating Regulation 41(2) of SECC Regulations, 2012, mandating equal, unrestricted, transparent, and fair access without bias; it is immaterial whether SEBI concluded fraud under PFUTP Regulations, as the present complaint focuses solely on Competition Act, 2002 violations, independent of other proceedings.

41. The Appellant submitted that the anti-competitive acts constitute a continuous wrong ongoing since 2009, with SEBI's 2016 probe culminating in the 30.04.2019 order; the cause of action arises de die in diem, rendering NSE's delay allegations baseless, especially as the co-location scam surfaced only via the 2015 whistle-blower complaint, prompting SEBI and CBI actions and public awareness.

42. The Appellant submitted that the CCI failed to note TCP-IP and Multicast TBT (Tick-by-Tick) protocols existed over a decade pre-2009 co-location, with no fundamental cost or software differences; Interconnected Stock Exchange of India used Multicast since 1999, and NSE adopted it for normal trading pre-2009, rendering purposeful TCP-IP selection without randomizer or load balancer patently anti-competitive, enabling inequitable access and front-running.

43. The Appellant stated that in *Jitesh Maheshwari vs. NSE* (Case No. 47 of 2018) (disposed 07.01.2019), the CCI affirmed jurisdiction over discriminatory co-location but deferred Section 26(1) action pending SEBI probe, noting insufficient evidence then; post-order, SEBI's investigation—relying on TAC and Deloitte reports—concluded the NSE's failure for equal access, violating SECC Regulations, directing Rs. 624.89 crores disgorgement with interest from TBT dissemination profits, six-month market access prohibition (Order WTM/GM/EFD/03/2018-19 dated 30.04.2019), and Rs. 62.58 crores deposit with interest for PFUTP violations (Order WTM/SKM/EFD1-24 DRAIII/16/2019-20 dated 30.04.2019). The Appellant contended that the CCI erred in not forming

prima facie view per these findings, as discriminatory abuse falls squarely under its independent jurisdiction for cogent evidence-based examination; this complaint advances beyond Jitesh by alleging co-location per se anti-competitive, distorting broker-client and inter-exchange competition.

44. The Appellant stated that the CCI overlooked NSE's prior Rs. 55.5 crores penalty (June 2011, upheld by COMPAT 05.08.2014, recovery stayed by Supreme Court 23.09.2014) for abusing dominance in currency derivatives via predatory pricing against MCX-SX (Case No. 13/2009), confirming habitual Competition Act violations; co-location abuses fall exclusively within CCI's domain, warranting DG investigation.

45. The Appellant submitted that anti-competitive activity prevailed at four levels: (i) broker-vs-broker via proprietary trading discrimination; (ii) co-located broker clients vs. non-co-located broker clients; (iii) NSE brokers (with co-location) vs. other exchanges' brokers; (iv) NSE vs. BSE/MCX-SX; NSE offered co-location not for international alignment but personal gain, distorting competition.

46. The Appellant contended that NSE discriminates against impecunious members unable to afford rack space, with three-year prohibitive charges (Rs. 22.50 lakhs full/ Rs. 10 lakhs half rack from 2009, halved post-complaints to Rs. 12/6 lakhs w.e.f. 01.01.2013) evidencing exploitation.

47. The Appellant stated that the CCI failed to note NSE's deviation from its establishment for transparent price discovery and equal access; as a public body discharging public service—not mere profit-driven enterprise NSE must prioritize retail investors and members; compromising this erodes its edifice, unlike airlines where business class premiums do not harm economy passengers, as stock trading is zero-sum (one's profit another's loss), with co-located early reactions profiting at outsiders' expense.

48. The Appellant submitted that DG investigation would have uncovered truths independently, yet denied; the NSE guidelines prohibit secondary server as primary connection, violated per emails allowing OPG Securities access despite functional primary servers; NSE Bye-Laws Chapter IX Clauses 5, 6(f)&(h) mandate system design, infrastructure, and monitoring for public interest, binding NSE not members for violations like signal-jumping, evidencing deliberate undue advantages beyond administrative error.

49. The Appellant contended that the NSE, as first-level market regulator, cannot claim immunity for selective inaction; secondary servers' lower load enables faster data/transmission and front-running; absent randomizer/load balancer, equitable access denied, seriously violating competition laws; SEBI found preferential secondary access possible, architecture prone to abuse, and randomizer absence causing inequity uncontradicted facts binding dominant NSE to fair access, warranting Section 26(1) probe post-sectoral trial-like findings.

50. The Appellant stated that stock trading's zero-sum nature (participants' profits equal losses) renders NSE's restricted, exorbitant co-location violative of Section 4 of the Act; the CCI failed to consider intra-co-location discrimination via arbitrary secondary server access (backup only on primary failure, per NSE emails), granted selectively (documents barring others), due to absent randomizer/load balancer and undefined connection policy, fostering gross abuse; TAC Report confirms system abuse-proneness, with SEBI's 13.05.2015 circular post-2008-2015 vacuum highlighting inherent violations, as selective rack rentals yield advance information edge.

51. The Appellant submitted that the CCI failed to consider CBI's Criminal Case RC/AC/1/2018-A0011 (28.05.2018) under Prevention of Corruption Act Sections 7,12,13(2), arraying unknown SEBI/NSE officials, OPG officers, and Ajay Shah (under investigation), plus Deloitte's report on serious violations; CCI's duty under the Act to eliminate anti-competitive practices, promote/sustain competition, protect consumers, ensure trade freedom mandates Section 19 inquiry.

52. The Appellant contended that the NSE is a repeat offender, per DG Report (20.09.2010, Case 13/2009) and the CCI order (26.06.2011) on predatory pricing against MCX-SX, confirmed via social media; this fits DG probe, given contemptuous recidivism.

53. The Appellant contended that implementation abuses Section 4 via: (i) TCP/IP choice despite decade-old Multicast availability (used by Interconnected SE 1999, NSE pre-2009 trading), baselessly citing complexity/cost when Multicast simpler/cheaper; (ii) NSE's day-one awareness of misuse potential, yet no randomizer/load balancer; (iii) intra-co-location inequities: discriminatory primary server access crowding out others; secondary server favouritism for time edges; all-day advantages to Omnesys (NSE subsidiary) users logging first/second/third on majority days, as algo host/server manager.

54. The Appellant submitted that price/time priority core to electronic trading per NSE Bye-Laws/Regulations/Rules for equilibrium matching is disadvantaged by co-location time lags, even at same prices; select brokers' advantages boost their/ NSE's business, revenue, profits, and dominance via increased transaction fees, creating mutual commercial incentives.

55. The Appellant stated that NSE's business-class passenger analogy testifies abdication of public duty for fair/equal/transparent/non-discriminatory access; price/time priority trading platform's soul bartered for commerce, perverting agreements/conduct; Informant's materials amply establish prima facie case for DG inquiry under Section 26(1) of the Act.

56. Concluding his arguments, the Appellant requested this Appellate Tribunal to set aside the Impugned order and allow the present appeal.

57. Per contra, the CCI submitted that they do not wish to file any reply and refuted all allegations of the Appellant. The CCI also gave its submission in brief on the last day of hearing before us and generally supported the stand of the NSE in present appeal. The CCI categorically submitted that it has passed Impugned Order strictly in accordance with law.

58. The NSE refuted all the averments of the Appellant treating these as baseless and misleading. The NSE submitted that the present Appeal has been filed under Section 53B of the Competition Act by Mr. Manoj K. Sheth challenging the order dated 28.06.2021 passed by the CCI under Section 26(2) of the Competition Act. By the said order, the CCI, after careful consideration of the information, written submissions, documents and oral arguments placed before it, concluded that no prima facie case of contravention was made out and consequently closed the matter at the threshold stage. The NSE stated that the Impugned Order squarely addresses the allegations raised by the Appellant and records cogent reasons for rejecting the same.

59. The NSE contended that the Appeal is nothing but a reiteration of the same unfounded and speculative allegations which were comprehensively examined and rejected by the CCI. The Appellant has failed to demonstrate any legal infirmity, perversity, or non-application of mind in the Impugned Order that would warrant interference by this Appellate Tribunal in appellate jurisdiction.

60. The NSE contended that notwithstanding the absence of any reliable material, the CCI independently examined the entire record, applied its mind to the issues raised, and recorded a reasoned finding that no prima facie contravention of the Competition Act was disclosed. The NSE submitted that it is a settled principle of law that an appellate forum does not substitute its own view merely because another view is possible. In the absence of perversity or manifest illegality, interference with a Section 26(2) order is wholly unwarranted.

61. The NSE submitted that the Appellant's case before the CCI was confined to only two broad allegations, namely: first, that the NSE allegedly abused its dominant position merely by offering co-location services to trading members who opted to pay for the same; and second, that amongst those trading members who availed of co-location services, certain members were allegedly provided preferential access. The CCI has independently examined both these allegations on their own merits and has rightly found that neither discloses any contravention of the Competition Act even at a prima facie level.

62. The NSE submitted that the CCI has expressly recognised that co-location services, which have been operational for over twelve years and are offered by multiple stock exchanges in India, help increase trading volumes, enhance liquidity and benefit investors. The CCI has categorically observed that any intervention to stop such services at this stage would be retrograde and adverse to the interests of the market, companies and the economy. This finding, which is

based on regulatory and economic considerations, has not been displaced or even addressed by the Appellant in the present Appeal.

63. The NSE submitted that the Appeal proceeds on a fundamental misunderstanding of the nature, purpose and economic rationale of co-location services. Co-location is a well-recognised and globally accepted service offered by stock exchanges to facilitate efficient trading, particularly in the context of Direct Market Access and Algorithmic Trading. The NSE contended that co-location services enable trading members to place their servers in close proximity to the exchange's trading systems, thereby reducing latency, improving speed of execution, enhancing transparency and increasing market liquidity. These outcomes benefit not only the trading members availing the service but also the market ecosystem as a whole through better price discovery and reduced transaction costs.

64. The NSE submitted that such services are neither unique nor exclusive to the NSE. They are offered by stock exchanges across the world and have also been introduced by other Indian exchanges. The provision of co-location services is therefore a market-enabling facility, not an exclusionary or anti-competitive practice.

65. The NSE submitted that it is a matter of record that since the introduction of co-location services in 2009, not a single complaint has been raised by any trading member alleging denial of access or discriminatory treatment. On the

contrary, the number of trading members availing of co-location services has steadily increased from 24 in 2010 to approximately 250 members over time. This undisputed factual position conclusively demonstrates that the services are perceived by the market as fair, non-discriminatory and welfare enhancing.

66. The NSE submitted that DMA was introduced in India by the sectoral regulator in 2008 with the objective of enhancing market efficiency. However, due to latency constraints, DMA did not initially achieve the desired uptake. The NSE contended that after engaging with market participants, it became evident that reduction of latency was essential for the effective functioning of DMA and Algorithmic Trading. International exchanges had already addressed this issue through co-location services, which had proven successful.

67. The NSE submitted that it was in this backdrop, and in furtherance of the regulatory objective envisaged by the sectoral regulator, that the NSE introduced co-location services in August 2009. Subsequently, BSE also introduced similar services, and the sectoral regulator issued multiple guidelines governing the provision of such services.

68. The NSE contended that the Appellant's assertion that the mere provision of co-location services on payment amounts to abuse of dominant position is fundamentally flawed. Charging for a value-added service does not constitute market division or denial of access. The NSE submitted that the Appellant's argument is commercially illogical and ignores basic principles of differentiated

services. Acceptance of such an argument would imply that any premium or specialised service offered on payment would be rendered illegal, which is contrary to established competition law principles.

69. The NSE submitted that co-location services have been in existence for over a decade, yet the Appellant approached the CCI only after an unexplained and inordinate delay. Such belated action clearly evidences abuse of process and forum shopping. The NSE contended that the technology forming the basis of the allegations is no longer in use, having been replaced since December 2016 by multicast tick-by-tick technology. The Appellant has not raised any grievance with respect to the current technology. The NSE submitted that it provides co-location services in a fair, transparent and non-discriminatory manner to all trading members who wish to avail the service and comply with the applicable requirements.

70. The NSE contended that the Appellant is neither a trading member nor a competitor and has failed to identify even a single instance where an eligible trading member was denied access to co-location services. The NSE submitted that bald and speculative allegations, unsupported by evidence, cannot form the basis for directing an investigation under the Competition Act.

71. The NSE submitted that after a detailed investigation followed by quasi-judicial proceedings, the SEBI has expressly recorded that there was no evidence of fraud, market abuse, collusion or connivance on the part of the NSE in the

provision of co-location services. SEBI further found that no benefit accrued to any trading member on account of the NSE's co-location services. These findings, rendered by the sectoral regulator vested with technical expertise and jurisdiction, directly negate the very foundation of the Appellant's allegations.

72. The NSE submitted that unverified newspaper reports relied upon by the Appellant are legally inadmissible and constitute hearsay. Judicial precedent has consistently held that such reports cannot form the basis of legal findings. The NSE contended that inconclusive reports relied upon by the Appellant expressly disclaim accuracy and completeness. Such material cannot be accorded evidentiary value. The NSE submitted that the mere initiation of proceedings by another authority under a different statutory regime cannot justify the initiation of proceedings under the Competition Act, which requires an independent prima facie assessment.

73. The NSE submitted that even assuming the Appellant's material at its highest, no contravention of the Competition Act is disclosed, even at a prima facie level. The NSE contended that permitting an investigation on the basis of speculative, outdated and suppressed material would result in a fishing and roving enquiry, contrary to the statutory scheme of Section 26 of the Competition Act.

74. The NSE submitted that the CCI has considered all the information, submissions and documents placed before it and has thereafter passed a well-reasoned order dismissing the information at the prima facie stage. The Impugned

Order clearly records that the CCI perused the information, written submissions and documents filed by both the Informant and the NSE, as well as the orders passed by the sectoral regulator and the SAT which were placed on record by the parties.

75. The NSE submitted that at the time of introduction of co-location services, no specific technology was mandated by the sectoral regulator. The NSE undertook extensive due diligence, including assessment by internal and external experts, multiple committees and its Board of Directors, before selecting the TCP/IP architecture. The choice was guided by considerations of market safety, reliability, integrity and accessibility, and by the need to ensure affordability and gradual adoption by trading members. The subsequent phased migration to multicast tick-by-tick technology further demonstrates the bona fide and adaptive approach adopted by the NSE.

76. The NSE submitted that under the TCP/IP architecture, sequential dissemination of data and inherent variability at multiple levels including server, port and trading member infrastructure ensured that no trading member could secure a guaranteed time advantage merely by connecting earlier. This technical reality, which has been acknowledged by the CCI, completely undermines the Appellant's speculative theory of systematic preferential access.

77. The NSE contended that notwithstanding the unclean hands with which the Appellant approached the CCI, the CCI nevertheless examined each allegation

on merits. After applying its mind to the entire material, the CCI concluded that no prima facie case of contravention of the Competition Act was made out and accordingly closed the matter. The Appellant was also afforded sufficient opportunities to advance his case, including oral arguments, despite there being no statutory requirement to do so at the prima facie stage.

78. The NSE submitted that the designation of a secondary server was solely for ensuring business continuity in the event of failure of the primary server. The secondary server was maintained in an active-active mode only to ensure seamless access during contingencies. Accessing the secondary server conferred no trading advantage. Clear co-location guidelines governed its use, and any deviation by individual trading members cannot be attributed to the NSE or elevated to a competition law violation.

79. The NSE submitted that the approach adopted by the CCI is fully in consonance with the law laid down by the Hon'ble Supreme Court in ***Competition Commission of India v. Steel Authority of India Limited***, (Civil Appeal No. 7779 of 2010) wherein it was categorically held that a prima facie opinion must be formed on the basis of the information and material placed on record, and that such opinion must reflect due application of mind.

80. The NSE contended that the Hon'ble Supreme Court has clearly held that the CCI must form its view "in no uncertain terms" that a prima facie case exists before directing an investigation. In the present case, the CCI, after considering

the entire record, rightly concluded that such threshold was not met. The NSE submitted that this Appellate Tribunal has consistently held that an informant has no vested right to seek an investigation under the Competition Act, and that unless sufficient material is placed to demonstrate a prima facie case, no direction for investigation can be issued.

81. The NSE submitted that the mere mechanical reproduction of documents and materials does not automatically warrant an investigation under the Competition Act. It is incumbent upon the CCI to be satisfied, upon application of mind, that all the ingredients of the alleged contravention are made out even at a prima facie level. The NSE contended that the Hon'ble High Court of Bombay has clarified that even at the threshold stage, there must be prima facie satisfaction with respect to all essential elements of the alleged violation. This requirement has not been met in the present case, and the Appellant's submissions are a transparent attempt to bypass this settled position of law.

82. The NSE submitted that the Appellant's allegation that the CCI conducted the matter as though it were a final hearing is wholly misconceived. Under the scheme of the Competition Act, an inquiry commences only after an order under Section 26(1) is passed, and prior to that, the CCI is fully empowered to test the information placed before it. The NSE contended that the Competition Act and the General Regulations expressly empower the CCI to call for information, conduct preliminary conferences and seek assistance from any person it deems

necessary to arrive at a prima facie opinion. The NSE submitted that Regulation 44 of the General Regulations further vests the CCI with wide discretion to call for documents or evidence at any stage. There is no legislative restriction on the exercise of this discretion, and therefore, the Appellant's challenge to the process followed by the CCI is unsustainable.

83. The NSE submitted that the allegation that the Appellant was denied a fair opportunity to present his case is entirely false. The Appellant was permitted to make detailed submissions during a preliminary conference and was granted multiple opportunities to present oral arguments, even though there is no statutory requirement to do so at the prima facie stage. The NSE contended that the principles of natural justice, including Audi alteram partem, do not apply at the stage of formation of a prima facie opinion. Nevertheless, the CCI extended ample procedural latitude to the Appellant, which he fully availed.

84. The NSE contended that the allegation that the NSE delayed proceedings by seeking extensions is mischievous and baseless. The NSE acted strictly in accordance with the directions of the CCI, which were issued with due cognisance of the disruptions caused by the Covid-19 pandemic. The CCI itself has recorded that delays were largely attributable to the pandemic, and no adverse inference has been drawn against the NSE.

85. The NSE submitted that the Impugned Order reflects a careful, reasoned and lawful exercise of jurisdiction by the CCI. The Appellant has failed to

demonstrate any error of law, procedural infirmity or perversity warranting interference by this Appellate Tribunal.

86. The NSE contended that the Appeal is devoid of merit and therefore deserves to be dismissed in limine, with costs.

Findings

87. We have already noted the facts and the pleadings of all parties in detail in the preceding discussion.

88. The Appellant is aggrieved by the Impugned Order dated 28.06.2021 passed by the CCI in CC No. 35 of 2019 under section 26(2) of the Act holding that there is no prima-facie case for further investigations about alleged abuse of dominant position by the NSE in alleged indulging in practice of granting preferential market access to select brokers on account of manipulation of Co-Location Facilities.

89. It has been brought to our notice that Co-Location Facilities given by the NSE was a mechanism whereby trading members of the NSE were allowed to take on rent the limited rack space and front run brokers and their clients by accessing the market early to take advantage of information on the price and other relevant information. It has also been argued by the Appellant that this practice of Co-Location Facilities eventually divide the market into two segments i.e., Trading

Member having Co-Location Facilities vis-à-vis Trading Member not having Co-Location Facilities, giving unfair advantages to selected brokers having Co-Location Facilities, restricting market access to others Trading Member in violation of Section 4(2)(a)(i), 4(2)(b)(ii) and 4(2)(c)(iii) of the Competition Act. We also take note that the CCI as well as the NSE strongly refuted all the allegations of the Appellant as baseless and submitted that there was no violation of any provision of the Competition Act and the CCI correctly passed the Impugned Order after examination all the evidence brought out by the Appellant, in accordance with law.

90. During initial hearing, the Appellant also mentioned issue regarding his locus, which has been settled and allowed in the favour of the Appellant in para 46 and 47 of the Impugned Order by the CCI and the same has attained finality since neither the CCI nor the NSE has challenged. As such, we will not look into this aspect of the locus of the Appellant in the present appeal.

91. We also take into consideration the appellant's allegation that NSE used Tick-By-Tick system through Transmission Control Protocol/ Internet Protocol ('TCP/IP') which was prone to manipulation and market abuse and help selected brokers in accessing data quickly to view complete order books i.e., all pending buy and sale orders with relevant quoted price and ordered quantity, whereas other

remaining brokers were kept devoid of the same creating unfair discrimination in market accessing among brokers and other stakeholders.

92. It is the case of the Appellant that the NSE deliberately created flawed architecture in order to favour select few brokers and further the NSE also allowed advantage to select few brokers by providing arbitrarily market access through use of its secondary server which was less crowded than the primary server. The Appellant also tried to impress us during hearing that selected few brokers had always access to secondary servers which was provided to them in connivance with the employees and management of the NSE and thus, the NSE was responsible for denying fair market access to large number of brokers and investors.

93. We take into account that one of the allegations of the Appellant against the NSE was for non-provision of Load Balancer and Randomiser which could have helped to create level playing field for all the trading members and create equitable grounds for the stake brokers as the Load Balancer and Randomiser would ensure that the data load is evenly distributed among the servers.

94. It is further the case of the Appellant that although there was large number of NSE Members, however, only few members availed the facility of Co-Location Facilities because the NSE kept deliberately high cost and such high charges made unaffordable for large number of its trading members. Finally, the Appellant also

took strong objection against the CCI for not referring the matter to the DG for further investigation in terms of the Section 19 of the Competition Act.

95. In order to understand the allegations of the Appellant, the rebuttal given by the CCI and the NSE and the issues involved, we will first take into account and elaborate few basic concepts which are relevant in the present appeal and which have been referred to by all the parties and other agencies, which have gone into the alleged allegations of Co-Location Facilities. As such, the basic concepts are being summarised, based on submissions of the Appellant, the CCI and the NSE, in the following discussions:

(a) Direct Market Access (DMA)

Direct Market Access (**DMA**) is a facility that allows brokers to offer their clients direct access to a stock exchange's trading system through the broker's infrastructure, without manual intervention by the broker. Some advantages of DMA are direct control of clients over orders, faster execution of client orders, reduced risk of errors associated with manual order entry, greater transparency, increased liquidity, lower impact costs for large orders, better audit trails and better use of hedging and arbitrage opportunities through the use of decision support tools and algorithm trading.

We note that SEBI has issued a Circular on 03.04.2008 about introduction of DMA.

(b) Algorithmic Trading, or Algo Trading & High Frequency Trading (HFT):

Algorithmic Trading, or Algo Trading, is a method of executing an order using automated pre-programmed trading instructions, relying on complex mathematical formulas and high-speed computers, accounting for variables such as time, price, and volume to send small slices of the order out to the market over time.

High-Frequency Trading (HFT) is a method of trading that uses computer programs to transact a large number of orders in fractions of a second. It uses complex algorithms to analyse multiple markets and execute orders based on market conditions.

(c) Co-location service

A co-location service allows the trading members of an exchange to locate their trading systems within the exchanges' premises. This benefits trading members by improving DMA and infrastructure for Algorithmic Trading, and enables them to get faster access to information regarding price and market movements. This in turn allows for swifter execution of trades as greater proximity to the stock exchanges' servers reduces the time it takes for a trader's server to interact with that of the exchange. Co-location services, thus, facilitate trades at higher speeds and lower costs, faster execution of orders, reduced risk of errors

associated with manual order entry, greater transparency, increased liquidity and therefore, provide greater avenues for better price discovery in the market. As a result, it also aids in lower impact costs of large trades, better audit trails and better use of hedging and arbitrage opportunities.

In this background, SEBI issued Circular dated 03.04.20008 on DMA and thereafter the NSE issued Circular on 31.08.2009 about Co-Location Facilities of renting space within the stock exchange premises for trading members to install their own servers. It has also been brought out that the NSE's role was limited for providing data, physical space for server's installation by trading member, ancillary services like server maintenance and cooling. We also take into consideration the explanation submitted by the NSE that at relevant stage of 2009, many international stock exchange also provided such Co-Location facilities to its trading members including: (i) the London Stock Exchange (UK) (ii) NASDAQ (US) (iii) The Chi-X (Australia) (iv) BATS (Better alternative trading system) (US) etc.

(d) TCP/IP and MTBT

We note that Stock Exchange like the NSE could have adopted the Transmission Control Protocol/ Internet protocol (TCP/IP) technology for co-location services or alternative Multicast Tick-by-Tick (MTBT) technology. Both TCP/IP and MTBT were recognized international standards. TCP/IP disseminates data

sequentially, ensuring each Trading Members receives every packet though in sequence. MTBT broadcasts data but cannot guarantee that every Trading Members will receive every packet. It has been brought out that implementing MTBT would have required extensive programming and investment by the Trading Members and the onus of receiving the data packets would have been on the TMs. Comparatively, TCP/IP was both less expensive and less complex than MTBT, making it more suitable for a nascent market, as TCP/IP required lower investments by Trading Members, it allowed for a gradual introduction and development of demand for the newly introduced colocation service. Conversely, MTBT would have necessitated greater investment from Trading Members, which, in 2009, was not considered viable for NSE. Accordingly, the NSE selected TCP/IP on account of: (i) market safety; (ii) reliability; (iii) data integrity and (iv) accessibility. At that time, stock exchanges such as the BATS and the Chi-X were also using TCP/IP.

96. At this stage, we need to take into consideration that SEBI after extensive consultation issued a Circular No. CIR/MRD/DP/09/2012 elaborating comprehensive regulatory framework for algorithmic trading. In this connection, it has been brought to our notice by the NSE that relevant para no. 41 is provided for equal, fair and transparent access which reads as under: -

Equal, fair and transparent access.

41. (1) *The recognised clearing corporation shall lay down a transparent policy framework for ensuring that there is no discrimination while rendering clearing and settlement services in settlement of trades on shareholder stock exchange(s) and on non-shareholder stock exchange(s).*

(2) *The recognised clearing corporation and recognised stock exchange shall ensure equal, unrestricted, transparent and fair access to all persons without any bias towards its associates and related entities.*

(3) *The recognised stock exchange and recognised clearing corporation shall not engage in activities that are unrelated or not incidental to its activity as a stock exchange or clearing corporation, as the case may be, except through a separate legal entity and as permitted by the Board.*

(Emphasis Supplied)

97. It will be relevant to note that the NSE completely shifted from TCP/IP Technology to MTBT Technology in 2016 which became exclusive method for providing Co-Location Services by the NSE to its Trading Members. We further take into consideration the empathetical argument of the NSE that up to 2013, there was no complaint whatsoever, regarding Co-Location Services and use of TCP/IP (since 31.08.2009) or use of MTBT which was contemplated in 2013 and finally scheduled to 2016 by the NSE.

98. We note that the whole controversy regarding Co-Location Services allegations against the NSE arose because of one pseudonymous complaint dated

08.01.2015 complaining regarding unfair and fraudulent practice in provision of Co-Location Services by the NSE which resulted into alleged financial and market scam.

99. The SEBI started examinations of allegations, after receiving pseudonymous complaints, regarding alleged fraudulent and unfair practices in the provision of co-location services by the NSE especially on the following aspects: -

- Whether the TCP/IP architecture of NSE for TBT data feed provided fair and equitable access to all Trading Members?
- Whether access to the secondary server of the NSE conferred an advantage and how the NSE monitored potential misuse?
- Whether the NSE could be held liable for violations under the Prevention of Fraudulent and Unfair Trade Practices Regulations, 2003?
- The role of the NSE's employees and the level of cooperation with the investigation.

100. We take into consideration that subsequent to above, SEBI also issued guidelines of Co-Location Services offered by stock exchanges vide Circular dated 13.05.2015. It has also been brought to our notice during submissions that SEBI set up an expert cross functional team primarily for fact finding, into

allegations in August, 2015 and based on such cross-functional team report, SEBI Technical Advisory Committee (TAC) was constituted on 30.11.2015 and TAC issued its report on 02.03.2016.

101. The NSE, based on SEBI instructions, appointed Deloitte for forensic investigations into complaint of preferential access due to Co-Location Services w.r.t. future and option segment on 01.10.2016 and Deloitte gave its report to SEBI on 23.12.2016. We further note that SEBI further directed the NSE and thereafter the NSE appointed Ernst and Young ('EY') to carry out forensic audit of the cash market and currency derivative and interest rate future segment and EY also submitted its report to SEBI.

102. We note that SEBI on 22.05.2017, issued a show cause notice to the NSE based on TAC report and Deloitte report. The SEBI also issued second show cause notice on 03.07.2018 and supplementary show cause notice on 31.07.2018 to the NSE. Detailed investigations including hearings were conducted by SEBI during intervening period and on 30.04.2019, SEBI passed its judgement, after considering, TAC Expert Committee Report; Deloitte Report – Forensic Review of Co-location Facility; EY Report – Cash Market; EY Report – Currency Derivatives Market and Interest Rate Futures; ISB Report – Profits earned by Co-located Trading Members – Final Report; Deloitte Report – First / Early Connect and Connection to Secondary Server; as well as the underlying evidence, the

responses to the SCNs and the submissions made during hearings. The SEBI finally held that:

- Trading Members who connected first to a server received data first, conferring an advantage.
- The absence of a randomiser resulted in unfair and inequitable access to data.
- The absence of a load balancer led to an imbalance of load between servers.
- The lack of defined policies and the delegation of monitoring TM connections (to the secondary server) to junior staff without oversight from higher authorities enabled the misuse of secondary servers.
- The principle of “Fair and Equitable access” was not incorporated in the TBT architecture, leading to a violation of Regulation 41(2) of the SECC Regulations, 2012.
- No case of collusion of the NSE’s employees with the Trading Members or proof of specific discrimination towards any specific Trading Members or the accrual of monetary benefits / unjust enrichment to any employee or Trading Members is made out. Therefore, no “fraud” or violation of the provisions of the SEBI (PFUTP) Regulations is made out against the NSE.
- As per the Appellant, SEBI passed orders against NSE wherein at para 8.3.3.7, where the SEBI had found that there was inequity in the colocation process

and that NSE failed to create a level playing field for the trading members. SEBI also held NSE violative of regulation 41(2) of the SECC regulations, 2012 and at the conclusion, SEBI directed the NSE to disgorge as sum of Rs. 620 crores and further restrained NSE from excessing the securities market for a period of 6 months.

- However, as also observed by the CCI in Paragraph 58, of the Impugned Order dated 28.06.202, SEBI found no evidence of fraud or unfair trade practices, nor any benefit accruing to Trading Members due to the NSE's co-location services. SEBI exonerated the NSE of allegations of unfair trade practices. SEBI made no findings of deliberate preferential access being given to any particular class of Trading Members in so far as access to secondary servers are concerned. The findings of the SEBI were centred on an alleged failure to have better defined policies and procedures for access to the secondary server and monitor connections to the secondary server by certain Trading Members.

103. The Appellant conceded that the CCI heard the Appellant during hearings conducted on 25.08.2020 and the CCI also considered written submissions made by the Appellant, the NSE response to investigation and written submissions and thereafter, the CCI conducted second hearing on 17.12.2020. We take into consideration the fact that several such other hearings took place in the intervening period and the CCI took into account the written submissions and additional submissions by the Appellant as well as the NSE during such investigations. On

28.06.202, the CCI, after three rounds of hearings, and considering all the material adduced by the Informant / Appellant, dismissed the Appellant's Information at the threshold stage. The CCI found that:

- The relevant market was determined as the “market for providing co-location services for algo-trading in securities to TMs” within India.
- The NSE was found to be dominant in this market. The CCI further noted that if the relevant market were to be expanded to accommodate members and investors, the assessment of dominance will not undergo any change in any expanded market.
- The CCI noted SEBI's findings that there was inadequate due diligence by the NSE, resulting in asymmetric information dissemination, but found no evidence of fraudulent conduct.
- The CCI held that the NSE's choice of TCP/IP technology was bona fide, given the nascent market and lack of regulatory prescription.
- The provision of co-location facilities provided by the NSE was not considered an abuse of dominance or anti-competitive, as such facilities enhance market liquidity and are recognised by SEBI.
- SEBI found that Co-location facility is offered by several major exchanges, exchanges are accessed by domestic and foreign investors alike for making investments and reaping rewards.

104. We note that incidentally the SEBI itself hasn't stopped the provision of co-location facilities and has recognized such service.

105. On the process, we take into account that on 27.08.2021, the Appellant filed an appeal before the NCLAT, Chennai, which was returned on 12.11.2021 due to jurisdictional issues. On 17.11.202, the appeal was filed before the NCLAT, New Delhi, on the same grounds as those raised in the original Information filed with the CCI.

106. We note that SEBI's order was challenged by the NSE regarding violation of security control, Regulation before SEBI Appellate Authority ('SAT') on 19.05.2019 and on 23.01.2023, SAT issued its order on the NSE's appeal against the SEBI Order, finding in favour of the NSE. The Salient features of SAT order includes:-

- *No fault in the NSE's adoption of TBT architecture over MTBT.*
- *The system was inherently random, and SEBI had acknowledged this. Therefore, absence of randomiser did not impute any fault on the part of the NSE.*
- *No early advantage as a Trading Members connecting first is not guaranteed to receive the data first.*
- *The NSE has not indulged in any unethical act nor has unjustly enriched itself as a result of any wrongful act.*

- *Agreed with SEBI's findings that no violation of the SEBI (PFUTP) Regulations.*
- *SAT overturned SEBI's findings regarding violations of Regulation 41(2) and 42(2) of the SECC Regulations.*

Separately, by way of its common order, the SAT directed SEBI to re-adjudicate certain issues vis OPG Securities:

- *to re-consider the charge of connivance and collusion of OPG and its directors with any employee/ officials of the NSE;*
- *to re-consider the issue of OPG crowding out other market participants;*

107. We also take into consideration that vide judgement dated 13 September 2024, the SEBI issued its findings on these issues and the SEBI held:

- *there was no unfair advantage to OPG on account of crowding out;*
- *therefore, the charge of collusion/ connivance was required to be examined only in the context of consistently logging in to the secondary server;*
- *in spite of multiple reports of Deloitte, EY, SEBI External Committee, where external experts have examined email dumps, communication record for a reasonable period of time, still, no direct or indirect evidences/ material/ objective facts of collusion/ connivance have been reported;*
- *there are no new evidences in the current proceedings, further, the findings of Deloitte further reduces the possibility of collusion/ connivance;*

- *due to the absence of sufficient material/ evidence/ objective facts on record, the test of “preponderance of probability” fails to produce enough justification for establishment of collusion/ connivance with the NSE’s employees.*

108. The Appellant also brought to our notice that an unstarred question no. 4017 was raised in the parliament and the same was replied by Minister of State in the Ministry of Finance. We take into account these details, which read as under: -

“Will the Minister of FINANCE be pleased to state:”

- a. Whether SEBI was alerted by a whistle blower of unethical practices followed by High Frequency Trading (HFT) companies on the National Stock Exchange (NSE) and if so, the details thereof;*
- b. Whether this manipulative practice gives certain vested traders market information ahead of the rest of the market to leverage the millisecond advantage available under HFT and if so, the details thereof;*
- c. Whether NSE had refused to part with information on its operations and functioning under the RTI Act in recent past;*
- d. If so, the details thereof; and*
- e. The steps taken by the SEBI to monitor and check such malpractices in the NSE?*

ANSWER

MINISTER OF STATE IN THE MINISTRY OF FINANCE
(SHRI ARJUN RAM MEGHWAL)

a : Yes Madam. The Securities and Exchange Board of India (SEBI) has informed that it received three letters dated

January 2015, 10th August 2015 and 28th October 2015 from a whistle-blower making the following allegations with regard to the co-location facility of the National Stock Exchange (NSE):

- i. Preferential access to data dissemination servers was given to few stock brokers
- ii. NSE allowed non-empanelled internet service provider (ISP) to lay fibre in its premises for few stock brokers, and
- iii. Certain NSE officials colluded with the stock broker(s) in the matter.

b SEBI had constituted an Expert Committee under the guidance of its Technical Advisory Committee (TAC) to examine the allegations made by the complainant. The major observations / findings of the Expert Committee following examination of the same were as follows:

- i. The architecture of NSF with respect to dissemination of Tick-by-Tick (TBT) through Transmission Control Protocol/Internet Protocol (TCP/IP) was prone to manipulation/market abuse.
- ii. Preferential access was given to stock broker(s) wherein it was possible for a stock broker to log in to multiple dissemination servers through multiple Internet Protocols (IPs) assigned to him. It was also possible for a single member to have multiple logins to a single dissemination server through multiple IPs assigned to it. It was observed that stock broker(s) had a substantial advantage by logging in first or even second and third.

iii. NSE followed a static mapping process for allocating members' IPs to dissemination servers due to which few brokers were able to log on to the fastest dissemination servers. NSE had no load balancers for members connection to the TCP/IP-based TBT Dissemination Servers. Further, NSE also did not have randomizers for randomizing member positions on the Disseminating Servers/Ports.

c and (d): National Stock Exchange (NSE) has informed that the applicability of the Right to Information (RTI) Act, 2005 to NSE was affirmed by the Central Information Commission and the Single Bench of the Delhi High Court. However, the division bench of the Hon'ble Delhi High Court, vide its Order dated May 4, 2010 stayed the judgement of the single judge bench of the Hon'ble Delhi High Court which had interpreted NSE as a "public authority" under the RTI Act. Hence, as on date, NSE does not come under the purview of the RTI Act. NSE has further informed that it received only one application under the RTI Act in the last one year seeking information on its operations and functioning. The said application from Shri. Arun Kumar Agarwal sought information on issues like trading details of price manipulation and insider trading in certain securities, applicability of RTI Act, defamation suit, initial public offering by NSE etc. Notwithstanding the stay order of the Division Bench of the Delhi High Court, the letter was responded to by NSE with all information available in the public domain on November 11, 2016.

(e) SEBI has informed that the TCP-IP based TBT data broadcast at NSE has been discontinued with effect from 3rd December 2016. Further, as an ongoing endeavour to consistently upgrade and strengthen the systems and practices at stock exchanges in line with technological advancements, SEBI has issued regulatory guidelines in the form of Circulars from time to time. In the matter of co-location. SEBI, vide Circular dated 13th May, 2015, has advised stock exchanges to ensure fair and equitable access to the co-location facility. Further, vide Circular dated 1st December, 2016, SEBI has, inter alia, directed the stock exchanges to further strengthen the co-location framework in order to ensure fair and equitable access, in the following manner:

- i. To allow direct connectivity between co-location facility of one recognized stock exchange and the co-location facility of other recognized stock exchanges.
 - ii. To allow direct connectivity between the servers of a stock broker placed in the co-location facility of a recognized stock exchange and servers of the same stock broker placed in the co-location facility of a different recognized stock exchange.
- (f) Further, the co-location services provided through third parties and local area network (LAN) based connectivity to stock brokers have been brought under the ambit of regulatory framework for colocation facility.”

B) It was also stated in the report that one of the brokers namely OPG Securities was always able to consistently able to log in first on servers with better hardware.

C)Further, it is also stated that OPG along with other brokers were given preferential access to backup servers of NSE backup system.

(Emphasis Supplied)

109. The Appellant also submitted that income tax raid took place against entities conducted to Co-Location Facilities on 18.11.2017 and similarly, CBI registered FIR in RC No. 01 of 2018 dated 28.05.2018 under Section 7, 12, 13(2) r/w 13(1)(b) of the Prevention of Corruption Act, 1988 and Section 66 of Information and Technology Act, 2000 which included the names of unknown officers, public officers of NSE as well as SEBI.

- On 23.09.2019, the Appellant had submitted his complaint before the CCI seeking for an inquiry in terms of Section 19(1) read with Section 26(1) of the Competition Act, 2002. On 11.02.2022, SEBI passed detailed order against the NSE as well as its former MD/CEO wherein serious revelations were made that the former MD/CEO was acting as per the instructions of Himalayan Yogi. On 05.03.2022, an order was passed by the Special Court, New Delhi, on the anticipatory bail application of Chitra Ramakrishnan, Ex MD/ NSE which was dismissed and the Special Court noted that SEBI's role and CBI's role is entirely different and held that this period is considered to be the dark period in the history of NSE and further held that NSE colocation scam was a serious economic offence affecting the country as a whole. Special Court also held that

various losses have occurred to affected parties and SEBI being market regulator has not done enough qua the offence.

110. Taking into consideration above background and discussion, we find that following issues emerge which are required to be deliberated upon in order to decide the present appeal.

111. ISSUES

- (i) Whether, the CCI erred in Impugned Order in declining the Appellant's request to conduct enquiry against NSE u/s 19(1) of the Competition Act.
- (ii) Whether, the CCI in the Impugned Order has correctly considered and decided aspects of Co-Location Facilities resulting into alleged discrimination in market access and restrictive market access to select few Trading Members in violation of the Competition Act.
- (iii) Whether, in absence of Load Balancer and Randomiser, the NSE failed to ensure free and equitable access to all trading members.
- (iv) Whether, the Co-Location Facilities offered by the NSE, were in contravention to Section 4 of the Competition Act.
- (v) Whether the NSE as dominant stock exchange in the relevant market, violated Section 4(2)(a)(i) of the Competition Act.

- (vi) Whether, the CCI failed to adjudicate correctly against NSE for alleged indulging in practice of granting preferential market access to select few brokers in violation of Section 4(2)(b)(i), 4(2)(b)(ii) and 4(2)(c) of the Competition Act.
- (vii) Whether, the CCI was bound to order enquiry by DG under Section 19(1) of the Competition Act.
- (viii) Whether, the CCI came to correct conclusion that prima-facie no case existed against the NSE in Impugned Order dated 04.09.2021.

112. Since, all these issues are inter-connected, inter-related and inter-dependent, we shall examine all these issues comprehensively in conjoint manner in the following discussion.

113. At this stage, we will also take into consideration the relevant section of the Competition Act, referred by the Appellant, the CCI and the NSE, during pleading before us which reads as under:

“Section 2 (h): ”"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of anybody corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is

located at the same place where the enterprise is located or at a different place or at different places;"

We note that this section defines the term "enterprise" for the purpose of the Act. It includes any person or a department of the Government that is or has been engaged in any activity relating to the production, storage, supply, distribution, or trade of goods or the provision of services. The definition is broad and encompasses private companies, government departments, and any other entity involved in economic activities related to goods and services. In the present appeal, NSE is definitely an Enterprise in terms of section 2(h).

Section 2 (u): "2. (u) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service."

We find that this section defines the term "service" which includes any service of any description which is made available to potential users. The definition is wide-ranging and encompasses various types of services provided by enterprises, including those related to trade, finance, entertainment, or any other commercial activity. In the present appeal, various services provided by the NSE including Co-Location services are treated as services in terms of Section 2(u).

Section 4- Abuse of dominant position.

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group, -

• (a) directly or indirectly, imposes unfair or discriminatory-

1. condition in purchase or sale of goods or service; or

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

Explanation:

For the purposes of this section, the expression -

1. "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to -

1. operate independently of competitive forces prevailing in the relevant market; or

2. affect its competitors or consumers or the relevant market in its favour;

2. "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;

3. "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5."

Section (4)(2)(b)(ii)

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

Section (4)(2)(c)

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

From above, it is clear that Section 4(2) (a) (i) of the Competition Act, 2002 deals with abuse of dominant position and specifically prohibits any enterprise or group from directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of goods or services. It prohibits dominant enterprises from leveraging their market position to impose conditions that are detrimental to their competitors or consumers and thereby distorting competition in the relevant market. In the present case, the Appellant has alleged that the NSE had violated Section 4 (2) (a) (i).

We find that similarly, Section 4 (2) (b) (ii) prohibits dominant enterprises from limiting or restricting the production of goods or provision of services in a manner that is likely to cause an adverse effect on competition. This provision aims to prevent dominant players from creating artificial scarcity or restricting supply to manipulate prices or exclude competitors. The NSE is alleged to have violated this by restricting market access in the present appeal.

We note that Section 4(2)(c) prohibits dominant enterprises from indulging in practices that are likely to result in denial of market access to competitors. It prevents dominant players from creating entry barriers or hindering the entry of new players into the market, thereby promoting competition and ensuring a level playing field.

SECTION 19 - Inquiry into certain agreements and dominant position of enterprise.

(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on -

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

(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;
- (d) benefits or harm to consumers;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

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

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

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

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

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

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;

- (d) *adequate distribution facilities;*
- (e) transport costs;
- (f) *language;*
- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-sales services.
- (i) *characteristics of goods or nature of services;*
- (j) costs associated with switching supply or demand to other areas.

(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 or the nature of services;
- (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.*
- (g) costs associated with switching demand or supply to other goods or services;
- (h) categories of customers.

(Emphasis Supplied)

We note that Section 19 explains the powers and approach of the CCI while examining anti-competitive agreements and abuse of dominant position. The CCI can start an inquiry on its own or based on information received from any person,

consumer, or association. While assessing agreements under Section 3, the CCI considers factors like market entry barriers, impact on competitors, consumer benefits or harm, and overall economic and technical development. For determining dominance under Section 4, the CCI looks at aspects such as market share, economic power, consumer dependence, entry barriers, and market structure. The section also lays down how to identify the relevant market, which includes both the relevant geographic market and relevant product market.

Various factors like consumer preferences, price, transport costs, regulatory barriers, and substitutability of goods or services guide this determination.

114. In the present appeal, the issue is whether the CCI erred in its determination that the NSE's colocation facility does not have anti-competitive implications, despite potential discrimination between traders and market division. In terms of Section 19(1) of the Competition Act, the CCI may enquire into any alleged contraventions of provisions as contained in Section 3(1) or sub-Section 4(1) of the Competition Act on its own or on receipt of any information. The Appellant has filed his information in terms of Section 4(1) of the competition Act, therefore, the CCI was entitled to look into the alleged violations by the NSE. As per Section 4(1) of the Competition Act, no enterprises or group shall abuse its dominant position. Further, Section 4(2)(a) stipulate that such enterprise enjoying dominant position shall not impose unfair or discriminatory conditions in purchase or sale of goods or services, directly or indirectly. Similarly, Section 4(2)(b)(ii) stipulates

that no enterprise may limit or restrict technical or scientific development relating to goods and services to the prejudice of consumers. We find that Section 4(2)(c) discuss practice resulting in denial of market access.

115. We need to appreciate that the intent of Competition Act is to ensure fair competition by prohibiting such practices which may cause appreciable Adverse Effect of Competition (‘AAEC’) in market within India. Per se, being dominant in the market is not bad at all, what is bad is, if such dominant player abuses its dominant position resulting into AAEC.

116. In the background of the facts discussed earlier, the NSE is undisputedly a dominant player in the relevant market and as such, we need to decide whether the NSE, who is dominant player in relevant market, abused its dominant position and if so, whether the same resulted into AAEC. The NSE being dominant player in the relevant market, had a clear capacity to control or influence upon the supply chain including the access to the trading members to its platform along with the stipulated conditions.

117. In this context, the allegations of preferential treatment given by the NSE through alleged manipulative Co-Location Services as well as access to secondary server to few favourable Trading Member by the NSE, is the main grievance of the Appellant.

118. We may state that abusive act by dominant player are required to be analysed under the “rule of reason” taking into consideration the various relevant

factors. We therefore take into consideration the factors which according to Appellant, has been used by the NSE resulting into alleged prejudice or harm to the customers which ultimately are investors and their intermediaries like trading members in the present appeal. It needs to be appreciated that bigness of an enterprise making it dominant entity may be result of various factors, inter-alia, organisation's efficiently, innovations and advantage occur to the enterprise in the then prevailing circumstances.

119. All are aware that the NSE came into existence as a challenger to decades established stock exchanges like the BSE and the NSE became dominant player in no time due to its technology advantage, openness, innovations, perceived fairness and transparency. The NSE was also supported by all big market players at that stage. We have already noted the legacy history of DMA, Co-Location, use of technology TCP/IP in 2009 and MTBT by NSE in 2016. We have noted that initially there was certain regulatory vacuum, since SEBI introduced DMA, but did not stipulate the conditions and the echo-system under which the stock exchanges were required to offer the co-location services. The first Circular of SEBI about Co-Location Services indeed came only in 2012 followed by subsequent Circulars.

120. Thus, we need to look into whether the NSE abused its dominant position by alleged manipulation of Co-Location Services in favour of select few brokers which is prime accusation of the Appellant in the complaint filed before the CCI.

We take into consideration the fact that the NSE offered Co-Location Services to all its trading members on first come first serve basis, thus prima-facie all trading members had the opportunity of availing such facility of the NSE, if it suited their requirements. We also need to appreciate that all the services offered by the NSE are not necessary required to be used by its trading members. We need to understand that when DMA and Algo trading were permitted by SEBI, allowing the stock-exchange to facilitate the same, the High Frequency Trading ('HFT') were kept into consideration so that HFT could go on smoothly without human interventions or human errors, protecting the investors and also insulate the market from any untoward errors due to operations by its trading members or representatives.

Thus, we do not find logic of the Appellant attractive on this ground.

121. We will also refer to allegations of the Appellant that higher annual fee of Rs. 22.5 lakh, which was later reduced to Rs. 10 Lakh, created distinction on market access and caused market divide among the trading member and thereby resulting into unfair market access to select few who paid hefty charges to avail Co-Location Services. Prima-facie, we do not find such articulation of the Appellant as impressive, since for a trading member, fee of Rs. 22.5 Lakh or Rs. 10 Lakh or any other fee, which is equally applicable to all trading member, cannot be considered as discriminatory. Even taking into consideration the

financial impact of such changes, by no stretch of imaginations, we may consider this as market barriers as prima-facie looking into the volume and the top line and bottom line of trading members, such charged levied by the NSE for all its Trading Member. Since, may be simply fraction of overall cost.

122. It is reiterated that merely being a dominant player is not bad in itself, unless it has resulted into abuse of its dominant position resulting into AAEC. The abuse can occur when a dominant enterprise like NSE in the present case, exploit its position by imposing unfair or discriminatory conditions of price or limit or restrict its services or product. If such elements are not present, then obviously such dominance cannot be presumed to be abusive. Fundamentally and significantly, clear distinction is required to be made between abusive practices under competition act which tend to exclude or restrict market competition or market access on one hand vis-à-vis the success of business entity like NSE who can offer better products, better platform, better technology, faster access or conducive environment to its trading member, which eventually may result into economic advantage to its trading members and ultimately to the investors.

123. We consciously take into consideration allegations of the Appellant that the NSE was involved in abuse of its dominant position which offered discriminatory conditions to its trading members and favoured select few Trading Members by providing co-location services and preferential secondary servers. It needs to be appreciated that discrimination in such cases, involve differentiation among

Trading Members, in case if the NSE gave preference to select few trading members/ brokers not warranted by circumstances of transactions or trading echo-system. Such discrimination could have been due to relating to price or terms of provisions of services and so on. In the present case, the Appellant has alleged that the Co-Location services were availed only by few limited brokers who came forward to take such services from the NSE, giving them unfair advantage over the other trading members who did not volunteer to take such co-location services. The Appellant further alleged that in the same cluster of selected few trading members who availed Co-Location Services, once again in such cluster few Trading Members illegally were given early access due to manipulative TCP/IP technology devised by the NSE favouring its favourable trading members in violation of Competition Act.

124. In this background we note that the Appellant himself is not trading member and he has claimed to be a trader of almost two decades experience. It needs to acknowledge that by a written circular, the NSE had offered its co-location services to all its trading members which implies that the Co-Location Services were not available, in any case, to anyone other than trading members of the NSE. In simple terms, it further tantamount that a common investor or trader like Appellant herein, were in any case not eligible or entitled to claim such Co-Location Services from the NSE. We would reiterate that Co-Location Services were facilities offered by the NSE to its trading members to locate their trading

system in the premises of the NSE so that, these Trading Members can have faster access to the data and thereby complete their order book efficiently.

125. In our understanding, there can never be a case that where all Trading Members were eligible to avail such Co-location services from the NSE, by non-opting to take such Co-Location Services, non-opting Trading Members were discriminated against. We reiterate that all Trading Members were free to apply, pay fee and get such Co-Location Services. It is for the Trading Members to decide to take or not to take such Co-Location Services. We are at loss to understand, how the NSE can be blamed, if other Trading Members do not avail such Co-Location Services as per their free will.

We also do not buy logic of the Appellant that so called higher charges of Rs. 22.5 Lakh or Rs. 10 Lakhs are prohibitive expensive, preventing majority of Trading Members in taking such Co-Location Services. Thus, on this ground we do not find the merit in the pleadings of the Appellant. The allegations of the Appellant would have been correct, if the NSE would have refused to offer Co-Location Services to any of its trading member, directly or indirectly, by stipulating stiff eligibility criteria for such trading member to apply for Co-Location Services. We have noted that the NSE offered clear terms of Co-Location Services to all its Trading Members who were willing to satisfy the basic conditions and on first come first serve basis. The NSE has categorically

mentioned that out of its all trading member, only limited number of trading members have availed Co-Location Services which are still available to any Trading Members who could take the same. Such candid statement of the NSE demolish the allegations of the Appellant on the face value.

126. In the impugned order, it is very evident that the CCI took all aspects into consideration in order to determine whether the NSE colocation facility is anti-competitive. It is a practice being there from way before and it has also guidelines which has to be followed in order to have this facility. The CCI felt that there was no potential discrimination which this facility holds between traders and market division because the prices were fixed uniformly for availing this facility and also this is given on first come basis.

127. We have gone into the CCI's Impugned Order along with SEBI orders, SAT judgement. We do not find any error in the Impugned Order on this account, where the CCI did not find any prima-facie case against the NSE for abuse of its dominant position done to providing its Co-Location Services. In the impugned order the, the CCI has not found the NSE to be guilty of violating the Section 4 of the Competition Act or the co-location facility to be anti-competitive because the CCI felt that technology is present in all walk of life and is the backbone to the financial system. Any intervention by the CCI to stop the co-location facility which is there since 2009 and is followed by majority of the world trading

markets, would not be appropriate. We may add that despite SEBI adverse comments on the NSE, the SEBI being the regulatory body, has itself not stopped this practice of the NSE.

128. We shall also examine whether the CCI was bound to order enquiry under Section 19(1) Competition Act. The Appellant castigated the CCI for its failure to conduct a necessary inquiry and order a thorough investigation against the Opposite Party, thereby neglecting its obligations under Section 19 (1) and Section 26 (2) of the Competition Act. The Competition Act empowers and rather obligate the CCI to look into alleged contraventions of provisions under Section 3 & 4 of the Competition Act if the informant like Appellant file a complaint/information. We have already examined and taken on record the Section 19 of the Competition Act. Section 19(3) of Competition Act lays down that the CCI will consider factors as stipulated, to appreciate AAEC. Similarly, under Section 19(4), the CCI has to examine the dominance of the entity in terms of the factors as laid down in (a to m) of Section 19 (4) of the Competition act. The CCI is required to determine the relevant market taking into consideration the relevant product market and relevant geographic market has laid down in 19(5), 19(6) and 19(7). Thus, we tend to agree with the Appellant that on receipt of information by the CCI, the Competition Act empowers the CCI to inquire into alleged contraventions. However, the golden rule is that for initiating an enquiry under any of the clause of Section 19 of the Competition Act, the CCI should be

of opinion that a prima-facie case exists. It would be wrong to assume that there should be a clear case to be treated as condition precedent for enquiry by the CCI or an enquiry to be conducted by the DG.

129. At this stage, we take into consideration that in earlier avatar, the Competition Act provided for “receipt of complain” which was later substituted by “receipt of information” in Clause (a) of Section 19 (1) of the Competition Act which was provided by Competition (amendment Act, 2007). Thus, we find that the Parliament consciously widened the scope of and given wider power to the CCI. In this connection, the Appellant submitted to us that his information contained several facts and prevailing available report which suggested that NSE was involved in scam reported by a pseudonymous complaint filed by some whistle blower exposing nexus between the NSE and its official including top management further including Chairman and MD and CEO. It is the case of the Appellant that in such given circumstances, there was clear prima-facie case and therefore, the CCI should have formed its prima-facie opinion in favour of the further enquiry.

130. On this aspect, we appreciate that under Clause (19)(a)(i) of the Competition Act, an enquiry may be instituted on receipt of any information from anyone including the informant and the CCI, if required, may form its opinion about existence of prima-facie within 60 days. In terms of Regulation 16(2) of the CCI (General Regulation) 2009, in such eventuality, if the CCI forms an

opinion that prima-facie case exists, the directions are required to be issued to the DG to investigate the matters. However, it needs to be consciously and clearly understood that if the CCI is of opinion that there exists no prima-facie case, the matter may be closed forthwith and the CCI may pass such orders as deemed fit and send a copy of its order to the parties concerned.

131. In the present case, we note that the Appellant filed an information under Section 19(1) of the Competition Act, but the CCI after examining the relevant facts and giving opportunity of being heard to the concerned parties as well as after examining the submissions made by the parties, the CCI formed an opinion that no prima-facie case existed and thus, passed the Impugned Order communicating to all parties including the Appellant.

132. We will be considering now the issue, whether the CCI is bound to be initiate the enquiry merely on the information received, if no prima-facie case exists. To reiterate, the CCI may direct enquiry only if it forms opinion that there exist a prima-facie case. The term “opinion” necessarily means something more than mere complaint or gossip or belief the complainant or informant may have. The CCI needs to form an opinion about existence of some material which at the outset rather than going into detailed probe, the CCI is able to form an opinion whether prima-facie such case existed.

133. The prima-facie information itself presume that it is subjective satisfaction of the CCI which is need to be arrived in an objective manner meaning that there

should be adequate material, on the basis on which the CCI forms such reasonable opinion. If such opinion formed by the CCI is arbitrary or perverse or based on some subjective factors or irrelevant facts, such opinion may not be held to be valid in terms of several judgments including *Nagraj vs. Krishna* [(1996) (ILRKAR) 753] where it was held that the expression prima-facie case means there is case which requires investigation and that based on the case is not based on erroneous or fictitious grounds. It also implies that the relevant material, evidence, circumstances in the knowledge of the CCI, there was possibility for the CCI to arrive at such conclusions that prima-facie the allegations of the Appellant were correct.

134. We need to recognise the fact that prima-facie case does not mean a case proved to be to the finality but means a case which is set to be established if the evidence which is furnished by the informant like the Appellant herein lead to support the same. In such cases, a summary enquiry is done by the CCI by taking evident of the concerned stakeholders including written submission as deemed to be adequate for summary enquiry. We note that the CCI in the present case, based on the allegations of the Appellant, indeed called the NSE, who submitted all the required information to the CCI. We further take into consideration that the CCI, evaluated such evidence and the documents furnished by the NSE before concluding that prima-facie did not exist.

135. We also consciously note that the CCI has also took into account the SEBI's order (SEBI being the Sectoral Regulator for Market) as well as SAT's order. The CCI also took into account various independent reports like Deloitte, E&Y, ISB, SEBI TAC Report etc., before passing the Impugned Order exonerating the NSE of allegations of the Appellant and we reiterate that the CCI, after going into all the investigation and the reports, held that although SEBI has found the NSE has not have exercised due diligence in putting structures of TBT, but there is no fraudulent part of conduct found. We do not find any error in the Impugned Order on this account.

136. It has been empathetically argued before us by the Appellant that there was no need for an opportunity of being hearing accorded to the NSE by the CCI at stage of forming prima-facie opinions. We find that although, technically and legally, the Appellant may be correct but based on principals of natural justice and *Audi alteram partem* and more so if the CCI is of considered view to hear the opposite party like NSE in the present case, it cannot be presumed prejudice that was caused to the Appellant. Thereby, on this particular limited issue of the alleged unfair opportunity of being heard given to the NSE, we are not with the Appellant.

137. As required by the competition law, the CCI should form a prima-facie opinion and as such opinion should be recorded and provided to the concerned stakeholders. Such information can obviously be formed on the basis of record

including the information furnished and references made to the CCI. The detailed judgment on the aspect having given by the Hon'ble Supreme Court of India in the case of **Competition Commission of India Vs. Steel Authority of India** (Civil Appeal No. 7779 of 2010). The relevant portion of the judgment reads as under: -

It is the notice of objections alone and not the Decision to commence proceedings which is the measure stating the final attitude of the Commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced.” The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of Audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation

17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision-making process. That is the precise reason that the legislature has used the word 'direction' to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion.....

The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of

which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analysing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act.”

(Emphasis Supplied)

138. Thus, we tend to agree with the CCI that it formed its prima-facie opinion based on which all evidence and factors and came to the conclusion that no further investigation was required. Therefore, in our opinion the CCI passed the Impugned Order correctly.

139. Now, we will also examine the allegation of the Appellant that the CCI neglected to consider the implications of the absence of a randomizer and load balancer, which may have resulted in unequal access for brokers, and whether the NSE's TCP/IP protocol was vulnerable to abuse. On this point, we note that the CCI (taking into consideration all facts, documents, SEBI order) has considered that there is an absence of randomizer and load balancer because Co-Location facility is given on first come first serve basis and also a proper charge is taken to get these facilities. Hence, the CCI did not feel that TCP is vulnerable to abuse. Prima-facie, we do not find any fault in the Impugned Order on this account.

140. The appellant argues that the CCI should have conducted a more comprehensive investigation, similar to a trial, to get to the truth of the matter. They contend that the CCI provided numerous opportunities for the NSE to present its case, and NSE made detailed submissions and oral arguments. However, the appellant points out that their own submissions and evidences were not adequately considered, and certain aspects were overlooked by the CCI.

However, after going through the records available before us and based on pleadings before us, we hold that the CCI has taken all steps to ensure that the

matters are fairly decided and the parties got chance to address their issues, give evidence and grievances which has been heard by the CCI. All the SEBI report and other evidence on record, has been called by the CCI and after perusal of all, only then the CCI has reached to such conclusions. We tend to agree with the CCI on these issues.

141. It is the case of the NSE that to establish a Section 4 violation, the impugned conduct and the anti-competitive harm must emanate from an "overt act" by the dominant enterprise, the NSE herein and not by misconduct by a third-party like its employees, if at all Section 4(2)(a)(i) violation necessitates an element of compulsion by the dominant enterprise. It is also the case of the NSE that section 4 violation, even prima-facie, cannot be established without evidence of anti-competitive harm, and prior to directing an investigation and therefore, the CCI needs to ensure that all elements of a Section 3/4 violation have been satisfied. On this issue, it is the case of the Appellant that no overt act on the part of the NSE was needed. All evidence, documents, information submitted by the Appellant to the CCI, were more than adequate to form prima-facie opinion by the CCI for causing further investigation.

On these contrary view points, we will take into consideration the judgment given by Hon'ble Supreme Court of India in the case of ***Competition Commission of India v. Schott Glass India P. Ltd. & Anr., 2025 SCC OnLine SC 1097***. The relevant portion of the judgement reads as under: -

“India's economic ascent rests on a delicate but decisive equilibrium. On the one hand, markets must remain contestable: no undertaking may extinguish rivalry by stratagems foreign to fair, merit-based competition. On the other hand, genuine achievement whether expressed in scale, efficiency or technological advance, must be rewarded and not punished, for it is the impetus for investment, innovation and consumer welfare. The Competition Act, 2002, is the charter that secures both pledges. It equips the Competition Commission of India with wide-ranging powers of inquiry and remedy, yet it permits intervention only where hard evidence shows that the impugned conduct has caused, or is likely to cause, a demand rigorous fact-finding, adversarial testing of testimony and, above all, an effects-based appraisal that balances commercial justification against proven harm. Preserving this symmetry between discipline and encouragement is essential if the statute is to nurture robust rivalry while sustaining the confidence of domestic and global investors who increasingly view India as a premier destination for enterprise and innovation.

59. Section 4 of the Act does not per se prohibit dominance; it prohibits the abuse of dominance. Abuse, by definition, is conduct that distorts the competitive process or harms consumers. The statute therefore contemplates two logically separate findings:

(i) that the impugned practice falls within one of the descriptive clauses (a)-(e) of sub-section (2), and (ii) that it

results in, or is likely to result in, an appreciable adverse effect on competition ("AAEC").

To collate the second enquiry into the first would equate description with proscription and convert the provision into a strict-liability offence.

60. We believe that three legislative signposts in the Act make the "effects requirement" explicit. Firstly, the preamble records that the Act is enacted "to prevent practices having adverse effect on competition" (emphasis supplied). Secondly, a dominant position is defined in the Explanation to section 4 of the Act as power that enables the enterprise "to affect ... the relevant market in its favour"; the inquiry is purposeless unless the decision-maker asks whether the challenged conduct has in fact been exercised to that effect. Thirdly, section 19(4) (I) of the Act obliges the Competition Commission of India, in analysing dominance, to consider the "relative advantage, by way of contribution to economic development," thereby recognising that conduct which enhances consumer welfare may co-exist with market power and should not be condemned.

66. We therefore hold: (i) that an effects-based analysis is an obligatory component of every inquiry under section 4 of the Act; (ii) that the Competition Commission of India, having relied on untested statements and pre-2009 correspondence, undertook no credible assessment of harm; and (iii) that, on the evidence marshalled by the COMPAT, converter growth, stable downstream prices, absence of foreclosure-no appreciable adverse effect on competition is shown.

67. The omission of a proper harm analysis vitiates the Competition Commission of India's order in limine. Because each of the alleged abuses has already been negated on the facts, the appeals must fail on this additional ground as well. The COMPAT's decision to set aside the Competition Commission of India's directions and penalty therefore warrants affirmation. Issue V is answered in the affirmative with respect to both the questions.”

(Emphasis Supplied)

We find some similarity especially on cause and effect conditions. We find the CCI correctly concluded that there is no prima-facie case against NSE in terms of Section 4 of the Competition Act.

142. We note that the Appellant could not make any concrete case as what harm Co-Location Facilities or even the access to secondary servers caused to the investors or consumers. At the cost of repetition, it may be reiterated that Co-Location Facilities was exclusively meant for Trading Members of the NSE and not for investors. Hence, we do not find in any merit in the Appellant's argument that Co-Location Services harmed the interest of the consumers. The CCI correctly assumed the situation and passed reasoned the Impugned Order. We do not find any error in the Impugned Order.

143. We will also examine the allegation of the Appellant that the CCI should not have relied upon the SEBI Report while forming its prima-facie opinion. The

argument of the Appellant is that the CCI is an independent authority with different purpose, whereas the SEBI is only market regulator. The CCI has opposed this contention and submitted that although the CCI is governed by the Competition Act, however, the CCI cannot, altogether, ignore SEBI Report and order especially on same issue of the Co-Location Facilities of the NSE. We find force in the logic of the CCI. We hold that while the CCI and SEBI ('act') in their own domain, in accordance with the applicable laws to them i.e., Competition Act and SEBI Act, respectively, however, one cannot ignore the fact that SEBI is sectoral regulator with requisite expertise to look into such matter. The CCI therefore, was correct in taking help of SEBI order, to the extent needed, to form its prima-facie opinion.

144. In this regard, we note that the Hon'ble Supreme Court of India in the case of Competition *Commission of India vs. Bharti Airtel Limited & Ors. [(2019) 2 SCC 521]* found that the CCI was correct in placing reliance on the Sectoral Regulator's factual and technical aspects while considering the Appellant's Information. The relevant portion of the judgement reads as under: -

“103. We are of the opinion that as TRAI is constituted as an expert regulatory body which specifically governs the telecom sector, the aforesaid aspects of the disputes are to be decided by TRAI in the first instance. These are jurisdictional aspects. Unless TRAI finds fault with the IDOs on the

aforesaid aspects, the matter cannot be taken further even if we proceed on the assumption that CCI has the jurisdiction to deal with the complaints/information filed before it. It needs to be reiterated that RJIL has approached the DoT in relation to its alleged grievance of augmentation of POIs which in turn had informed RJIL vide letter dated 6-9-2016 that the matter related to interconnectivity between service providers is within the purview of TRAI. RJIL thereafter approached TRAI; TRAI intervened and issued show-cause notice dated 27-9-2016; and post issuance of show-cause notice and directions, TRAI issued recommendations dated 21-10-2016 on the issue of interconnection and provisioning of POIs to RJIL. The sectoral authorities are, therefore, seized of the matter. TRAI, being a specialised sectoral regulator and also armed with sufficient power to ensure fair, non-discriminatory and competitive market in the telecom sector, is better suited to decide the aforesaid issues. After all, RJIL's grievance is that interconnectivity is not provided by the IDOs in terms of the licences granted to them.

104. We, therefore, are of the opinion that the High Court is right in concluding that till the jurisdictional issues are straightened and answered by TRAI which would bring on record findings on the aforesaid aspects, CCI is ill-equipped to proceed in the matter. Having regard to the aforesaid nature of jurisdiction conferred upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of “subscriber”, “test period”, “reasonable demand”, “test phase and commercial phase

rights and obligations”, “reciprocal obligations of service providers” or “breaches of any contract and/or practice”, arising out of the TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/Tdsat under the TRAI Act only. Only when the jurisdictional facts in the present matter as mentioned in this judgment particularly in paras 72 and 102 above are determined by TRAI against the IDOs, the next question would arise as to whether it was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It would be at that stage CCI can go into the question as to whether violation of the provisions of the TRAI Act amounts to “abuse of dominance” or “anti-competitive agreements”. That also follows from the reading of Sections 21 and 21-A of the Competition Act, as argued by the respondents.

***105.** The issue can be examined from another angle as well. If CCI is allowed to intervene at this juncture, it will have to necessarily undertake an exercise of returning the findings on the aforesaid issues/aspects which are mentioned in para 102 above. Not only TRAI is better equipped as a sectoral regulator to deal with these jurisdictional aspects, there may be a possibility that the two authorities, namely, TRAI on the one hand and CCI on the other, arrive at conflicting views. Such a situation needs to be avoided. This analysis also leads to the same conclusion, namely, in the first instance it is TRAI which should decide these jurisdictional issues, which come within the domain of the TRAI Act as they not only arise out*

of the telecom licences granted to the service providers, the service providers are governed by the TRAI Act and are supposed to follow various regulations and directions issued by TRAI itself.

114. We, thus, do not agree with the appellants that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of CCI under the Competition Act is totally ousted. In a nutshell, that leads to the conclusion that the view taken by the High Court is perfectly justified. Even the argument of the learned ASG is that the exercise of jurisdiction by CCI to investigate an alleged cartel does not impinge upon TRAI's jurisdiction to regulate the industry in any way. It was submitted that the promotion of competition and prevention of competitive behaviour may not be high on the change of sectoral regulator which makes it prone to “regulatory capture” and, therefore, CCI is competent to exercise its jurisdiction from the standpoint of the Competition Act. However, having taken note of the skilful exercise which TRAI is supposed to carry out, such a comment vis-à-vis TRAI may not be appropriate. No doubt, as commented by the Planning Commission in its report of February 2007, a sectoral regulator, may not have an overall view of the economy as a whole, which CCI is able to fathom. Therefore, our analysis does not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after TRAI has

undertaken necessary exercise in the first place, which it is more suitable to carry out.”

(Emphasis Supplied)

145. The above judgment passed by the Hon’ble Supreme Court of India does not support the case of the Appellant in the present appeal. Thus, we do not find any error in the Impugned Order on this aspect especially since the CCI formed its opinion in accordance with Section 3, 4 and 19 of the Competition Act, albeit, taking into consideration various information, reports, documents including SEBI/SAT order. We find this was right approach adopted by the CCI in the present case especially keeping in view the ratio of Bharti Airtel (Supra) provided by the Hon’ble Supreme Court of India.

146. Upon consideration of the record, we hold that the CCI was justified in passing the impugned order and in declining to direct an inquiry against the NSE under Section 19(1) of the Competition Act, 2002.

147. The CCI rightly examined the issues relating to co-location facilities and correctly concluded that no case was made out by the Appellant regarding denial of market access or grant of preferential access to select trading members. The allegations concerning the absence of a load balancer and randomiser were also found to be not established.

148. We hold that the CCI is not required to order an investigation by the Director General unless a prima facie case is made out. In the present case, the

CCI formed its opinion after hearing the parties and considering the SEBI order and various expert reports, including those of SEBI TAC, Deloitte, Ernst & Young, and ISB. We do not find any error in the Impugned Order or approach of the CCI.

149. In view of the above, we find that the impugned order warrants no interference. The appeal is devoid of merit and is dismissed.

150. No order as to costs. All pending interlocutory applications, if any, stand disposed of.

[Justice Mohammad Faiz Alam Khan]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

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