

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Competition Appeal (AT) No. 13 of 2017

IN THE MATTER OF:

Shri Vinod Kumar Gupta
Chartered Accountant
KKSharma Law Offices,
4th Floor, Sishan House,
119, Shahpurjat,
New Delhi 110 049

.. Appellant

Versus

1. Competition Commission of India
Through Secretary, Ms. Smita Jhingran, IRS
Hindustan Times House,
18-20 Kasturba Gandhi Marg,
New Delhi - 110001

.. Respondent No. 1

2. WhatsApp LLC
(formerly known as WhatsApp INC.)
650 Castro Street Suit
120-219 Mountain View,
California, 94041 USA.

.. Respondent No. 2

Present:

For Appellant:

For Respondents:

Mr. Prakhar Gupta, Advocate

Ms. Shama Nargis (Deputy Director Law, CCI, R1).

Mr. Kunal Sharma, Advocate for R-1.

Mr. Amit Sibal, Sr. Advocate with Mr. Pavit Singh Katoch, Mr. Shashank Mishra, Ms. Karishma Sundara, Ms. Akshi Rastogi, Mr. Apurv Jain, Ms. Nitika Dwivedi, Mr. Yaman Verma and Mr. Tejas Karia, Advocates for R-2.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appeal has been filed by the Appellant under Section 53B R/w Section 26(2) of the Competition Act, 2002 (for short 'Act') against the impugned order dated 01.06.2017 passed by the Competition Commission of India (for short 'CCI') in Case No. 99 of 2016.
2. The Appellant has prayed the following reliefs:
 - i. To Set aside the impugned order dated 01.06.2017, passed by the CCI in Case No. 99 of 2016;
 - ii. Direct the 'Director General to cause an investigation to be made into the matter; and
 - iii. Pass any other order(s) as this Tribunal may deem fit and proper in the facts and circumstances of the case.
3. The Appellant – Shri Vinod Kumar Gupta, Chartered Accountant, representing a society, named, Fight for Transparency Society. As per the submission of the learned counsel for the Appellant that the main objective of society is to bring the voice of people at large before the appropriate judicial forums for protection of their rights and secure social justice etc.
4. The brief facts of the case as stated by the Appellant is as follows:

- a. The Appellant has alleged the anti-competitive conduct of WhatsApp for which he has submitted certain information, particularly, relating to the privacy policy of WhatsApp.
- b. It is also stated that WhatsApp has made many changes to its privacy policy for the first time from the time Facebook acquired it.
- c. All the changes in the privacy policy resulted into the social network join to keep enjoying the services of WhatsApp. Such changes in privacy policy is an abuse of dominant position enjoyed by the group in the matter and such changes are thus in violation of Section 4(2) of the Act. As a result, it has laid to a mechanism of cross border economic terrorism and will have an adverse effect on the competition within India.
- d. Inter alia, he has also stated that the WhatsApp presence is over one billion users globally owing to its presence worldwide and it is a proprietary, cross platform encrypted instant messaging clients from Smart Phones. It uses the internet to send text messages, documents, images, video, user locations & Audio messages to other users using standard cellular mobile numbers. The relevant messages App are available free for various smart phones.

- e. As per the Appellant, WhatsApp has dominance established in the Indian market and as stated that it is installed on 95% of Indian Android Devices. To add further, it has got clear market domination in 109 countries and grabbing 55.6% of the world. He has also stated that WhatsApp holds substantial market share in India with more than 70 Million Users.
- f. It has also stated that new privacy policy of commenced on 25.08.2016 after take over by the Facebook of WhatsApp and Facebook becoming the WhatsApp parent company. As a result, the WhatsApp has forced to share their user accounts details and other information available on WhatsApp to the Facebook. His allegation is that now Facebook & WhatsApp can connect user accounts on both the places and a fear has been pumped in by the Appellant that Facebook might start having insight in consumer uses of the App and target ads accordingly. The only way for the people in Indian who do not want to use WhatsApp to opt out of the services within 30 days leading thereby the customer/the people of India to accept the new terms and conditions without having any other remedy and, therefore, the consent is not real as the consent is under pressure. He has also alleged that the Facebook manipulates the public opinion to achieve consent.

g. They have stated that Predatory Pricing is conspiracy speculative in nature, where conspirators sustain substantial loss in present to reap uncertain gains in future. It was held in Brooke Group Ltd Vs. Brown & Williamson Tobacco Corpn, it was held that Predatory price conduct consists in a business rival pricing its product in an unfair manner with an object to eliminate or retard competition and thereby gaining and exercising control over prices in the relevant market. The Plaintiff must prove:

- That the price complained of is below an appropriate measure of its rival's costs.
- That the competitor had reasonable prospects of recouping its investment in below-cost price.

h. WhatsApp dropped of subscription fee it previously charged users and become fully free in Jan.2016. Previously it used to charge 0.99\$ per annum subscription fees after one year of free trial, and IOS users were charged one off charge for lifetime. The same removal of charges was confirmed by the official blog of WhatsApp.

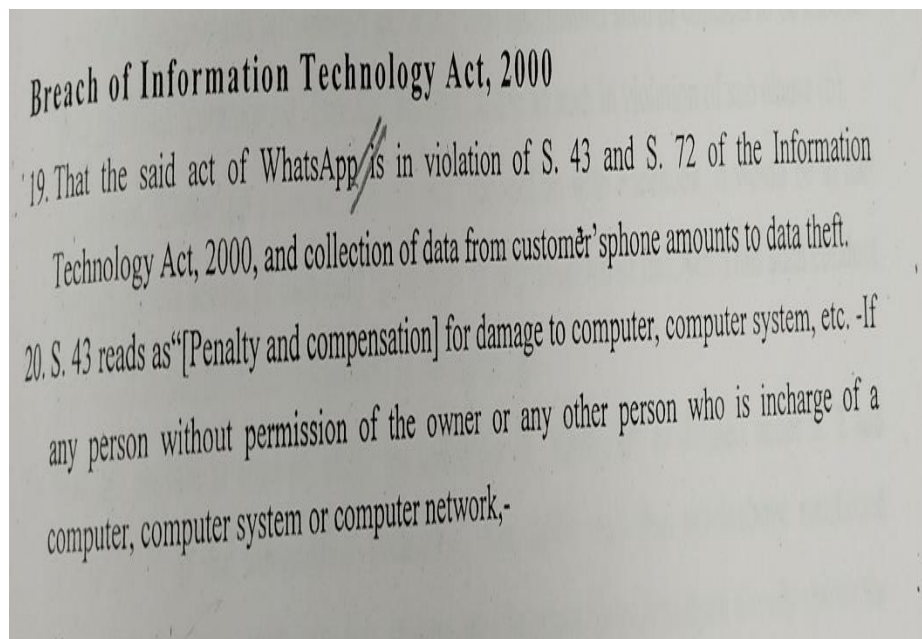
i. The subscription amount was the source of income for WhatsApp which was to the tune of \$10.8 million before Facebook acquisition, with that gone their remained no source

of income for the group, and had to depend on Facebook i.e. parent company (with huge financial as well as other resources) to maintain its business. The number of users of WhatsApp also increased from 450 Million to over 1 billion people. Thus, it is asserted that the WhatsApp while removing the fees of subscription, actually provided the service below the cost, largely sourcing the remaining funds from parent company that is Facebook and the same helped it increase the customer base substantially.

- j. The WhatsApp group has been able to enlarge the user base substantially with removal of subscription fees after acquisition by Facebook, now using the data base of user for advertising can easily fetch the group huge chunk of fortune as has been predicted by Barron's than 20 percent climb in Facebook Inc share is expected owing its increase to advertisement revenue among its platforms. Thus, recoupment of profits after suffering loss for small period of time is evident from the acts and methodology employed by the group, thus the said practice can be said to be Predatory Pricing. Thus, the new privacy policy as employed by WhatsApp is 'Contrary to Public Interest' as well as "predatory Pricing" methods are also employed this could be seen as

‘Abuse of Dominant Position’ by the group. And such abuses are contrary to Section 4(2) of the Act.

- k. The Appellant has also stated that its new WhatsApp Policy has ‘Breach of Information Technology Act, 2002 has depicted below (appearing at page no. 81 to 86 of the Appeal Paper Book):



(b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

82

(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

Explanation- for the purposes of this section-

(ii) "computer data base" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network

21. That new privacy policy of WhatsApp would allow WhatsApp to copy/ extract/download mobile's database and information including vital information such as contacts to be used for their personal (commercial) benefits and ends, and is as such in violation of sub clause (b).
22. And since WhatsApp plans on sharing that information with Facebook, it would be in fact facilitating the access of data held by mobile, in contravention of this Act. Thus such conduct also leads to therise of contravention of subclause (g).
23. That the mobile is covered under the definition of "computer" as defined under S. 2 sub clause (i) ¹³ of the Information Technology Act, 2000. And thus hereinabove mentioned clauses shall apply and the conduct of party may be made liable. And since already shown the

¹³"computer" means any electronic magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network;

consent so obtained does not have any value, this act seems to be in contradiction to S. 43 of IT Act.

24. S. 72 A of Information Technology Act 2000:—"Punishment for Disclosure of information in breach of lawful contract:-Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person shall be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both."

25. For this purpose it might be necessary to delve into original terms of contract which were acceded by the customers while downloading and choosing to use the service. It declares that "Your data isn't even in the picture".¹⁴ Even when WhatsApp joined the Facebook group it was promised to the users that, such acquisition would not affect the privacy policy of WhatsApp and it would not indulge in sharing or selling of "personally identifiable information."

26. Here at this juncture it would also be correct to distinguish between "opt out" policy as proposed by WhatsApp as against "opt in" policy which must have been used to obtain the consent for new terms and conditions. Thus, instead of seeking consent of the user before sharing the data, the mechanism has been designed in such a manner so as to require user to take active steps to ensure that the privacy is not breached by sharing of such data.

27. Thus, it was the lawful and binding contract to which people initially agreed to while using its services, but changing of privacy policy would practically allow WhatsApp to use information collected by in pursuance of existing contract, and share it with its parent company that is Facebook to use it to its commercial advantage. This would result in wrongful gain in favor of Facebook, since the information so revealed would be of private in nature and breaching Right to Privacy of people, and making commercial profit out of it cannot be justified in any manner.

¹⁴Why we don't sell ads, WhatsApp Blog, 18 June 2012. <https://blog.whatsapp.com/245/Why-we-dont-sell-ads> marked as ANNEXURE-4 collectively.

28. Thus, by changing privacy policy WhatsApp would be sharing private information with Facebook, based on a CONSENT which NEVER EXISTED, Thus is in violation of S. 72 A of IT ACT 2000.

84

Breaching Right to Privacy

29. That Right to Privacy was upheld as a part of Right to Life under Art. 21 of The Constitution of India deriving the concept from European Convention on Human Rights, by Hon'ble Supreme Court in *R. Rajagopal v. State of Tamil Nadu*.¹⁵, in which it was held that, The right to privacy as an independent and distinctive concept originated in the field of tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognized.. This right has two aspects which are but two faces of same coin;

- (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and
- (2) the constitutional reorganization given to the right to privacy against unlawful government al invasion.

30. The Right to Privacy was further substantiated in *People's Union of Civil Liberties v. Union of India*¹⁶ which said that Right to Privacy as part of Art 21, was obligation from *Universal Declaration of Human Rights*¹⁷ and *International Covenant on Civil & Political Right*¹⁸. And on different occasion Hon'ble Supreme Court held that Right to Privacy was separate enforceable statutory right under S. 2 (d) of Protection of Human Rights Act, 1993.¹⁹

31. The Hon'ble Delhi High Court recognized the need to protect privacy in technological sphere, and invoked the Art 8 of European convention read Art 21 of Indian Constitution.²⁰ in this case the laptop containing private information and confidential commercial information was stolen by the defendant, and was held to be breach of privacy.

32. Reading from hereinabove mentioned judgments by Hon'ble Supreme Court it is clear that Right to Privacy has been one of the celebrated rights in India and the action can be taken in

¹⁵ *R Rajagopal v. State of Tamil Nadu aka Auto Shankar Case*, (1994) 6 SC6 632.

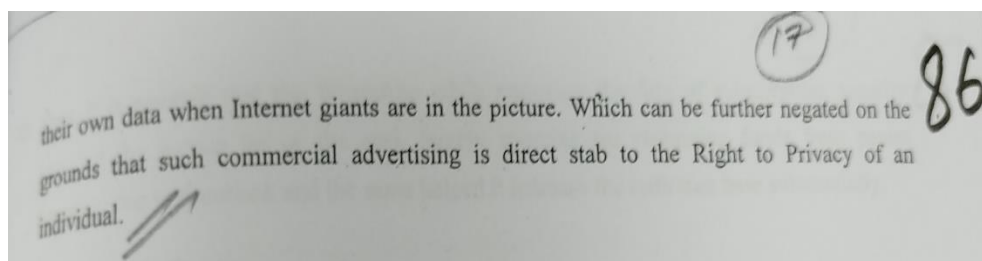
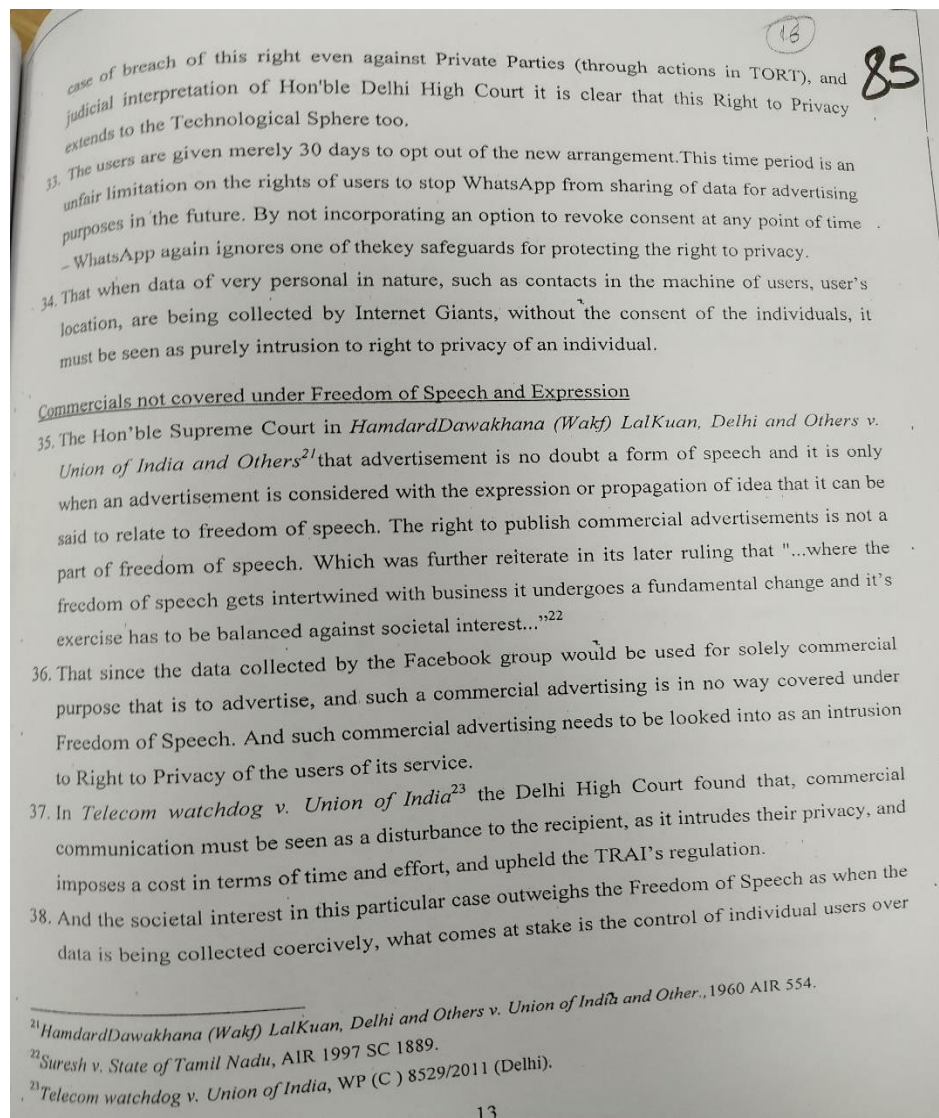
¹⁶ *People's Union of Civil Liberties v. Union of India*, (1997) 1 SCC 301.

¹⁷ Article 12, Universal Declaration of Human Rights.

¹⁸ Article 17, International Covenant of Civil and Political Rights.

¹⁹ *Phoolan Devi v. Shekhar Kapur* (1995) 57 DLT 154

²⁰ *Shankara Shekhar Mishra v. Ajay Gupta*, (2011) AD (Del) 139



1. General Power to change terms and conditions in control of WhatsApp:

Having kept disproportionately high discretion in changing Terms and Conditions / Terms of Service (ToS), these have been changed substantially over a period of time including the withdrawal of promise of data privacy given earlier by WhatsApp. On the same pattern, a large number of terms and conditions have been updated without informing the users. End to End encryption, being a claim, can also be withdrawn at any later stage; they have already taken license for the same (reference page no. 174 of the Appeal paper Book).

Terms of Service changed constantly without any actual user consent and not requiring express notification: for user to keep track of changing TOS, including privacy policy, the only way is to regularly check updates as continuous usage is being taken as a consent. (Ref. page no. 174 of the Appeal) Moreover, implied consent is being deemed on behalf of users, while if user wants to change any T&C of service, they are required to take express consent from the R2.

Unfair imposition of opt in:

- Given only 30 days either to accept terms and conditions or delete account, with Pre selection of opt in (page 113 of Reply to Appeal by WhatsApp)

- Proper mechanism for notice not followed-

In Application procedure followed to obtain consent.

Unless accepted that User won't be able to use services.

Not given in regional/local languages and newspaper

Unfair Ability to terminate services from Users, without

giving any reason: Despite the largest users of nearly 20 cores having been hooked to the service, R2 reserves the right to terminate services at any point of time without any intimation. Creating a possibility wherein the entire country can be brought to a standstill (ref. page no. 174 of the Appeal).

Jurisdiction and Governing Law of California: Despite having the largest user base in any country of 20 crores in India, the jurisdiction for disputes is only California. Practically, not feasible for any user from India to approach for any legal grievance redressal. Though beyond the reach of most of the users in India but even if, with great determination, a user is able to get a favourable order, the maximum liability which R2 has limited itself is USD 100 only. (ref. page 173 of the Appeal, Limitation of Liability)

No policy laid down for minimum standard for protection

of data: Contrary to the expressed commitment for reasonable commercial protection of the data collected given in 2012 TOS including privacy policy, this commitment withdrawn from 2016 TOS including privacy policy. (Ref. page No. 169 (Old policy)/ Ref. page no. 173 (new policy) of the Appeal).

Data is owned by the user: User is the owner of information with only license given to R2 to use and exploit, throughout the world. WhatsApp transfers the liability to the user while continually reaping commercial benefits from the data taken by R2. User is not even aware of this exploitation after the license is taken by R2 from the user. No further permission is required. On the contrary, R2 even takes license to use data of those, in the address book of user, who are not even using R2.

Information Collected from Users by the WhatsApp Inc.

Privacy Policy: (information we collect, page 177 / Appeal)

- Information users provided: User Account information such as mobile number, profile name, profile picture and status message. Messages and user's connection, customer support.

- Automatically collected information: usage and Log information, transactional information device and connection information. Cookies, Status information.
- Third party information: Information other provided about you, third party providers third party services.

Only the specific information which is described is in the knowledge of the users, while the other data so generated is automatically collected by the R2. Thus, users are not aware of the data over which they have ownership; further no active efforts have been made by the R2 to inform the user. Today a user has no option of knowing exactly what all data have been licensed to WhatsApp. Even while being the owner of data, the user is having no control or knowledge as regards to how his/her data is being used (ref. page no. 177 of the Appeal)

No duty upon WhatsApp Inc. to even inform the users in case of data breach:

The whole data, whether known and unknown to a user, is in possession of R2. If this data is breached

in the hands of R2, the user may not even be aware of this breach. On the one hand, the user is supposed to inform the R2 of any possible data breach, while R2 disowns the duty to inform the user/owner of the data in case of data breach by R2. In other words, a duty to keep the WhatsApp account safe is imposed on the user, while the whole data and its control lie with R2 (Ref. page 172 of the Appeal)

They have empowered themselves to transfer the information to anyone: having retained the power to sell data to anyone including India's enemy country or terrorist's groups or to business rivals, R2 does not take the duty even to inform the owner to information i.e. the user, as to whom the information has been transferred. Normally, being the owner of data, the user must be aware of how the license given by R2 is being utilized or the data being sub-licensed. Implications of this generic power are wide and many, as large number of Top Military personnel, bureaucrats, politicians and policy makers use the services of WhatsApp on

regular basis, it has acquired license to sell their data, including, but not limited to, location, people they communicate with (which can be quite sensitive), to even Pakistan and China (as they can sell it to China as well). This can be dangerous to the nation at large. Power to influence election of a nation with Facebook Inc (of which R2 is a part has been seen in Cambridge Analytica case. Further when fake news was spread using these platforms. (Ref. page no. 178 of the Appeal.

Proving **Terms and Condition in English language alone:** Even after having the largest user base of more than 20 crore in India, it has not made efforts to provide translated version in vernacular language. Whatever translated version exists has only been translated partially. The whole document has not been translated.

While disclaimer clause: This clause, practically, absolves WhatsApp from any liabilities arising from the acts enumerated hereinabove.

5. The Deputy Director law CCI/Respondent No.1 has stated that the impugned order dated 01.06.2017 of the CCI is being

reiterated to supplement its stands and augmented it by stating that the order of CCI is quite elaborated and brings out the reasons and logic for arriving at the findings. Accordingly, it appears that the CCI has covered in its order under Section 26(2) of the Act which commences from formulating the issue resulting from the input provided by 'Informant' who is primarily aggrieved by the alleged abusive conduct of the WhatsApp/OP in compelling the users through changed in its terms of service and privacy policy, to share their accounts details and other information with Facebook etc. covering the provisions of Section 4 of the Act. To bring out a clarity of the impugned order, it is prudent to extract para 10 to 20 the said order passed by the CCI on 01.06.2017.

10. In order to arrive at a decision in this matter, it is to be determined is whether the OP has infringed the provisions of Section 4 of the Act. However, determination of the said issue requires delineation of relevant market, assessment of the position of dominance of the OP in the relevant market and examination of the alleged abusive conduct of the OP in terms of Section 4 of the Act in case it is found to be in a dominant position in the relevant market.

11. The Commission notes that as per Section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the 'relevant product market' or the 'relevant geographic market' or with reference to both the markets. In regard to the relevant product market, the Commission notes that 'WhatsApp', an instant communication app for smartphones using standard cellular mobile numbers, is a platform for communication through texting, group chats and voice and video calls. It is noted that instant communication apps cannot be compared with the traditional electronic communication services such as text messaging, voice calls etc. as provided by various telecommunication operators. It is so because unlike traditional modes of communication, instant messaging using communication apps are internet based and provide additional functionalities to the users. For example, users of communication apps can see when their contacts are online, when they are typing or when they last accessed the application. Further, instant communication apps can be used through smartphones only whereas traditional electronic communication services can be used through any

mobile phone. There are also differences in the pricing conditions in both the above said modes of communication. 'WhatsApp' is a free to download communication application which does not charge any fee from its users for providing the services and just uses internet connection on the device to send instant messages, connect voice calls etc. Further, text messaging through traditional modes can be done between people who do not use the mobile service of the same service provider, whereas instant messaging services typically require you and your contacts to be on the same communication application platform. Thus, the Commission is of the view that the relevant product market in this case may be considered as 'the market for instant messaging services using consumer communication apps through smartphones'.

12. With regard to the relevant geographic market, the Commission observes that the functionality provided by consumer communication apps through smartphones is inherently cross-border. As consumers are free to install any app they want, the geographic scope for either demand or supply of consumer communication apps is not limited to any particular area where the consumers acquire

connectivity to his/ her device. Moreover, the developers distribute similar products to all of their customers regardless of their geographic location. Further, functionality of consumer communication apps through smartphones does not differ depending on the region or country concerned, either in terms of price, functionalities, platforms or operating system. This is consistent with the fact that all consumers with access to internet are in principle free to download and install any app they want, irrespective of their geographic location anywhere in the world. However, competitive conditions, regulatory architecture and players may vary in different countries/ regions. Since in the present matter, the allegations of the Informant pertain to the alleged anti-competitive conduct of 'Whatsapp' within the geographic boundary of India and the conditions of competition in the market for instant messaging services using consumer communication apps through smartphones is homogeneous throughout India, the Commission is of the view that the geographic area of 'India' may be considered as the relevant geographic market in the instant case.

13. Considering the relevant product market and the relevant geographic market delineated above, the Commission is of the view that relevant market in this case may be considered as 'the market for instant messaging services using consumer communication apps through smartphones in India'.

14. On the issue of dominance of the OP in the relevant market as defined supra, the Commission notes that in India a number of other players such as Apple with iMessage, BlackBerry with BBM, Samsung with Chat ON, Google with Google Hangouts and Microsoft with Skype are providing consumer communication apps and are also active in the provisions of smartphone hardware and operating systems. Besides, many other consumer communication apps providers such as Hike, Viber, WeChat and Snapchat are also active in market. As per the information available in the public domain, globally 'WhatsApp' is having a billion monthly active users and within India, it is having 160 million monthly active users. According to a study of 'Jana and mCent', 97% of the smartphone users in India use a communication app daily and the most popular is 'WhatsApp', which is installed on

96% of devices and has more daily active users than any other communication app in India. As per the said report, 'WhatsApp' is installed in 2.3 times more devices than home-grown messaging app Hike. According to a study conducted by 'TNS/TNC Connected Life Study 2015', 56% of the internet users in India use 'WhatsApp' and 51% use 'Facebook' every day. Further, amongst India's internet users, 'WhatsApp' tops the list of instant messaging apps. Further, citing a study conducted by Global Web Index, the Informant has submitted that 64% of mobile users in India use 'WhatsApp' which is the largest as compared to any other mobile messaging app usage. Based on the the above, the Commission is of the opinion that the OP is in a dominant position in the relevant market as defined under para 13 above.

15. With regard to the abusive conduct of the OP in the relevant market, it is noted that the Informant has alleged that the OP is abusing its dominant position in the relevant market by introducing privacy policy which compels its users to share their account details and other information with 'Facebook'. In this regard, the Commission observes that the data sharing terms of the privacy policy of the OP

as updated on 25th August, 2016 relate to sharing of users' 'WhatsApp' account information with 'Facebook' to improve the online advertisement and products experiences available on user's 'Facebook' page. It is noted that the OP provides the option to its users to 'opt out' of sharing user account information with 'Facebook' within 30 days of agreeing to the updated terms of service and privacy policy. Moreover, the OP has submitted that 'Facebook family of companies' will use such information for the purpose of improving infrastructure and delivery systems, understanding how their services are used, securing systems, and fighting spam, abuse or infringement activities. The Commission also finds force in the submission of the OP regarding its users safeguards that all types of 'WhatsApp' messages (including chats, group chats, images, videos, voice messages and files) and 'WhatsApp' calls are protected by end-to-end encryption so that third parties and 'WhatsApp' cannot read them and also the message can only be decrypted by the recipient. Further, as stated in the key updates summary of the OP, nothing a user shares on 'WhatsApp', including his/ her messages, photos, and account information, will be shared

onto 'Facebook' or any other apps of 'Facebook family of companies' for any third party to see, and nothing a user posts on those apps will be shared by 'WhatsApp' for any third party to see.

16. The Informant has also alleged that the conduct of the OP is in breach of the IT Act, 2000 and the right to privacy. In this regard, the Hon'ble High Court of Delhi in W.P. (C) 7663/2016 in the matter of Karmanya Singh Sareen and Others Vs. Union of India and Others; wherein the Petitioners, who were the users of WhatsApp, had made the prayer that sharing user data of subscribers of 'WhatsApp' with any entity including 'Facebook' should be prohibited and protection and safety of privacy of details/ data of every kind of user of 'WhatsApp' should be ensured; vide its order dated 23rd September, 2016 has observed that:

"However, the contention of the petitioners is that the proposed change in the privacy policy of WhatsApp amounts to infringement of the Right to Privacy guaranteed under Article 21 of the Constitution of India. Even this cannot be a valid ground to grant the reliefs as prayed for

since the legal position regarding the existence of the fundamental right to privacy is yet to be authoritatively decided {Vide: K. S. Puttaswamy (Retired) and Anr. v. Union of India & Ors., (2015) 8 SCC 735}. Having taken note of the inconsistency in the decisions on the issue as to whether there is any "right to privacy"

guaranteed under our Constitution, a three Judge Bench in K.S. Puttaswamy (supra) referred the matter to a larger Bench and the same is still pending.

18. Be that as it may, since the terms of service of "WhatsApp" are not traceable to any statute or statutory provisions, it appears to us that the issue sought to be espoused in the present petition is not amenable to the writ jurisdiction under Article 226 of the Constitution of India.

19. However, we have taken note of the fact that under the Privacy Policy of "WhatsApp", the users are given an option to delete their "WhatsApp" account at any time, in which event, the information of the users would be deleted from the servers of "WhatsApp". We are therefore, of the view that it is always open to the existing users of "WhatsApp" who do not want their information to be shared with "Facebook" to opt for deletion of their account....."

17. In the said order the Hon'ble High Court of Delhi had also ruled that if the users opt for completely deleting 'WhatsApp' account before September 25, 2016, the information/ data/ details of such users should be deleted completely from 'WhatsApp' servers and the same shall not be shared with 'Facebook' or any one of its group companies. However, against the aforesaid order of the Hon'ble High Court of Delhi, an appeal was preferred before the Hon'ble Supreme Court and the matter is still pending before the Hon'ble Supreme Court. In the above backdrop, the Commission is of the view that the allegations of breach of the IT Act, 2000 do not fall within the purview of examination under the provisions of the Act.

18. Further, the Informant has alleged that by not charging any subscription fee since January, 2016 from its users, the OP is indulging in predatory pricing. In this regard, the Commission observes that there are several other applications available in the relevant market which do not charge any fee from the users for availing their services for instance, Hike, Messenger and Viber are also available for free. It appears to be the standard practice in the industry/ business that all consumer communication apps are not

charging any fee from the users. The Commission observes that 'WhatsApp' was previously charging subscription fee from its users which was subsequently scrapped. This may be due to the presence of many other service providers who are offering the services for free of cost. Furthermore, from the submissions of the OP, the Commission notes that the revenue model of the OP is like other players in the industry/ business and it is still evaluating the various modes that can be used to earn revenues from its services by providing value to its customers.

19. The Commission also observes that there are no significant costs preventing the users to switch from one consumer communication apps to another. It may be due to the following reasons: (i) all consumer communication apps are offered for free of cost or at a very low price (mostly free), (ii) all consumer communication apps are easily downloadable on smartphones and can co-exist on the same handset (also called 'multi homing') without taking much capacity along with other apps, (iii) once consumer communication apps are installed on a device, users can pass on from one app to its competitor apps in no-time,

(iv) consumer communication apps are normally characterised by simple user interfaces so that costs of switching to a new app are minimal for consumers, and (v) information about new apps is easily accessible given the ever increasing number of reviews of consumer communication apps on apps store like google play store etc. Furthermore, the expansion of Hike Messenger to nearly 100 million user base within three years of launching their services into the aforesaid market reflects that in this market, there are no significant barriers to entry and consumers appear to be price sensitive. Based on the above, the Commission is of the view that even though 'WhatsApp' appears to be dominant in the relevant market, the allegations of predatory pricing have no substance and the OP has not contravened any of the provisions of Section 4 of the Act.

20. In the light of the above analysis, the Commission finds that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OP in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.”

6. The Respondent No.2 /Appellant in I.A No. 893 of 2022 brought to the notice of this Tribunal on 29th April, 2022 that the 2nd Respondent existing name as appearing in the appeal paper book so filed originally vide diary no. 2193 dated 31.07.2017 as “WhatsApp INC” has been changed into “WhatsApp LLC” w.e.f. 01.01.2021.
7. It is pertinent to mention that this Tribunal vide its order dated 29th April, 2022 has allowed IA No. No. 893 of 2022 in the interest of justice on the ground that there is no objection from the other side as well as on the side of the Appellant even though no counter was filed in the said IA.
8. It was submitted by the Ld. Sr. Counsel for the R2, the Appeal is erroneous and misconceived and the Appellant has failed to produce/ present any evidence before the R1- CCI to establish even prima facie that WhatsApp violated the Act. The various issues raised/ elaborate explanations/Submissions made by the Ld. Sr. counsel including the Written submission filed by the R2 are enumerated hereunder:
 - a. The R2/WhatsApp LLC has no access to user chat contents as technically messages are end to end encrypted.
 - b. Since end-to-end encryption means no other than the sender and recipients, not even WhatsApp can read or

otherwise access message/ all content. Technically encryption offers a secrecy and it can be read only by those to whom it is addressed and this is a reason that it is widely prevalent and being used by the Banks/e-commerce sites and other devices manufacturing etc. What it was stated by the Ld. Sr. Counsel that 2016 update allowed WhatsApp to collect and share limited information with Meta and other 3rd parties for specific purposes. He went on to submit that WhatsApp only collects limited information from its users as per its 2016 privacy policy and a user is required to provide their mobile number and users are only required to enter at least some characters in the name field and they are not required to provide a real name. Since WhatsApp is not verifying user name and so is the case with sharing of other information including profile photo is optional.

- c. It was submitted by the Ld. Sr. Counsel that WhatsApp with Meta under the 2016 update, but the data sharing for Meta's own use was to achieve three specific purposes (as also recognized by R1): (i) business analytics (for example, assessing how many WhatsApp users were also users of Meta); (ii) administrative, operational, and security

purpose (such as preventing spam, abuse, infringement, understanding services use); and (iii) improving Meta ads and services (for example, giving Meta users better friend suggestions and more relevant advertisement).

- d. WhatsApp cannot and would not access or share user's chats with third parties. It is also submitted that WhatsApp completed the implementation of end-to-end encryption in 2016 for all messages on WhatsApp. All types of WhatsApp messages (including chats, group chats, images, videos, voice messages and files) are protected by end-to-end encryption. WhatsApp's end to end encryption system ensures that messages exchanged between WhatsApp users cannot be decrypted and viewed by anyone other than the sender and recipient of the message through their WhatsApp applications. Since WhatsApp does not have access to the messages (including videos, photos etc.) shared between its users, the question of sharing such messages with third parties does not arise. In other words, neither WhatsApp nor any third party, including Facebook can read messages exchanged on WhatsApp. WhatsApp cannot and does not share the content of communications with anybody. Without prejudice to the fact that the R2 is

not dominant, it is submitted that no document of R2 can be said to be abusive, or in any manner in contravention of Section 4 of the Act. It is worth noting that, whilst the Hon'ble Delhi High Court has upheld the validity of the Update, Respondent No.1 has also rejected the allegations of the Update being unfair. No Indian court or authority has found any element of unfairness or illegality in the update. In the case of DLF Limited Vs. CCI (Appeal No. 20 of 2011 dated 19th may, 2014, which involved an alleged violation of Section 4(2)(a) of the Act. the COMPAT held that unless there is an 'imposition' of unfair or discriminatory condition there will be no breach of Section 4(2)(a)(i) of the Act. Further where acts have been voluntarily conducted (such as in the present case), there can be no 'imposition' as 'imposition' has an element of compulsion. Therefore, before arriving at a finding of an abuse under Section 4(2)(a) of the Act, the Appellant is required to establish that (a) the Update was 'imposed' on users, and (b) the Update was 'unfair' and the Appellant has failed to meet either of these requirements. It is submitted that in any event, there is no basis for concluding that either conditions are

satisfied and thus there is no violation of Section 4(2)(a) of the Act.

- e. At the outset, it is important to note that the 2012 Privacy Policy of R2 specifically allowed it to (i) amend its privacy policy , (ii) share user information with a third party service provider “to the extent that is reasonably necessary to perform, improve or maintain the WhatsApp Service” and “to protect the security or integrity of the WhatsApp site or our servers, and to protect the rights property or personal safety of WhatsApp, our users or others”, and (iii) in case of an acquisition or merger of R2 with a third party, transfer or assign the information collected from users to such third party. These are standard provisions, which reserve the commercial rights of any service provider. Though the 2012 Privacy Policy allowed R2 to update its privacy policy without seeking further user consent, R2 went above and beyond what was required under the Privacy Policy. R2 ensured that all users received clear and prominent notice of the Update, including the revised Privacy Policy, and an opportunity to consent to the Update, if they so choose, by affirmatively accepting the Update. Existing users were given thirty days to decide

whether to consent voluntarily to the Update by clicking "Agree", and new users similarly had to click "Agree & Continue." In addition, Respondent No. 2 implemented a control that gave existing users the further choice not to have their account information used by Facebook, Inc. to improve their Facebook advertisements and product experiences. It is, therefore, humbly submitted that since the Update cannot be said to have been "*imposed*" by Respondent No. 2 on its users, there can be no violation of Section 4(2)(a) of the Competition Act, and this allegation should be dismissed on this basis alone.

- f. That Section 4 of the Competition Act deals with only ex post violations of the Competition Act and not with theoretical prospective violations that have no basis in fact. Therefore, in the absence of evidence of existing effects or likely adverse effects on competition, there can be no finding of an imposition of an unfair term or condition. Further, there is no allegation that the Update excluded or foreclosed any other consumer communications application, or that there was any harm to consumers / users of consumer communications applications, or, for that matter, any harm to users of WhatsApp, or otherwise

restricted competition in any relevant market in India. Without even these most basic elements of an alleged violation of the Competition Act, the present Appeal should not be entertained. Without prejudice to the submissions that the users had a clear choice to opt out and switch to alternate consumer communications applications, it is submitted that the mere lack of an option to opt out of sharing any information whatsoever and continue to use WhatsApp *ipso facto* cannot be unfair or abusive. The supposed lack of choice must lead to a competitive harm in order to be cognizable under the Competition Act - i.e. there must be foreclosure of competition shown; there also needs to be a demonstration of such a harm. All end-user license agreements (*EULA*) in the software markets are standard 'take it or leave it' agreements, without any option to reserve any one portion. If the mere lack of an option to reject or reserve any portion of the terms of use / *EULA* is considered to be abusive, as is alleged by the Appellant, then any and all such terms / *EULAs* of an allegedly dominant enterprise would be in contravention of Section 4 of the Competition Act. This would severely infringe an

enterprise's rights to enter into contractual relationships under terms it considers reasonable. Therefore, the allegation of the Appellant that the Update was unfair is baseless and against competition law principles, and ought to be dismissed. The Appellant also alleges that the "assurance" given earlier through official blogs by Respondent No. 2 that the collected user information would not be used for commercial purposes was "*unfairly*" withdrawn by the update. The Appellant has completely misconstrued the postings by Respondent No. 2. This post is irrelevant in the present case, as the proposed business model of charging users a fee was never implemented in India except for a short duration to iPhone users. In any event, the post merely sought to explain Respondent No. 2's then proposed revenue generation model of charging a fee rather than generating revenue through advertisements / ads. It is submitted that the 2012 Privacy Policy of Respondent No. 2 and Update are wholly consistent with standard industry practice with respect to the collection and use of information to provide and improve the services. There are myriad examples across online markets, such as the

Vodafone/Kabel Deutschland merger, Google's acquisition of Nest, Viber's acquisition by Rakuten, and Tumblr's acquisition by Yahoo, where intellectual property and data, including personal information, is shared by a company with its acquirer in order to help the combined company build upon the assets and capabilities of the acquired company. A rule that precluded such integration and data sharing efforts would damage investment and discourage acquisitions in India's technology industry, as any acquirer would face the prospect that changes to the target's data sharing practice (post acquisition / merger) could be viewed as anti-competitive conduct under the provisions of the Competition Act.').

- g. The R2 has submitted that several industries such as technology, e-commerce, media, energy, telecommunications, insurance, banking and transport rely on the collection and use of data to improve the experience for its users. Similarly, sharing of limited data by Respondent No. 2 with Facebook, Inc. was intended to (as recognised by Respondent No. 1), among other things, improve user experience, for example, by more effectively fighting spam and abuse, and by giving

Facebook users an improved products and ads experience. Further, the Update clearly informed users of the information and the purposes for which user information would be shared with Facebook, Inc. if they consented to the Update. The privacy policies of other free consumer communications applications such as WeChat, Viber, Hike, Line, and Snapchat contain almost identical language as Respondent No. 2's with respect to the collection and use of data to improve the user experience, including by providing targeted advertising. It is further important to note that information shared with Facebook, Inc. is not shared onto Facebook or any of the other family of applications for others to see. In any event, Respondent No. 2 provided its existing users with a *control* that went above and beyond the law and industry standard, enabling those users to decide whether or not Facebook, Inc. may use their account information to improve their Facebook advertisements and products experience. Further, several governments owned companies, including the State Bank of India, and the Indian Railway Catering and Tourism Corporation Limited, also collect and use customer information in similar ways

see <https://www.onlinesbi.com/sbjava/PrivacyStatement.html>: <https://www.services.irctc.co.in/beta/htmls/termsrc.html>. As is evident from the above, Respondent No. 2 submits that collection of data is a common practice among online market participants, and it is important for improving the customer experience and quality of services. The mere collection and use of data by a business cannot be held to be unfair. Users benefit from the improved quality of services and products that result from the use of this data, and those products and services are often provided at no cost for the user. The Appellant has not provided any evidence or reasoning as to how such collection and usage of user information has damaged him or any other user of WhatsApp. In fact, the sharing of information has in no way diminished, but to the contrary has improved, the quality of services offered. Further, if the Appellant's theory were to be accepted, then when any of the technology companies named above or any other company operating in India changes its Privacy Policy to better serve its users, such a change would constitute an unfair act by resulting in a change to the user experience. Such a result would, of course, be absurd, and would only

serve to harm Indian users of these services by die incentivizing innovation and change. This further shows why the Appellant's allegation that the change to the Privacy Policy was unfair should be rejected.

- h. WhatsApp is not dominant in any relevant market, and consequently, cannot be said to have abused its dominant position; Respondent No. 2 humbly submits that the definition of relevant market can be left open in the instant case as there is no abuse that can be established; this has been unequivocally held by Respondent No. 1 in the detailed Impugned Order. In fact, in the absence of any abuse, there is no requirement to assess whether Respondent No. 2 enjoys a dominant position. Accordingly, Respondent No. 2 reserves its right to make detailed submissions on relevant market and assessment of dominant position. Without prejudice to the above, assuming without accepting the relevant market to be as defined by Respondent No. 1, i.e., *"the market for instant messaging services using consumer communications apps through smartphones in India"* (Consumer Communications Applications), it is humbly submitted that Respondent No. 2 cannot be said to be dominant. It is submitted that, in

alleging that Respondent No. 2 is a dominant enterprise, the Appellant has made no reference to the rest for dominance under the Act, let alone satisfied it. Explanation (a) to Section 4 of the Act sets out the test for dominance and states that for an enterprise to enjoy a dominant position, it must be in a position of strength that enables it to act independently of competitive forces prevailing in the market or affect competitors, consumers or the relevant market in its favour. This is not the case here, and the Appellant has failed to provide any comparative analysis or provide any evidence that Respondent No. 2 acts independent of competitive constraint from other providers of consumer communications applications active in India such as Google Hangouts, iMessage, Viber, Hike, Line, imo, Messenger, Snapchat, or the SMS services offered by every telecommunications operator in India. Market shares do not establish dominance in the innovation driven Consumer Communications Applications market; The Appellant has sought to establish that Respondent No. 2 is dominant based solely on an assertion that Respondent No. 2 has high market shares based on incomplete and

misleading data. First, the percentage of phones that have downloaded a particular app does not indicate how frequently such an app is used or its share of a market in any meaningful sense. Indeed, the evidence that is in the record indicates that other consumer communications applications have entered successfully and grown rapidly. Hike, for example, has over 100 million users and is only one of many such services. Second, Respondent No. 2 submits that market shares in and of themselves, do not establish dominance. In a technology driven market that is dynamic and constantly evolving, such as the market under consideration in the present case, market shares tend to fluctuate drastically and are not sufficient to show dominance. This is also recognized by the EC in Facebook/WhatsApp where it held that "*the consumer communications sector is a recent and fast growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral.*" Respondent No. 1 has recognized this in its recent decision in the Ola Case, where it acknowledged the dynamic nature of innovation driven markets, and expressed its hesitation to

interfere where such interference poses a risk of prescribing sub-optimal solutions to nascent and developing markets. Considering factors such as rapid market expansion, low entry barriers and effective entry of competitors, countervailing forces in the market, and the nature of competition in the dynamic innovation driven markets, Respondent No. 1 held the mobile application based taxi aggregator - 'Ola Cabs' - not to be dominant. It is submitted that similar factors exist in the Consumer Communications Applications market as well, and, like in the Ola Case, high market shares are irrelevant. As the EC found, short innovation cycles are present in the Consumer Communications Applications Market. When Viber was among the few (along with the erstwhile Google Talk, not Hangouts) to offer the option of voice calls, it was one of the widest used consumer communications applications. When other applications began offering similar services, usage shifted to other applications fairly quickly especially to those that offered a better product.

- i. *The Consumer Communications Applications space is characterized by significant entry and expansion,*

negating any alleged dominance; the R2 submits that the dynamic nature of this space and the increasing reach of the internet and mobile telephony across the world has also led to significant entry and expansion by other consumer communications applications.

9. We have carefully gone through the pleadings of the parties and extant provisions of the Act and the submissions made by the ld counsel / Ld. Sr. Counsels for the parties including their written submissions and we are having the following observations:

- a. It is observed that the Petition originally filed were having three Respondents as given below:

It is further observed from the files that the Respondent No.3 filed IA No. 52 & 53 of 2017 has filed for deleting Facebook India & Facebook Inc. from the memorandum of parties in the present appeal, on multiple grounds that it is neither a necessary nor a proper party for the effective adjudication of disputes raised in the instant proceedings. It was also stated that they were non-party to the original proceedings before the Commission in the case no.99 of 2016 apart from other reasons as stated in those IAs.

The order so passed by this Tribunal on 25.10.2017 are appended below:

“25.10.2017- An application has been preferred by ‘Facebook, Inc.’ and ‘Facebook India Online Services Pvt. Ltd.’ for deleting them from the array of the respondents as both of them are arrayed as

Respondent No. 3 to the appeal. According to them, they were not party before the Competition Commission of India (hereinafter referred to as the 'Commission') and they have been wrongly impleaded as party respondent to the present appeal.

Learned counsel for the appellant referring to the rejoinder filed before the Commission submits that certain allegations had also been made against the 'Facebook Inc.', but the Commission has not dealt with such allegations in the impugned order. We have heard the learned counsel for the parties and perused the record. We find that the Facebook, Inc. and Facebook India Online Services Private Limited were not the party-respondent before the Commission and they were not even heard nor any decision taken with regard to them. For the said reason we also do not want to hear them at the stage of appeal. Hence, we allow the prayer to delete their names from the array of the respondents. Accordingly, it is ordered to delete the names of Facebook, Inc. and Facebook India Online Services Private Limited from the array of the respondents.

However, it is made clear that if the case is remanded, it will be open to the appellant to agitate the matter against the aforesaid parties before the Commission if there is any allegation against them. With the aforesaid observations, I.A. Nos. 52 and 53 of 2017 stands disposed of.

Post the appeal on 15th November, 2017. The appeal may be disposed of at the stage of admission.”

- b. The entire thrust of the Appellant /Society, fight for transparency society is on the new privacy policy commenced on 25.08.2016 after take over by the Facebook of WhatsApp and Facebook becoming the WhatsApp parent company asking the users to share their user account details and other information available on WhatsApp to the Facebook and the only way for the user was to opt out of services within 30 days leading thereby the customer to accept the new terms and conditions without having any other remedy or consent under pressure.
- c. The other grievance of the Appellant is that the WhatsApp policy has breached the provisions of Information Technology Act, 2002.
- d. The Appellant has made also to prove that termination of users services without giving any reason to a large population of user is an unfair ability and so also the jurisdiction and governing law of California restricting the maximum liability to US\$100 only has made non-feasible for any user from India to approach for any legal grievance redressal.

- e. It is also observed that WhatsApp washed off its hand to inform the user in case of case breach & lack of policy laid down for minimum standard for protection of data. The Appellant also submitted penalty imposed and enquiry initiated by different forum around the world.
- f. The Ld. Sr. Counsel for the R2 has stressed that the nature of information shared under 2016 up-date was limited and used for specific purposes. He stressed that WhatsApp has no access to user chats content, as messages are end to end encrypted. Even on query by the Bench he went on to confirm through his submission that WhatsApp messages including chats, group chats, videos, files etc are end to end encrypted and nobody other than the sender and recipients can illicit any information out of that even not WhatsApp or any third party. Encryption is technical a widely used programme by the Banks, e-commerce site etc.
- g. It was also confirmed by the learned Sr. Counsel that the WhatsApp has collected only mobile number of the user and some characters in the name field which may not be a real name and sharing of all other information was optional.
- h. He has stressed that the coverage of Section 4(2)(a) of the Act requires to prove by the Appellant that it has imposed directly

or indirectly unfair or discriminatory conditions in services. The Appellant has failed to prove with any data or any reasoning other than that inbuilt system has provided the user with the option to accept the update or disconnect from WhatsApp site.

- i. We do not find anything unusual in this as it was not compulsorily put on the users to accept their terms and conditions under pressure. Users were free to come out of their site if they are having a doubt or any other reason.
- j. We are also observing these days that all e-commerce site asking for such option and only when the user is confident that it is not a spam site, then users put 'agree' otherwise, they come out the sites to save their data.
- k. We also do not find any unfair or discriminatory conditions, if WhatsApp has accepted the responsibility that it is end to end encrypted messaging with high quality voice and video calling and other user friendly features.
- l. Let it be very clear that in any 'merger'/ 'amalgamation' the transfer of business involves existing users/service providers/vendors to opt for the new organization and this is the way the update is accepted or rejected.

- m. It is also very much clear that the 2012 Privacy Policy of WhatsApp, allowed WhatsApp to amend its privacy policy and share user's information with a third-party service provider to the extent it is reasonably necessary to maintain or improve the WhatsApp service and to protect the security or integrity of the WhatsApp site or servers. WhatsApp has not also washed off its hands for keeping the users unaware in case of data breach, if it comes to their notice as was confirmed by the Ld. Sr. counsel for R2. WhatsApp has ensured that all users received clear and prominent notice of the 2016 update including the revised privacy policy and an opportunity to consent to the 2016 update by accepting the same within 30 days by clicking "agree" for existing users and "agree and continue" for new users.
- n. WhatsApp has also implemented a use control that has helped the existing users the additional choice not to allow their account information to be used by Meta to improve their Meta advertisements and products experiences without their consent. This is over and above the 2012 WhatsApp Privacy Policy.
- o. The other issue on the violations of provisions of Information Technology Act, 2000 is concerned, we do not find that how

Competition Act and IT Act is connected to determine competition and the Adjudicating Authority and the Appellate Authority for both are different and law is different. As pointed out by the Respondent that the Hon'ble High Court of Delhi has found in *Karmanya Singh Sareen Vs. Union of India & ors.* (W.P(c) No. 7663 of 2016, found no infirmity in the 2016 update and the matter is litigated before the Hon'ble Supreme Court of India in *Karmanya Singh Sareen & Anr. Vs. Union of India* (SLP (C) No. 804 of 2017).

- p. The Commission in its elaborate order dated 01.06.2017 has reached to the conclusion that the WhatsApp Inc. is in a 'dominant position' in the relevant market. We agree with it as the Commission has collected the data which reveals that 96% of devices uses WhatsApp and are active users than any communication App in India. The Commission has also found that 56% of the Internet Users in India use 'WhatsApp' and 51% use 'Facebook' everyday. Hence, it is primarily accepted that the WhatsApp Inc. and now the changed management after take over is in a 'dominant position' in the 'relevant market'.
- q. What the Appellant has failed to prove that the Opposite party/Respondent is abusing its dominant position in the

relevant market by introducing privacy policy which compels its users to share their account details and other information with Facebook as the Respondent has provided the users opt out of sharing user accounts information with Facebook within 30 days of agreeing to the updated of service and privacy policy. It also reveals that they have updated the policy for improving infrastructure and delivery system alongwith tools for securing systems and fighting with spam, abuse or such negative activities.

- r. An ‘organization’ may be a ‘dominant organization’ but only when it abuses its ‘dominant position’ then only ‘Section 4 of the Competition Act, 2002’ is attracted. For brevity and clarity the same is reproduced below:

Section 4 of the Competition Act, 2002;

“4. Abuse of dominant position.—

(1) No enterprise shall abuse its dominant position.

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

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service; or

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or

discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

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

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation .—For the purposes of this section, the expression—

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

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

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

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

- s. From the above it is very clear, unless you abuse the 'Dominant Position' prohibitory action cannot be taken against you. As far as the issue of 'predatory pricing' is concerned, there is no cost being charged by WhatsApp messaging at the moment and hence, directly we cannot confirm that it is predatory prices as R1/Commission has rightly observed that there are no significant costs preventing the users to switch from one consumer communication Apps to another as also almost all consumer communication Apps are offered free of costs or at a very low price (mostly free) and available normally by simple user interfaces. It is very much clear world-wide nothing is free but it is the organization which lends such services develops some business modules to generate sufficient income to sustain its growth. Hence, based on all these discussions, we do not find even the allegations of 'predatory pricing' has any substance.
- t. As far as reliance on foreign proceedings pointed out by the Appellant is concerned, what we observed in certain foreign jurisdiction the provisions of Indian Competition Act and those foreign jurisdiction, Competition Act have different connotation e.g. Italian Competition Authority under Article 20, 24, & 25 of the Italian Court provisions do not related to

abuse of dominance or any Anti-Competitive Behavior which are prohibited under the (Indian) Competition Act 2002 vide Section 4. Unlike, the Competition Commission of India/R1, the Italian Competition Authority (AGCM) bears two hats and enforces Italian and European Consumer Protection law as well as Competition Law. However, these are distinct functions and there are different departments within the AGCM responsible for the implementation of the antitrust and competition laws, and consumer protection laws (AGCM, Organization Chart, available at <http://en.agcm.it/en/about-us/organization/organization-chart> (on 06 May, 2022)).

- u. It is a settled law that requisite reliance be placed on our home land proceedings under the homeland jurisdiction and the law laid down by the Hon'ble Supreme Court of India. Blending the issue of (Competition Act, 2002) (Indian) where certain provisions have been borrowed from statute in Australia and Canada are not relevant. The law laid down by foreign authorities are not binding on this Tribunal as has been held by the COMPAT (the National Stock Exchange of India Ltd. Vs. Competition Commission of India and Ors. dated 05 August, 2014 (Appeal no. 15 of 2011), at paragraph 52 to 55.

- v.* All these reveal that legal elements require to establish abuse of dominant position in India are distinct from the situation/conditionality laid down in other jurisdiction and mixing borrowing from statutes of foreign jurisdiction does not mean that Indian statutory authority is to act as per the statute of foreign jurisdiction or their case law unless it finds a 'prima facie' violation of the Competition Act, 2002.
- w.* All this depicts that Respondent No.2 in the present form is, no doubt, a 'dominant position' but it has not 'abused its dominant position' based on inputs provided by the Appellant. Simply updation of terms and conditions and the users consenting or non-consenting does not amount to abuse of dominant position in the relevant market where R2 is operating as one of the service providers in the form of messaging App where multiple messaging providers are available as also in the service sector. In the digital age it has become a common practice. It is also proved, beyond doubt, that this Tribunal is not competent under the Competition Act, 2002 to enter into the violation of Information Technology Act, 2002 where relevant authorities are different to adjudicate the issue and in this case the Hon'ble Delhi High Court has already examined the issue and has passed the

consequential order *Karmanya Singh Sareen Vs. Union of India & ors.* (W.P(c) No. 7663 of 2016 and the same is in appeal before the Hon'ble Supreme Court of India in *Karmanya Singh Sareen & Anr. Vs. Union of India* (SLP (C) No. 804 of 2017).

- x. It is also very clear that this Tribunal is to do the judicial scrutiny of the orders passed by R1. While examining the issue, the citations available within Indian jurisdiction are primarily to be relied and if, no reference, is there then only, we can opt for the judgment in foreign jurisdiction. Each countries statute has its own nuances. We have already seen that Italian Competition Authority looks at consumer protection as well as Competition Law whereas Indian Competition Act is primarily concerned with preventing practices having adverse effect on Competition, to promote and sustain competition in market etc. The facts brought out in foreign jurisdiction may be different from the facts what has been brought for Indian jurisdiction so all these reliance on foreign proceedings is misplaced and needs to be disregarded as they have no relevance insofar as the present case is concerned.

In view of the above, we do not find any inconformity in the findings of Competition Commission of India and hence, the 'Appeal' deserves to be dismissed and accordingly is dismissed.

Pending application, if any, stands disposed of.

Interim order, if any, passed by this 'Appellate Tribunal', stands vacated. No order as to costs.

(Justice M. Venugopal)
Member(Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

2nd August, 2022
New Delhi

Raushan