NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 12 of 2020

[Arising out of order dated 8th July, 2020 passed by the Competition Commission of India in Case No. 17 of 2020]

IN THE MATTER OF:

M/s Prashant Properties Private Limited
Regd. Office: 13, Harish Mukherjee Road,
Kolkata – 700 025

... **Appellant**

Vs.

1. **Competition Commission of India(CCI)**
9th Floor, Office Block-1
Kidwai Nagar (East)
New Delhi – 110 023

.. **Respondent No. 1**

2. **SPS Steels Rolling Mills Ltd.,**
Diamond Heritage, 16, Strand Road,
Room No. – H 523 A,
5th Floor, Kolkata- 700 019
(through Managing Director Shri Deepak Kumar Agarwal) .. **Respondent No. 2**

3. **Shakambhari Ispat & Power Limited,**
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017
(through Managing Director Shri Deepak Kumar Agarwal) .. **Respondent No. 3**

4. **Shri Deepak Kumar Agarwal,**
Managing Director of SPS Steels Rolling
Mills Ltd., Diamond Heritage,
16, Strand Road, Room No. – H 523 A,

5th Floor, Kolkata- 700 019 .. **Respondent No. 4**

5. **Shri Ramabatar Agarwal,**
Director of SPS Steels Rolling Mills Ltd.,
Diamond Heritage, 16, Strand Road,
Room No. – H 523 A, 5th Floor,
Kolkata- 700 019 .. **Respondent No. 5**

6. **Shri Sanjay Kumar Chowdhary.**
Director of SPS Steels Rolling Mills Ltd.,
Diamond Heritage, 16, Strand Road,
Room No. – H 523 A, 5th Floor,
Kolkata- 700 019 .. **Respondent No. 6**

7. **Smt. Priyanka Goenka,**
Director of SPS Steels Rolling Mills Ltd.,
Diamond Heritage, 16, Strand Road,
Room No. – H 523 A, 5th Floor,
Kolkata- 700 019 .. **Respondent No. 7**

8. **Shri Ajit Kumar Nath,**
Additional Director of SPS Steels Rolling Mills Ltd.,
Diamond Heritage, 16, Strand Road,
Room No. – H 523 A, 5th Floor,
Kolkata- 700 019 .. **Respondent No. 8**

9. **Shri Deepak Kumar Agarwal**
Managing Director of
Shakambhari Ispat & Power Limited**,**
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017
.. **Respondent No. 9**

10. **Mr. Ajay Kumar Lahoti,**
Director of Shakambhari Ispat
& Power Limited,
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017
.. **Respondent No. 10**

11. **Shri Swati Agarwal,**
Director of Shakambhari Ispat
& Power Limited,
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017

..**Respondent No. 11**

12. **Shri Asit Baran Bhattacharjee,**
Additional Director of Shakambhari Ispat
& Power Limited,
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017

.. **Respondent No. 12**

13. **Shri Ramabatar Agarwal,**
Director of Shakambhari Ispat
& Power Limited,
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017

.. **Respondent No. 13**

14. **Shri Ranjit Banerjee,**
Director of Shakambhari Ispat
& Power Limited,
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017

.. **Respondent No. 14**

15. **Smt. Priyanka Goenka,**
Additional Director of Shakambhari
Ispat & Power Limited,
Room No. 801, 8th Floor, Diamond Prestige,
41A, AJC Bose Road, Kolkata- 700 017

.. **Respondent No. 15**

16. **Vijaykumar V. Iyer,**
Resolution Professional of
SPS Steels Rolling Mills Ltd.,
Deloitte ToucheTomatsu India LLP,
Indiabulls Finance Centre

Tower No. 3, 27th Floor,
Senapati Bapat Marg,
Elphinstone Road(West)
Mumbai- 400 013 .. **Respondent No. 16**

Present:

For Appellant:	**Mr. P. Chidambaram, Sr. Advocate, Mr. Dhruba Mukherjee, Mr. Rajiv Ranjan, Sr. Advocates with Mr. Anurag Singh, Ms. Kanchan Yadav and Mr. Zain A. Khan, Advocate**
For Respondents:	**Ms. Shama Nargis, Dy. Director Law, CCI, Mr. Anup Kumar, Ms. Neha Jaiswal, Ms. Shruti Singh, Mr. Shivam Kumar, Advocates for Respondent Nos. 2 to 15.** **Mr. Vaijayant Paliwal, Mr. Nikhil Mathur and Mr. Siddhant Kant, Advocates for Respondent No. 16**

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

The Appellant (M/s Prashant Properties Pvt. Ltd.) has filed an Appeal under Section 53B of the Competition Act, 2002 against the impugned order dated 8th July, 2020 passed by the Competition Commission of India (hereinafter **CCI**) in case No. 17 of 2020 (in Re Prashant Properties Pvt. Ltd. Vs. SPS Rolling Mills & Ors.). The CCI has dismissed the Appellant's Information Complaint under Section 26(2) of the Competition Act, 2002.

2. The Appellant's complain is that the CCI was not required to go into the question of dominance for the reason "that the Appellant's right under

a Permitted User Agreement (PUA) dated 30.05.2014 had been extinguished through the IBC process" which finding is itself contrary to concurrent findings of the NCLT and NCLAT in Insolvency and Bankruptcy Proceeding (IBC Proceeding). CCI has not provided opportunity for hearing or holding of Preliminary Conference which was imperative in the facts and circumstances of the case. It was also stated by the Learned Senior Counsel of the Appellant that the Scope of enquiry under Section 26 read with Section 19 of the Competition Act 2002 is to determine whether the prima facie case is made out under Section 3 or 4 of the said Act. Such prima facie enquiry would be guided by the criteria lead down under Section 19(3) and Section 19(4) for violation of Section 3 & 4. This exercise has not been done by the CCI before passing the Impugned Order. It was also stated by the **learned Senior Counsel that the Appellant is pressing its intention to limit its appeal only to the findings given by the CCI at paragraphs 24,25,26 & 27 of the Impugned Order which are at pages 66 to 68 (Volume-1) of the Appeal paper Book.** He also continued to submit that the findings are not only contrary to records but are also passed by the CCI by exceeding its jurisdiction. Learned Counsel has limited relief only in respect of perverse observation made in the order of CCI and prays for **expunging the said remark**. What the learned Senior Counsel has submitted that the said observation on merits have no basis or in simple language, he has also stated that it is contrary to the findings already recorded by the appropriate fora in proceedings under Insolvency and Bankruptcy Code, 2016 (in short **Code**) by NCLT Kolkata Bench and this Tribunal. In addition to above, the Appellant has further submitted as follows:

> …
>
> *"(ii) A perusal of the Resolution Plan and relevant documents such as Minutes of Meeting of Committee of Creditors (COC), Valuation Reports etc would show that exclusive use of the said family of marks was not a precondition for implementation of the Resolution Plan. The same would be apparent from the fact that:*
>
> *(a) While the original resolution plan provided that 'RA will also request the RP to take necessary steps to ensure no encumbrance is created by the CD on the "Brand Equity" of "Elegant" to dilute its value to RA by entering into licensing agreement with other manufactures of similar products" the addendum to the Resolution Plan dated 30.8.2018 revised it to the effect that 'subsequent to the closing date, the Resolution Applicant shall take requisite steps to proceed annulment of any contracts entered into or obligations// encumbrances licenses entered into by the erstwhile members of the Board of Directors and/or Corporate Debtor for dilution of the Corporate Debtor's rights and interest in the brand." (Emphasis supplied)*
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> *(b) Further in the 12th COC Meeting held on 10.11.8.2018, it has been specifically observed that the said portion of resolution plan which mentions for*

exclusive use of the brand elegant by the successful resolution applicant be declared as omitted. The relevant part is extracted herein below:

> *"Shankambhari clarified that the point on "Elegant" brand had been addressed in the original Resolution Plan read together with the clarifications and addendums issued in relation thereto and agreed that the point in their revised financial offer mentioning exclusive use of "Elegant" brand by them and use of the brand by anyone else be declared null and void be declared as omitted." (Emphasis supplied)*
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> [**Minutes of Meeting of COC 10/11.8.2018, Appeal Volume I/Pg. 239 @ 251**

(iii) Significantly, however, in the meantime, in the proceedings under IBC, the Appellant has succeeded by a series of favourable orders, to establish the validity of the PUA

*(a) Order dated 6.8.2019 of NCLT disposing as not pressed CA No. 5 of 2019 filed by Resolution Professional for suspension of brand sharing agreements including the PUA [**Appeal Volume II, pg. 308**]*

(b) Order dated 26.2.2020 of NCLT rejecting CA No. 937 of 2018 filed by the R-16/RP for avoidance of the PUA. Although, mandatory relief sought by the Appellant for directions upon the Respondent's not

to interfere with its rights under the PUA were not granted on the ground that upon approval of resolution plan, the Adjudicating Authority recorded categorical findings that the applicability of the PUA was not affected. The relevant portion is extracted herein below:

> *33…….We further observe that our decision as regards the plea of Resolution Professional it being an undervalued transaction does not have any bearing on the applicability of this agreement in future in either way as our decision is related only to whether any recovery/consideration is warranted or not….”*

(c) *Order dated 5.6.2020 of NCLAT in Company appeal (At)(Ins.) No. 513 of 2020 upholding the order dated 26.2.2020 passed by NCLT but once again re-iterating that the Appellant must not have any apprehensions as the applicability of PUA is not affected. The relevant portion is extracted herein below:*

> *‘4. ……. if at all there were any apprehensions in the mind of the appellant, same have been allayed by the Adjudicating Authority by observing in Para 33 of the impugned order that the decision as regards plea of Resolution Professional on there being an undervalued transaction does not have any bearing on the applicability of this*

agreement in future in either way.'
(Emphasis supplied)
[Appeal Volume II/Pg 488 @ 490]

3. Learned Senior Counsel has submitted that:

(i) *In the order impugned the CCI has not only exceeded its jurisdiction but also recorded incorrect factual submission such as the findings that no appeal was preferred by the Appellant against the NCLT's order dated 26.2.2020 when in fact the Appellant had filed Company Appeal (At)(Ins.) No. 513 of 2020. Furthermore, the CCI has held that the validity of the agreement had come under cloud while at the same time finding that the NCLT has vide the said order dated 26.2.2020 held that the agreement was not undervalued or fraudulent.*

(ii) *The Scope of determination of the CCI was limited to examining the compliant keeping in view the abuse of dominant position. However, the Ld. CCI virtually sat in appeal over various orders passed by NCLT and NCLT also, the findings given by the CCI are beyond its jurisdiction.*

(iii) *It is further submitted that a perusal of the Resolution Plan and relevant documents such as Minutes of Meeting of Committee of Creditors(COC), Valuation Reports etc. would show that exclusive use of the said family of marks was not a precondition for implementation of the Resolution Plan.*

(iv) *The Competition Commission of India has recorded that the suit filed by the Informant seeking permanent injunction against the OP's and allowing use of the trademark has been dismissed by the abovementioned Civil Court vide order dated 10.12.2019. However, it has failed to notice that such dismissal has not been on merits but on the ground of lack of jurisdiction on account of pendency of proceedings under the IBC before the NCLT Kolkata. Further, an appeal against the said order is pending.*

(v) *No conclusions, especially on matters extraneous to competition concerns, ought to have been arrived at by the Competition Commission without giving an opportunity of preliminary hearing to the Appellant.*

4. Finally, the Appellant has submitted:

"….. to set aside the order passed by the Competition Commission of India to the extent following observations have been made by Competition Commission of India contrary to record and/or in excess of its jurisdiction:

(i) *The observation in para 26 of the impugned order wherein the Competition Commission of India observes that 'the Informant ought to have preferred an appeal before NCLAT, which it has not done'. and/or 'Thus, it appears both from the Informant as well as the documents annexed therewith that the subsistence of any legal right of the Informant, in respect of the use of the trademark of OP-1, under the Permitted User Agreement dated 30.05.2014, and the validity of such agreement itself has come under cloud* *after the resolution process undertaken in relation to OP-1 company under IBC. The Ops are the owners of the such mark, who consequent upon the approval of the resolution plan by NCLT, have the vested right to the use of such marks, to the exclusion of the Informant, which is evidenced upon a perusal of the order dated 26.02.2020, passed by NCLT' and/or. Further, as per NCLT, this right came to be accrued upon the Ops by virtue of the earlier order of NCLT dated 08.04.2019, approving the Resolution Plan, and in terms of which OP-2 has expended considerable sums to take the control of the affairs of OP-1, which has held the mark 'ELEGANT" besides other marks, being registered under the Trade Marks Act in its name' and/or 'there is nothing to show any legal right that is inherent in the Informant in relation to aforementioned marks.*

(ii) Observation made in Para 27 of the impugned order to the effect that 'the rights of the Informant to use of such mark appears to have been extinguished under the legal process of IBC….'

SUBMISSIONS OF RESPONDENT NOS. 2 TO 15:

5. It was stated by the learned Counsel for the Respondent Nos. 2 to 15, Mr. Anup Kumar, that the learned Senior Counsel for the Appellant has stated before this Tribunal that owing to a wrong advice, the Appellant file the Application in Case No. 17/2020 before the CCI and also restricted his arguments for expunging the remarks stated in paragraphs- 24,26 of

the impugned order. The Learned Counsel has further submitted that the findings and observations of the CCI are based upon the information and documents supplied by the Informant/Appellant itself. Such findings cannot be termed as contrary to the record. The CCI has passed a reasoned order under the Competition Act, 2002. The Appellant is using forum shopping as he has pursued the same in four rounds of litigation for the same relief.

6. In the **First Round of Litigation** it is alleged a claim of Rs. 15.15 Crores before the IRP during CIRP of the Corporate Debtor (Respondent No. 2). The Resolution Plan of the Respondent No. 3 was approved by the 'Committee of Creditors' (in short **CoC**) with 100% vote share and subsequently approved by the Adjudicating Authority vide order dated 08.04.2019 in CA(IB)/871/KB/2018. The Appellant has not challenged that approval of the Resolution Plan and hence that has attained finality.

7. In the **Second Round of Litigation**, Title Suit No. 563 of 2019 against Respondent No. 2/Corporate Debtor (in short **CD**) was filed before the 2nd Civil Judge at Alipore, West Bengal seeking a Decree of Declaration that PUA dated 30.05.2014 is valid and subsisting etc. and progressively the same suit travelled upto Hon'ble Supreme Court in Civil Appeal No. 9022/2020 which remitted matter back to the Trial Court to decide the matter. The Trial Court, vide Judgment and order dated 10.12.2019 has dismissed the Title Suit No. 563/2019 filed by the Appellant herein and

the Appellant has gone in Appeal before the 1st Appellate Court against the order which is pending for adjudication.

8. In the **3rd Round of Litigation**, the Appellant sought an intervention by CA No. 124/KB/2020 before the Adjudicating Authority appearing at page 382 seeking reliefs 'c' and 'd' under the clause 'E' appearing at page No. 404-405 seeking similar relief restraining the CD under CIRP (Respondent No. 2 in the present Appeal) from exercising valuable right under the PUA dated 30.05.2014 and publishing Notice or held out any threats. However, the Adjudicating Authority rejected the Appellant's claim to use brand "**ELEGANT**" vide paragraph-33 of the order appearing at page 486 of the Appeal Paper Book. For brevity and clarity, the same is reproduced below:

> …
>
> *"33. As regards the second aspect, the first challenge made by the successful resolution applicant is that the application filed by Prashant Properties Pvt. Ltd. was not maintainable for the reason that this Authority has no jurisdiction as the resolution plan has already been approved and, thereafter, this Authority has become functus officio as far as resolution plan is concerned. We find substantial merit in this argument for the reason that resolution plan has already been approved on 8th April 2019 by this authority. It is a settled position that there is no power of review to this Authority of its own actions, hence the contentious of Intervenor being in the nature of asking this Authority to review its own decision are not*

valid within the scheme/framework of the provisions of IBC, 2016. Thus, this contention of Successful Resolution Applicant is accepted particularly when there does not exist a case of fraud or violation of provisions of Section 30(2) of IBC, 2016 in getting the approval of Resolution Plan. We further note that no appeal under Section 61 of IBC, 2016 against approval of Resolution Plan has been preferred by Prashant Properties Pvt. Ltd., Intervenor, who also happens to be operational creditor of the Corporate Debtor and time limit for doing so has already expired, hence Resolution Plan has become final. Such Resolution Plan is binding on all stakeholders as per provisions of Section 31 of IBC, 2016. We have further noted that Intervenor was also aware of the proceedings challenging the validity of Permitted User Agreement before approval of Resolution Plan and has also participated in proceedings relating to the validity of these agreements and as a creditor as well in CIRP proceeding, hence, it cannot be said that all such actions have happened behind its back. Consequently, proceedings cannot be challenged on this ground also. We further observe that our decision as regards the plea of Resolution Professional it being an undervalued transaction does not have any bearing on the applicability of this agreement in future in either way as our decision is related only to whether any recovery/consideration is warranted or not. Thus, in view of this discussion, we reject all claims made by the Intervenor i.e., Prashant Properties Pvt. Ltd.

..

and the same order at Appeal by this Tribunal in CA (AT) (Insolvency) No. 513 of 2020 in the matter of ***Prashant Properties Pvt. Ltd. versus Vijaykumar V. Iyer RP of the Corporate Debtor & Ors.*** has been dismissed by this Tribunal appearing at page 488 (Annexure A-24) of the Appeal Paper Book.

For brevity and clarity, the same is reproduced hereunder:

"05.06.2020 *The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata rejected claims made by the Appellant – 'M/s Prashant Properties Pvt. Ltd.' on the ground that the Resolution Plan had already been approved on 08.04.2019 by the Adjudicating Authority, which had no power to review its own decision. This rejection order, which is part of the composite order passed by the Adjudicating Authority in CP(IB) No. 595 / KB / 2017 on 26.02.2020, has been* *assailed by the Appellant through the medium of instant appeal.*

2. Appellant claimed that it was entitled to use the brand 'Elegant' and 'Family of Marks' as holder of the same. It sought intervention by filing of CA No. 124/KB/2020 in CA(IB) No. 937/KB/2018 which had been pending determination before the Adjudicating Authority. The Adjudicating Authority declined to draw an adverse conclusion on the basis of report of the Resolution Professional and the Forensic Consultant against the management of the Corporate Debtor though permitted User Agreement was not cancelled while approving the Resolution Plan. The Adjudicating Authority, apart from holding that it was not a case of undervalued or preferential transaction, held that the application preferred by the Appellant was not maintainable as the Adjudicating Authority had no jurisdiction to determine any issue relating to the Resolution Plan after the same had been approved.

3. Learned counsel for the Appellant submits that the finding recorded by the Adjudicating Authority is erroneous in-as-much-as the public notice dated 18.04.2019 issued by the Resolution Professional prior to decision in CA(IB) No.937/KB/2018 was without jurisdiction and right to use of trademark 'Elegant' based on the approved Resolution Plan has not passed on to the Successful Resolution Applicant. This submission is contested by learned counsel for the Respondent who submits that after approval of the Resolution Plan the Adjudicating Authority had become functus officio and the decision qua approval of the Resolution Plan could not be reviewed by it.

4. After hearing learned counsel for the parties and wading through the record, we are of the considered opinion that the Appellant who was an Operational Creditor could not seek intervention after approval of Resolution Plan by the Adjudicating Authority. Admittedly, the Resolution Plan was approved by the Adjudicating Authority on 08.04.2019 and in terms of provision embodied in Section 31(1) of the I&B Code the approved Resolution Plan is binding on all stakeholders involved in the Resolution Plan including the 'Creditors'. It is not in dispute that approved Resolution Plan has not been assailed by the Appellant in appeal under Section 61 of the I&B Code and limitation for filing such appeal has already expired. Thus, the approved Resolution Plan has attained finality and is beyond the pale of challenge at the instance of Appellant – 'Operational Creditor'. It also emerges from the record that the Appellant had all along been represented throughout the Corporate Insolvency Resolution Process proceedings as a creditor and it could not lie in his mouth that the proceedings qua the validity or otherwise of the permitted User Agreement of the brand name were conducted behind its back. If at all there were any apprehensions in the mind of the Appellant, same have been allayed by the Adjudicating Authority by observing in Para 33 of the impugned order that decision as regards plea of Resolution Professional on there being an undervalued transaction does not have any bearing on the applicability of this Agreement in future in either way.

5. Thus viewed, we find no merit in this appeal. The same is dismissed. No costs."

9. In the **Fourth Round of litigation** where the CCI did not even find prima facie case in favour of the Informant/Appellant and has accordingly dismissed its Application/Case No. 17/2020 in limine vide impugned order dated 08.07.2020, which is in Appeal in this Tribunal. It is also stated by the Learned Counsel for the Respondent that the Successful Resolution Applicant/Respondent No. 3 has already paid more than Rs. 266 Crores and he is being dragged by the Appellant before multiple fora on the same issue.

Respondents have cited following Judgments to supplement its case although they have not provided copy of the Judgments and even not the complete citations:

i) "***Essar Steel India Limited***." – (2020) 8 SCC 531 (Para- 105, 107)

ii) "***Innoventive Industries Ltd***" – (2108) 1 SCC 407 (Para-33)

iii) "***K. Sashidhar" -*** (2019) 12 SCC 150 (para-52)

iv) ***"Ghanshyam Mishra and Sons Pvt. Ltd."***, 2021 SCC OnLine SC 313

SUBMISSION OF RESPONDENT NO. 16:

10. The Learned Counsel for the Respondent No. 16/erstwhile Resolution Professional of the Corporate Debtor and he has stated that the Adjudicating Authority in the case of Corporate Debtor under CIRP/Respondent No. 2 in CP(IB) No. 595/KB/2017 had admitted that the Application filed by Allahabad Bank under Section 7 of the Code

appointing him as Interim Resolution Professional vide Adjudicating Authority's (NCLT Kolkata) order dated 22.12.2017 and subsequently confirmed him as Resolution Professional by the Committee of Creditors (in short '**CoC**') by order dated 19.01.2018. Resolution Professional/Respondent No. 16 has also submitted that on 03.09.2018, CoC has unanimously approved the Resolution Plan of Respondent No. 3 as successful Resolution Applicant and on 8th April, 2019, the Adjudicating Authority approved the Resolution Plan of Respondent No. 3 i.e. Shakambhari Ispat & Power Limited. The Resolution Professional was the member of the Monitoring Committee and stood discharged w.e.f 11.04.2109 and he is not aware of the developments of the Corporate Debtor thereafter. He has also stated that Section 233 of the Code provided that no legal proceeding should be initiated against him and on bare perusal of the Appeal, it reveals that the Appeal challenging the order of the CCI dated 08.07.2020 has been filed on 31.07.2020. He has not raised any contention in this Appeal save and except that he be dropped as Party Respondent No. 16 in the present Appeal.

ANALYSIS AND OBSERVATION:

11. We have gone through the submissions made by learned Senior Counsel/Counsels of the Parties, Appeal Paper Book filed by the Appellant, Replies given by the Respondents, Written Submissions provided by the Parties and are having the following observations:

a) The Judgments cited by Respondent Nos. 2 to 15 are related to the provisions of Insolvency and Bankruptcy Code, 2016 and has not much impact on the issue involved under the Competition Act, 2002 as the Insolvency and Bankruptcy Code, 2016 approved Resolution Plan requires vide Section 30(2)(e) that the Resolution Plan does not contravene any of the provisions of law for time being in force.

b) The Appellant is carrying on the business of marketing, distribution, sell of multifarious wholesale items and in the process is entitled to certain rights including manufacture, use, distribution and sale of TMT Bar, TMT rod, Steel Plant rod, rolled and cast building materials etc. and similar goods of services inter alia claiming to be entitled to the "ELEGANT" Brand or Family of Marks within the geography territory of India under an agreement dated 30.05.2014.

c) In terms of the agreement dated 30.05.2014, the Appellant had entered into an agreement with Respondent No. 2/ SPS Steels Rolling Mills Ltd/Corporate Debtor who was in CIRP providing Appellant by the Respondent No. 2 a non-exclusive license for the "Family of Marks" in all forms in respect of goods corresponding the said mark for the period of 21 years from the date of signing and execution of this agreement with a further right that the agreement may be extended/renewed with the expressed consent and assent from the either party before the expiry of this agreement appearing at Serial No. 4 at page 102 of the Appeal Paper Book. The Appellant was required to pay Royalty on half year basis @ Rs. 75 per tonne for using the 'Family of Mark' appearing at Serial No. 5, page 102 of the Appeal Paper Book.

d) The Appellant is now seeking for expunging all marks mentioned in paragraphs 26 & 27 of the CCI Order dated 08.07.2020 (appearing at page 68 of the Appeal Paper Book). For brevity and clarity, the same is reproduced below:

> *"26. In view of the above, the Commission observes that it may not be germane to define a precise relevant market and assess the dominance of the OPs as no abuse can be seen to have arisen based on the facts and circumstances disclosed in the Information. When the rights of the Informant to use of such mark appears to have been extinguished under the legal process of IBC, it would not be worthwhile from a competition standpoint to firstly undertake a relevant market analysis and assessment of dominance of OPs in such market, which is the normal course of action accepted by the Commission in respect of cases brought before it, under the provisions Section 4 of the Act, but for the facts and circumstances of the present case, as presented above."*
>
> *27. Thus, the Commission is of the opinion that no competition concern can be said to have arisen in the present matter and the information is closed forthwith against the OPs under Section 26(2) of the Act. Consequently, no case for grant of relief(s) as sought*

under Section 33 of the Act arises and the same is also rejected.

e) The Appellant has also raised the issue that the Impugned Order has been passed without giving opportunity of hearing. He is also aggrieved that the CCI has not carried out the market analysis as required under Section 4 of the Competition Act, 2002.

f) On going through the entire appeal, it is hoving area that the Appellant is interested only in enforcing its agreement with Corporate Debtor/Respondent No. 2 entered on 30.05.2014, as stated supra. The Appellant became aware of the General Notice issued by the Corporate Debtor/Respondent No. 2 appearing at page -150 (Annexure A-8) of the Appeal Paper Book vide which the Respondent No. 2 has made a Public Notice asking public not to use trade mark 'ELEGANT" or associated Trademark or anybody using the same will be left to civil/criminal prosecution. The Appellant even in their Appeal Paper Book has dealt at length the matters relating to NCLT/NCLAT relating to the Corporate Debtor/Respondent in CIRP the entire issue.

g) Even the CCI has noted the same thing in paragraph 22 in its order dated 08.07.2020 appearing at paragraph-65 of the Appeal Paper Book.

h) The CCI has also adopted the issue of agreement dated 30.05.2014 entered into between the Appellant and Respondent No. 2/Corporate Debtor within CIRP.

i) The Informant/Appellant here has prayed to Commission to enquire into the matter, for passing an order for investigation under Section 26 of the Act and upon result of the investigation, pass an order of penalty under Section 27 against the Opposite Party therein which includes Respondent Nos. 2 & 3 herein.

j) This case is involving the provisions of Sections 4,19,26 & 27 of the Competition Act, 2002. For brevity and clarity, the same are reproduced below:

Section 4 in 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;

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.

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

Section 19 in the Competition Act, 2002
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 a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission

shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

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

(d) accrual of benefits to consumers;

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

(f) promotion of technical, scientific and economic development 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 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.*

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

(a) *physical characteristics or end-use of goods;*

(b) *price of goods or service;*

(c) *consumer preferences;*

(d) *exclusion of in-house production;*

(e) *existence of specialised producers;*

(f) *classification of industrial products*

Section 26 in the Competition Act, 2002

26. Procedure for inquiry on complaints under section 19. —

(1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.

Provided that if the subject- matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub section (3) to the parties concerned:

Provided that in case the investigation is caused to be made based on a reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) to the Central Government or the State Government or the statutory authority, as the case may be.

Where on receipt of a complaint under clause (a) of sub-section (1) of section 19, the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary.

(4) The Commission shall forward a copy of the report referred to in sub-section (2) to the parties concerned or to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director General relates on a complaint and such report recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director-General.

(6) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act. .

(8) If the report of the Director General referred to in sub-section(3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

Section 27 in the Competition Act, 2002

27. Orders by Commission after inquiry into agreements or abuse of dominant position. —Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely: —

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the

turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

[Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher;

….

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

…

(g) pass such other order as it may deem fit.

[Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such contravention, then it may pass orders under this section, against such members of the group.]

k) As far as the question of personal hearing or Preliminary Conference is concerned, on an information received under Section 19 of Competition Act, 2002 is concerned, now it is settled law laid down by the Hon'ble Apex Court that the commission is only to determine whether the prima facie case exists and at this stage, no personal hearing or preliminary conference is mandatory.

l) It is also amply clear that the Commission on a complaint under Section 4 for determining any enterprise enjoys the dominant position or not, it is required to go in any of the matter involved; like the market shares of the enterprise, size and resources of the enterprise or size and importance of the competitors or examining the powers of the enterprises or vertically integration of the enterprises or dependence of the consumer on the enterprise etc. The Commission is empowered to consider any other factor if it is relevant for the enquiry for determining the dominant position of the enterprises.

For brevity and clarity, reference is invited to Hon'ble Supreme Court Judgment reported in Civil Appeal No. 7779 of 2010 in the matter of **"Competition Commission of India Vs. Steel Authority of India Ltd & Anr."[@ pages 79-80]** which is reproduced hereunder:

" ……. We have held that there is no statutory obligation on the Commission to issue notice for grant of hearing to the parties at

the stage of forming an opinion under Section 26(1) of the Act unless, upon due application of mind, it finds it necessary to invite parties or exports to render assistance to and produce documents before the Commission at that stage. We are also unable to agree with the view expressed by the Tribunal that the inquiry commences as soon as the aspects highlighted in sub-section 91) to Section 19 are fulfilled and brought to the notice of the Commission. It is obvious that Regulation 18(2) was not brought to the notice of the Tribunal which resulted in error of law, particularly, when examined in the light of other provisions and scheme of the Act as well. The Commission, vide its order dated 8th December, 2009, had, for reasons stated therein, declined the extension of time to SAIL. Thi Order of the Commission cannot be stated to be without jurisdiction or suffering from any apparent error of law."…..

m) The proceedings under the Insolvency and Bankruptcy Code, 2016 is only directly applicable to the Code to the extent it is enumerated in Section 31(4) proviso of the Insolvency and Bankruptcy Code, 2016 as depicted herein below:

***Proviso of Section 31(4) of* Insolvency and Bankruptcy Code, 2016**

The resolution applicant ….

"Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

(n) The Appellant has even gone to the Hon'ble Supreme Court of India in Civil Appeal No. 9022/2019 in the matter of '***SPS STEEL ROLLING MILLS LTD. VERSUS PRASHANT PROPERTIES LIMITED'*** and the Hon'ble Apex Court has remitted back the matter to the Trial Court and the same is depicted below:

"Heard the learned counsel for the parties. Leave granted.

The main injunction application is pending before the trial court, we need not comment on the merits of the case. The trial court had granted ex-parte injunction, against which Misc. appeal was taken to the District Court. The District Court also granted ex-parte stay of the order of trial court during the pendency of the misc. appeal. Against the interim stay, the respondent *approached the High Court by way of CO No. 2205 of 2019.*

The trial court has not decided the application for injunction on merits so far. In the facts and circumstances, the High Court has unnecessarily gone to the merits of the case and has made certain Signature Not Verified observations which were not called for at this stage. Digitally signed by JAYANT KUMAR ARORA Date: 2019.11.28 16:43:11 IST Reason:

The High Court should have requested the trial court to decide the matter, which recourse we adopt now.

We set aside the order passed by the High Court and also the order passed by the District Court. As we have stayed the order, the stay order be continued and let status quo, as on today, be maintained for a period of 15 days from today. We direct the trial court to decide the matter of injunction finally during 15 days' period, uninfluenced by any observations made by it earlier or by the appellate court or by the High Court. We also clarify that this order also shall not influence the trial court in reaching a decision. We leave all questions open to be agitated before the trial court. The stay of the order shall continue for a period of 15 days. In view of the above, the appeal is disposed of. Misc. appeal pending before the District Court is also disposed of.

No costs."

(o) The CCI has given a reasoned order based on the information provided by the Appellant itself and thereby in a reasoned judgment, it has formed the opinion that no competition concern can be said to have arisen in the present matter and the information is closed under Section 26(2) of the Competition Act, 2002.

(p) All these suggest that it is for the Trial Court/their Appellate Courts to decide the matter on the use of trade mark "ELEGANT" of the Appellant.

With the above observations, we are disposing of the Appeal. No order as to cost.

(Justice M. Venugopal)
Member(Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

9th May, 2022

Akc