Jyoti Sawroop Arora vs The Competition Commission Of India & ... on 16 May, 2016

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw

*IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 16th May, 2016

+ W.P.(C) No.6262/2015

JYOTI SAWROOP ARORA ..... Petitioner
Through: Mr. Vikas Goel and Mr. Abhishek Kumar, R.V. Prabhat and Mr. J.S. Arora, Advs.

Versus

THE COMPETITION COMMISSION OF INDIA & ORS ..... Respondents
Through: Mr. D.P. Singh, Ms. Snuchita Shrivastava and Mr. Devansh Arya, Advs. for R-1.
Mr. Avinash Sharma, Adv. for R-2.
Mr. Rahul Malhotra, Adv. for R-5&17.
Mr. Rakesh Kumar, Mr. Navin Kumar and Mr. Bipin Kumar, Advs. for R-6.
Mr. Amir Singh Pasrich and Ms. Vinita Chhatwal, Advs. for R-7.
Mr. Dhruv Rajain, Adv. for R-8&19.
Mr. G. Ramakrishna Prasad, Ms. Tatini Basu and Ms. Lovely Kumari Singh, Advs. for R-10.
Mr. Preshit Surshe, Adv. for R-11.
Ms. Chandni Mehra, Adv for R-12.
Mr. Himanshu Tyagi, Adv. for R-13.
Mrs. Aayushi S. Khazanchi and Mr. Karan Luthra, Advs. for R-14.

Mr. A.S. Chandhiok, Sr. Adv. with Ms. Kalyani Singh, Ms. Ambika Soni, Ms. Sweta Kakad, Ms. Monika tyagi and Mr. Anukrit Gupta, Advs. for R-15.
Mr. M.M. Sharma, Ms. Deepika Rajpal and Mr. Danish Khan, Advs. for R-16.
Mr. Krishnan Venugopal, Sr. Adv.

with Mr. Rahul Goel, Ms. Anu Monga, Mr. Nitish Sharma and Mr. Neeraj Lalwani, Advs. for R-18.
Ms. Neelambera Sandeepan and Mr. Sammith S., Advs. for R-20.
Ms. Anindita Barman and Mr. Keshav Mohan, Advs. for R-22.
Mr. Devashish Bharuka and Mr. Abraham C. Mathews, Advs. for R-23.
Mr. Subodh Prasad Deo and Ms. Radhika Seth, Advs. for R-24.
Mr. H.S. Chandhoke, Ms. Deeksha Manchanda and Mr. Arjun Nihal Singh, Advs. for R-25.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 226 of the Constitution of India impugns the order dated 3rd February, 2015 of the respondent no.1 Competition Commission of India (CCI) in case No.59/2011 holding no violation of the provisions of the Competition Act, 2002 having been committed, inspite of

the Director General (DG) of the CCI in its Report having recommended that there is contravention of the provisions of the Act. The petition was entertained and notice thereof issued.

2. After notice, when the petition was listed before this Court on 12 th February, 2016, I had of my own enquired from the counsels whether not such an order was appealable before the Competition Appellate Tribunal (COMPAT).

3. The counsels drew attention to Section 53A(1)(a) of the Competition Act which empowers COMPAT "to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under Sub-Sections (2) and (6) of Section 26.....". It was further pointed out that Sub-Section (2) of Section 26 provides for CCI, on receipt a reference from the Central Government or a State Government or a Statutory Authority or information received under Section 19, closing the matter forthwith if of the

opinion that there exists no prima facie case. It was stated that CCI in the present case did not so close the matter but rather was of the opinion that there existed a prima facie case and in exercise of powers under Sub-Section (1) of Section 26 had directed the DG to cause an investigation to be made in the matter. It was further pointed out that DG submitted its Report

recommending that there was contravention as averred in the information; however CCI, after consideration of the objections and suggestions of the parties concerned has vide the impugned order dated 3 rd February, 2015 differed from the findings of the DG on issue of contravention of provisions of Sections 3(3)(a) & (b) of the Competition Act and held that sufficient evidence is not available on record which warrants a finding of contravention of the provisions of the Act and accordingly closed the matter. It is argued that Sub-Section (6) of Section 26 against a direction, decision or order whereunder the remedy of appeal to COMPAT has been provided is as under:-

> "(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."

i.e. provides for a contingency where the CCI agrees with the recommendation of the DG and closes the matter and not the contingency where CCI has disagreed with the recommendation of the DG, as has happened in the present case. It was argued that since the remedy of appeal

is not provided, the petition under Article 226 of the Constitution would be

maintainable against such an order.

4. Though the counsel for the petitioner on 12th February, 2016 also contended that the said question is no longer res integra in view of the judgment of the Supreme Court in Competition Commission of India Vs. Steel Authority of India Limited (2010) 10 SCC 744 but to me it prima facie did not appear so.

5. I had on 12th February, 2016 itself drawn the attention of the counsels to Vinod Kumar Chowdhry Vs. Narain Devi Taneja (1980) 2 SCC 120 where the Supreme Court, though in the context of Section 25B(8) of the Delhi Rent Control Act, 1958 held that the words "order for recovery of possession of premises" have to be construed as an order deciding the application for recovery of possession of premises because there can be no discrimination between the remedies available to the two parties to a litigation and which will render the provision unconstitutional and because of the overall scheme of the Act. Attention of the counsels was also invited to State of Maharashtra Vs. Marwanjee P. Desai (2002) 2 SCC 318 on the interpretation of Section 7 of the Bombay Government Premises (Eviction) Act, 1955.

6. Finding that there is no specific sub-section in Section 26 dealing with contingency of the CCI disagreeing with the Report of the DG and closing the case as has happened in the present case and being of the prima facie view that by the reasoning in the two judgments aforesaid of the Supreme Court and further citing V.C. Shukla Vs. State (1980) Supp. SCC 92 holding that right of appeal has to be liberally construed, I had on 12th February, 2016 expressed prima facie opinion that even against an order where CCI disagrees with the report of the DG and closes the case, an appeal to

COMPAT lies and the writ petition would thus not be maintainable. The counsels who were not prepared on the said aspect were asked to address this Court first thereon. In the light of the aforesaid turn of events which the hearing took, the occasion for any of the respondents filing counter affidavits or calling for the same did not arise. However the respondent no.1 CCI only even before the hearing on 12th February, 2016 had filed a counter affidavit.

7. On 28th March, 2016, the counsel for the petitioner and the senior counsel for the respondent no.15 M/s. Oberoi Realty Limited also contending that appeal does not lie to COMPAT were heard and the matter adjourned to 21st April, 2016 for arguments of other counsels for the

respondents supporting the contention of the petitioner that against the impugned order no appeal lies before COMPAT.

8. On 21st April, 2016 it was pointed out by some of the counsels that with the coming into force on 26th March, 2016 of the Real Estate (Regulation and Development) Act, 2016 (RERD Act), the remedy of the petitioner in any case was not before the CCI but before the Real Estate Regulatory Authority (RERA) constituted under the said Act. The counsel for the petitioner sought time to consider the said aspect. Accordingly, the matter was adjourned to today to enable the counsel for the petitioner to consider. It was also the contention of the senior counsel for the respondent no.18 M/s Puravankara Project Limited on that date that irrespective of the legal question, there was no prima facie merit in the challenge by the petitioner to the impugned order of CCI and for this reason also this Court should not go into the legal question. It was yet further contended that the legal question, as I had raised, was also pending before the Supreme Court.

9. Today, the counsel for the petitioner has stated that according to him the jurisdiction for the grievance with which the petitioner had submitted the information to CCI and finding prima facie merit wherein CCI had ordered

investigation lies exclusively with the CCI under the Competition Act and RERD Act is prospective in nature and the petitioner presses this petition.

10. Per contra, the senior counsel for the respondent no.18 has contended that even if this Court were to hold that this petition is maintainable, in any case on facts there is no merit in the petition. It was contended that since there are as many as 25 respondents in this petition, all represented through Advocates and wanting to address this Court on the legal question aforesaid of availability of appeal against the impugned order to COMPAT, this Court rather than spending time on hearing on the said aspect may first hear the counsels on the factual merit if any of the petition and only if convinced therewith should proceed to go into the said aspect.

11. Being agreeable with the last of the aforesaid contention of the senior counsel for the respondent no.18, the counsels for the petitioner and the senior counsel for the respondent no.18 have been heard on the factual merits of the petition.

12. The petitioner, alleging contravention by the respondent no.2 M/s. Tulip Infratech Pvt. Ltd. (Tulip) and by respondents no.3 & 4 namely Director, Town & Country Planning, Chandigarh and Haryana Urban

Development Authority (HUDA) of the provisions of Section 3 of the Act, lodged information under Section 19(1)(a) of the Competition Act with the CCI. It was the case of the petitioner that various enterprises engaged in real

estate development business including the respondent no.2 Tulip, by an arrangement/understanding amongst themselves, adopt a anti-competitive modus operandi/practices. Reliance in this regard was placed on a statement of the Chairman of the respondent no.5 Confederation of Real Estate Developers Association of India (CREDAI) as reported in the newspaper of its members signing a code of conduct including qua the actual usage area to the buyers, compensation in case of project delays and other clauses of buyers agreements. It was further the case of the petitioner that various enterprises engaged in real estate development have agreements/understanding amongst themselves resulting in the flat buyers agreement which the purchasers of real estate from the said developers are compelled to sign being one sided and containing arbitrary clauses which were exploitative of the buyers.

13. As aforesaid, CCI passed an order under Section 26(1) directing DG to investigate the conduct of residential apartment complex builders including of respondent no.2 Tulip and respondent no.5 CREDAI.

14. The senior counsel for the respondent no.18 has handed over a copy of the separate opinion of the Member, Technical of CCI not finding a prima facie merit within the meaning of Section 26(1) of the Act in the complaint/information submitted by the petitioner inter alia observing that the intention of the Competition Act is not to put each and every commonly prevailing business practice detrimental to consumers under the Competition Act scanner; citing the example of practice followed by shops, of "goods once sold will not be returned", it was observed that every practise is not capable of being treated as a practice carried on if there is no indication of meeting of the minds and it was held that if neither the prices are getting

jointly fixed nor outcome is getting jointly controlled nor market is being consciously shared nor any bid being rigged through practice then even that conscious and jointly decided "practice" cannot come in the purview of Section 3(3).

15. In accordance with the order under Section 26(1) of majority of the members of CCI, as aforesaid, DG submitted a Report of certain practices being commonly carried on by the builders/developers of residential apartments by way of tacit agreement/understanding/informal co-operation and having caused implications for consumers and resultantly

impacting/determining the final prices of apartments in contravention of Section 3(3)(a) of the Competition Act and controlling the provisions of services in contravention of Section 3(3)(b) of the Act. However DG did not find any contravention of the provisions of the Competition Act by the respondent no.5 CREDAI.

16. CCI, vide its order dated 15th April, 2015 ordered impleadment of 20 builders who were selected by DG as a representative sample for the purpose of investigation in the matter, i.e. the respondents 5 to 25 herein and after considering the replies, objections and submissions of the respondents and the rejoinder of the petitioner/informant thereto, has found/observed/held:-

(i) That the petitioner/informant, prior to the information (Case No.59/2011) on which investigation by DG was ordered also, had filed information being Case No.07 to 2011 against the respondents no.2 to 4 namely Tulip, Director, Town & Country Planning, Chandigarh and HUDA on similar facts, alleging abuse of dominant position.

(ii) CCI had vide order dated 29th April, 2011 closed that case

observing that there was no prima facie indication of

dominance by the respondent no.2 Tulip in the relevant market and that there was no allegation of any agreement between the respondent no.2 Tulip and other enterprises engaged in similar or identical business and therefore none of the clauses of Section 3(1) read with Sections 3(3) or 3(4) of the Competition Act was found to be applicable.

(iii) The subject information (Case No.59/2011) however alleged anti-competitive agreements / arrangements / understanding amongst various real estate enterprises including respondent no.2 Tulip and tacit understanding amongst all the real estate players in the market; according to the petitioner/informant the Code of Conduct adopted by the respondent no.5 CREDAI also indicated collusion amongst its members.

(iv) That as far as the alleged anti-competitive conduct arising out of the agreement between the petitioner/informant and the respondent no.2 Tulip was concerned, the same did not fall within the discipline of Section 3(3) read with Section 3(1) of the Competition Act as the petitioner/informant and the respondent no.2 Tulip are not operating at the same level; the

agreement also does not come within the purview of Section 3(4) as an end-consumer is not part of any production chain in the market as envisaged thereunder. Similarly with respect to the alleged conduct of the respondent no.2 Tulip in terms of the provisions of Section 4 of the Act, CCI in the previous case

filed by the petitioner/informant had ruled out applicability of Section 4 as dominance of the respondent no.2 Tulip was not established; the petitioner/informant had neither filed any fresh material to establish contra nor did the DG come across any material which could be reflective of any change in the market dynamics.

(v) That there was no specific allegations of anti-competitive conduct in terms of provisions of Sections 3 and 4 of the Competition Act against the respondents no.3 & 4 namely Director, Town & Country Planning, Chandigarh and HUDA and the prayer of the petitioner/informant seeking examination of their functioning did not merit consideration.

(vi) That the common practices carried on by the builders/developers found by the DG to be emanating out of a tacit agreement were as follows:-

"(a) Non-disclosure of calculation of total common area and its proportionate apportionment on the apartments being sold on Super Area basis and, reserving the right to increase or decrease the flat area.

(b) Non expressly disclosing the applicable laws, rules and regulation etc. with respect to the projects being developed.

(c) Reserving the right of further construction on any portion of the project land or terrace or building and to take advantage of any increase in FAR/FSI being available in the future.

(d) Charging high interest from the apartment owners on delayed payments as against payment of significantly lower interest/inadequate compensation on account of delay on the part of the builder in implementation of the project.

(e) Restricting the rights, title and interests of apartment allottees to the apartments being sold, and retaining the right to allot, sale or transfer any interests in the common areas and facilities as per their discretion.

(f) Fastening the liability for defaults, violations or breaches of any laws, bye laws, rules and regulations upon the apartment owners without admitting corresponding liability on the part of builder/developer.

(g) Non-disclosure of all the terms and conditions of sale to the prospective buyers at the stage of booking of apartments and taking booking amount from interested buyers without disclosing the terms and conditions of the Sale Agreement to be executed at a later stage."

(vii) That DG, to arrive at the aforesaid finding conducted a comparative study of the flat buyers agreements executed by such builders with their respective buyers and based on the commonalities aforesaid it was concluded that the same reinforces the presumption of "one follows the other" phenomenon; the DG further observed that though the various clauses of the agreements conveying same or similar intent were differently worded, the same could not be reached through independent actions of the various builders and thus concluded that contravention of the provisions of Sections 3(3)(a) and 3(3)(b) of the Act was made out.

(viii) That for establishing contravention of Section 3(3) read with Section 3(1) of the Act, some evidence of practice carried on or decision taken by the CREDAI which further results into price fixing, limiting and controlling provision of services etc. has to

be shown; in the present case the DG did not find any evidence

which is suggestive or indicative of any role played by CREDAI in providing its platform to the members for anti-competitive practices. In such a scenario, it was incumbent upon the DG to have gathered sufficient evidence in the light of the thresholds laid down in the Act.

(ix) The DG, de hors the platform of CREDAI for conducting the impugned practices, did not find any material other than the agreements executed between the builders and the buyers containing the common clauses to a varying degree.

(x) Such commonality, in the absence of any evidence to establish role of CREDAI or understanding, arrangement or action in concert between the individual enterprises which are arrayed as opposite parties, cannot be held to be in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act.

(xi) CCI itself after looking into the matter in great depth found no evidence to corroborate that CREDAI has provided any

platform, directly or indirectly to its members for indulging in any anti-competitive practices.

(xii) CREDAI had over 9000 members; there were other players in the real estate development market who were not associated with CREDAI.

(xiii) Since DG had not produced sufficient material on record wherefrom any concert amongst the players can be gleaned, it would be futile to examine the common practices to ascertain the contravention of the relevant provisions of the law.

(xiv) Though CREDAI does provide platform to real estate enterprises to meet and discuss issues of common interest and find common solutions to their problems to further the commercial interest of its members who are all builders/developers but DG did not find any evidence of any role played by CREDAI in providing its platform to the members for anti-competitive practices.

(xv) That a perusal of the Code of Conduct including the clauses relating to booking, agreement to sell and forfeiture also did not make out a case of contravention of the provisions of the Act.

Resultantly, CCI differed from the finding of the DG on issue of contravention of provisions of Sections 3(3)(a) and (b) of the Act and held that no sufficient evidence was available on record warranting a finding of contravention.

17. The senior counsel for the respondent no.18 on the basis of findings/reasons aforesaid of CCI contends that there is no scope of interference therewith under Article 226 of the Constitution of India. During the hearing, a copy of the order dated 29th April, 2011 of the CCI of dismissal of the earlier information submitted by the petitioner (Case No.7/2011) is also handed over.

18. The senior counsel for the respondent no.18 also draws attention to the prayer paragraph of the petition inter alia seeking restoration of the allotment of a flat in a project Tulip White in Sector-69, Gurgaon of the respondent no.2 Tulip and contends that the petitioner has been litigating in

that respect before foras/courts and the present petition is yet another steps in

the said direction. A summary of the common practices found by the DG and the conclusion of the DG thereon is also handed over to show that even DG has found variations from builder to builder and project to project and some of the practices being followed by only a few of the builders.

19. I tend to agree with the senior counsel for the respondent no.18 that irrespective of the legal question on which the hearing was commenced, there is no merit in the petition on the merits of its own facts. I have in fact asked the counsel for the petitioner that when several enterprises are carrying on the same business/enterprise, whether not owing to the peculiar features/factors of that business/enterprise common to all, there is bound to be a commonality in certain respect in the clauses of the contracts which such businesses/enterprises enter into with all those with whom they enter into contracts and whether such commonality which is inherent owing to the nature of business/enterprise can be called violation of the provisions of the Competition Act. Instance of vendors of fruits and vegetables is given and it is enquired, whether not all are bound to call their goods „fresh irrespective of whether in fact they are fresh or stale and whether by their said conduct they can be said to be in violation of the Act.

20. No proper reply to the said query is forthcoming save that the counsel for the petitioner draws attention to the paragraphs of the impugned order of CCI, after the paragraph where the CCI concludes that a finding of contravention of the Competition Act is not warranted. In the said paragraph,

CCI has clarified that its finding should not be taken as ignoring the hardships which the consumers of real estate face at the hands of developers of real estate and comments on the absence of a regulatory mechanism for the said sector and the need for redressal thereof by the policy makers and expresses hope of the Parliament bringing a suitable legislation therefor (and which has now been brought in the form of RERD Act).

21. I am unable to agree. Merely because CCI has made such observations, would not dilute the findings of CCI of there being no evidence of any agreement between the developers of real estate or of formation of cartels resulting directly or indirectly in determining the purchase or sale price or any anti-competitive practice.

22. The counsel for the petitioner, from the report of DG has not been able to show any evidence which the CCI in the impugned order has ignored

or which can be said to be showing anything contrary to the reasoning adopted by CCI in the impugned order.

23. The challenge in this petition is thus to the application by CCI of Section 3 of the Act to the facts of the case and the scope of this petition has to be confined to see whether the said application is in accordance with settled principles of law and interpretation of statutes and if it is found to be so, cannot be extended to judge the correctness of the conclusions drawn by CCI, an expert body comprising of members from several fields and which is the domain of an appeal and not exercise of jurisdiction under Article 226.

24. Section 3(1) to (3) of the Competition Act, relevant for our purpose

are as under:

"3. Anti-competitive agreements.-- (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons,

including cartels, engaged in identical or similar trade of goods or provision of services, which--

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

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

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

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

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

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

25. In my analysis, Section 3

A. Prohibits i) an enterprise; ii) an association of enterprises; iii) a

person; and, iv) an association of persons from entering into any agreement as specified in sub-section (1) thereof.

B. declares such an agreement to be void.

C. presumes i) such an agreement; or ii) „practice carried on ; or iii) „decision taken

by such associations engaged in identical or similar trade of goods or provision of services, if it

a) determines price
or
b) limits or controls
or
c) divides / allocates areas or types or customers
or
d) results in price rigging

to have an adverse effect on competition.

26. An agreement, in law, may be oral or in writing but requires a meeting of minds of the parties entering into agreement on all the essentials of the subject qua which they are entering into agreement so as to bind each other thereto and compel performance or to measure damages in lieu of performance. Such meeting of the minds, in the absence of a writing, has to be proved as a fact and without it being so proved, there cannot be said to be contravention of Section 3(1).

27. However, rarely is evidence available, even if applying test of preponderance of probabilities, to establish / prove that an agreement which is prohibited by law has taken place. Agreements prohibited by law are always shrouded in secrecy.

28. To take care of such an eventuality, Section 2(b) of the Act while defining „agreement , takes within its ambit "any arrangement" or "understanding" or "action in concert", even if arrived at informally and

even if not intended to be enforceable. Thus, an agreement within the meaning of Section 3(1) will be found if the action of parties are found to be in pursuance to some common intention, even if not in pursuance to an „agreement within the definition of Contract Act, 1872, but in pursuance to an „understanding or „arrangement . Conversely it follows that merely because two or more persons are doing similar or identical thing, will not find an agreement within the meaning of Section 3(1) unless some, if not all the way, meeting of their minds or common intention to do so is established.

29. Further, Section 3(1) does not prohibit „association or „agreement per se, as indeed it cannot. The agreements which are prohibited are those i) in respect of production, supply, distribution, storage, acquisition or control of goods and provision of services; and, ii) which causes or is likely to cause an appreciable adverse effect on competition.

30. „Appreciable adverse effect on competition , vide Section 3(3) is presumed from such agreement i) determining price; and, broadly, ii)

limiting or controlling availability of goods or services. Though the word „or is found to be missing from between categories (a) to (d) of sub-section (3) of Section 3 but in the context thereof, in my opinion has to be necessarily read. It is thus not as if only when all the clauses (a) to (d) are applicable, has the presumption to be drawn.

31. However Section 3(3) while providing so, besides to „agreement refers also to "practice carried on" or "decision taken". The word „decision again connotes meeting of minds of those engaged in identical or similar trade of goods or provision of services. The question which arises is,

whether the words "practice carried on" refers to a situation resulting even without meeting of minds. If that were to be so, then the second question which would arise is, whether a practice carried on by those engaged in same trade even without any meeting of minds to carry on such a practice would be covered. Section 2(m) defines a "practice" as including relating to the carrying on of any trade. However what is peculiar is that Section 3(3) which contains the words "practice carried on" is only raising a presumption as to what the same words in Section 3(1) mean. Section 3(3) by itself is neither prohibitory nor a voiding provision as Sections 3(1) and 3(2)

respectively are. Thus, the words "practice carried on" have to be understood as a practice of trade in pursuance to meeting of minds.

32. Seen in this light, in the absence of any evidence of meeting of minds between any two or more developers of real estate with an intention of causing an appreciable adverse effect on competition, there could be no violation of Section 3 as was complained/ informed of by the petitioner/informer. Mere formation of an association i.e. the respondent No.5 CREDAI, is not violation of Section 3, without it being further established that such an association was to or has resulted in appreciable adverse effect on competition. DG, which is an investigative agency of CCI and with whose findings/recommendations CCI, which has adjudicatory role is not bound, found such violations because of finding certain common practices followed by all the developers of real estate surveyed/examined by DG. CCI has however found such practices to be not a result of any common intention. CCI has further found such practices to be not having

any appreciable adverse effect on competition.

33. I find no error in such reasoning/logic/approach of CCI.

34. The seven common practices found by DG and as have been listed out hereinabove are found by me to be such which are inherent to the business/enterprise of real estate and/or real estate development. The transactions in real estate are governed by the Transfer of Property Act, 1882 and the Apartment Acts of different States besides by the other laws which vary from state to state and within the state vary qua different type/category of real estate. The principle of caveat emptor i.e. buyer alone is responsible for checking the quality and suitability and title of the property also applies to real estate transactions. The development/construction of real estate is governed by separate set of state and municipal laws, besides the Master Plan, and norms whereof keep on changing from time to time enabling further construction/expansion of construction on the land. In fact during the hearing I have drawn the attention of the counsel for the petitioner to the decision of HUDA in the recent past of increasing the FAR and which has resulted in the land, of which development was complete, also becoming capable of being built on further and enquired whether not owing to such happenings, there is bound to be a clause in the agreement reserving the right of further development/construction. Merely because all carrying on the same business are following certain practices, cannot label the said practices

which are inherent to the nature and needs and contingency of the trade/enterprise, a violation of the Act and if it were to be held so, I wonder as to how the various developers of real estate would draft the contracts of

sale of real estate without providing for the various eventualities which are common to sale and purchase of real estate. In fact when individuals not in the business/enterprise of real estate also develop their own properties and sell part of the development, they also are known to have same clauses as found by DG, in their agreements.

35. From my law practice of over 25 years, largely in the field of real estate also, I can say that a large number of developers of real estate, to save legal cost, merely copy paste either the agreements of their earlier real estate projects or the agreements as in vogue in the market. This is not to say that the Advisors in the field of real estate do not themselves follow the practice of cut and paste and which in my practical experience, is responsible to a large extent for the commonality found by the DG and from which commonality DG presumed contravention of the provisions of the Act.

36. Moreover, the counsel for the petitioner has been unable to tell how the seven practises determine price or limit or control availability of real estate.

37. No error is thus found in the impugned order of the CCI. The petition is dismissed.

38. In this view of the matter, need to render finding on the maintainability of appeal against the order or on the exclusive jurisdiction of RERA established under the RERD Act over the subject matter of the grievance is not felt.

No costs.

RAJIV SAHAI ENDLAW, J.

MAY 16, 2016 „pp (corrected & released on 21st June, 2016)