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CompLR

IN THE HIGH COURT OF BOMBAY

Writ Petition Nos. 8594, 8596 of 2017, Writ Petition No. 7164 of 2017, Civil Application (Stamp) No. 17736 of 2017 in Writ Petition No. 7164 of 2017 and Writ Petition Nos. 7172, 7173 of 2017

Decided On: 21.09.2017

Appellants: **Vodafone India Limited and Ors.**
Vs.
Respondent: **The Competition Commission of India and Ors.**

Hon'ble Judges/Coram:
Anoop V. Mohta and Bharati H. Dangre, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Iqbal M. Chagla, Senior Advocate, Pallavi Shroff, Aashish Gupta, Ameya Gokhale, Meghana Rajadhyaksha, Vaibhav Singh, Sukriti Jaiswal i/by Shardul Amarchand Mangaldas & Co.

For Respondents/Defendant: Shrihari Aney, Senior Advocate, Prateek Pai and Ritika Gadoya i/by Key Stone Partners

Case Note:
Anti-competitive activity - Enquiry - Jurisdiction - Sections 26(1), 19 of the Competition Act, 2002 - Whether Petitioners ("Service Providers") challenge relating to impugned order/direction passed by Commission, pending the Complaints under Section 19(1) of Competition Act, by Informants/Complainants/ Respondents, thereby directing an inquiry against them was liable to be allowed? Held, in view of provisions of TRAI Act and Authority so provided, their obligations and being of regulatory Authority in telecom sector, no other Authority and/or Act took away and/or override the power and the Authority of the specified Authority and its jurisdiction to deal and decide the aspect of "Quality of Service", in telecommunication service sectors and the respective obligations of service providers. Case was made out by Petitioners to interfere with impugned majority decision/ orders. Impugned order, in no way, could be said to be purely an administrative order. Judicial review, if case was made out, was permissible even against orders passed by the Authority like the Commission, specifically in facts and circumstances of case. Substantial client/consumer base was in State of Maharashtra. Respondents/ service providers Officers' were at Mumbai. Affidavits and averments and documents so placed on record, showed that, various correspondences/the documents had been exchanged by and between the parties, within jurisdiction of Maharashtra State including Mumbai. All writ petitions were maintainable and entertainable. Present Court had territorial jurisdiction to deal and decide the challenges so raised against impugned order (majority decision) passed by Competition Commission of India (CCI) under

provisions of Section 26(1) of the Competition Act, 2002 and all consequential actions/notices of the Director General under Section 41 of the Competition Act arising out of it. Telecommunication Sector/Industry/Market was governed, regulated, controlled and developed by Authorities under Telegraph Act, Telecom Regulatory Authority of India Act (TRAI Act) and related Regulations, Rules, Circulars, including all government policies. All the "parties", "persons", "stakeholders", "service providers", "consumers" and "enterprise" were bound by statutory agreements/contracts, apart from related policy, usage, custom, practice so announced by Government/Authority, from time to time. Question of interpretation or clarification of any "contract clauses", "unified license" "interconnection agreements", "quality of service regulations", "rights and obligations of TSP between and related to above provisions", were to be settled by the Authorities/TDSAT and not by Authorities under Competition Act. Concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of TRAI Act and the policy so declared, were matters within jurisdiction of Authority/TDSAT under TRAI Act only. Competition Act and TRAI Ac were independent statutes. Statutory authorities under the respective Acts were to discharge their power and jurisdiction in light of object, for which they were established. There was no conflict of jurisdiction to be exercised by them. But Competition Act itself was not sufficient to decide and deal with the issues, arising out of provisions of the TRAI Act and contract conditions, under the Regulations. Competition Act governed anti-competitive agreements and its effect - the issues about "abuse of dominant position and combinations". It could not be used and utilized to interpret contract conditions/policies of telecom Sector/Industry/Market, arising out of Telegraph Act and TRAI Act. Authority under Competition Act had no jurisdiction to decide and deal with various statutory agreements, contracts, including the rival rights/obligations, of its own. Every aspects of development of telecommunication market were to be regulated and controlled by concerned Department/Government, based upon policy so declared from time to time, keeping in mind need and technology, under TRAI Act. Impugned order passed by Competition Commission of India (CCI) under provisions of Section 26(1) of Competition Act, 2002 and all consequential actions/notices of Director General under Section 41 of Competition Act proceeded on wrong presumption of law and usurpation of jurisdiction, unless contract agreements, terms and clauses and/or the related issues were settled by Authority under TRAI Act, there was no question to initiating any proceedings under Competition Act as contracts/agreements go to the root of alleged controversy, even under Competition Act. Authority like the Commission and/or Director General, had no power to deal and decide stated breaches including of "delay", "denial", and "congestion" of POIs unless settled finally by Authorities/TDSAT under TRAI Act. Therefore, there was no question to initiate any inquiry and investigations under Section 26(1) of Competition Act. It was without jurisdiction. Even at time of passing of final order, Commission and the Authority, would not be in a position to deal with contractual terms and conditions and/or any breaches. Un-cleared and vague information were not sufficient to initiate inquiry and/or investigation under Competition Act, unless governing law and policy of the

concerned "market" had clearly defined respective rights and obligations of concerned parties/persons. Impugned order and all consequential actions/notices of Director General under Competition Act, therefore, in present facts and circumstances, were not mere "administrative directions". Every majority decision could not be termed as "cartelisation". Even ex facie service providers and its Association COAI, had not committed any breaches of any provisions of Competition Act. Impugned order was set aside. Petitions allowed.

JUDGMENT

Anoop V. Mohta, J.

1. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2 . The Petitioners ("Service Providers") have challenged common impugned order/direction dated 21 April 2017 passed by the Competition Commission of India (CCI) ("the Commission") under Section 26(1) of the Competition Act, 2002 ("Competition Act"), pending the Complaints under Section 19(1) of the same Act, by the informants/Complainants/Respondents, thereby directing an inquiry against them. The consequent show cause notices issued by the Director General ("DG"), are also challenged.

3. We are disposing of all these Writ Petitions finally, by consent of the parties, by this common Judgment/Order as the issues are common and they are based on identical facts and position, so the related laws, except few individual details.

4. The Complaints before the Commission (Case No. 81 of 2016 and Case No. 83 of 2016) have been filed by CA Ranjan Sardana and Mr. Kantilal Ambalal Puj, against the Petitioners (Opposite Parties (OPs), Cellular Operators Association of India (COAI), OP-1, Vodafone India Limited (VIL), OP-2, Bharti Airtel Limited (BAL), OP-3 Idea Cellular Limited (ICL), OP-4, Telenor (India) Communications Private Limited (TICPL), OP-5, Videocon Telecommunications Private Limited (VTPL), OP-6, Aircel Limited (AL), OP-7, (TSPs) and Reliance Jio Infocomm Limited ("RJIL"), OP-8 Reliance Jio Infocomm Limited ("RJIL") (Respondent) (Case No. 95 of 2016) has filed similar such information against the TSPS/OPS.

5. The allegations against all the Petitioners-TSPs, are of "cartelisation" by "action in concert" by delaying and denying adequate Point of Interconnections (POIs), even during the test phase/period, thereby attempting and thwarting the RJIL's new project/entry in the telecom market, as that action resulted into failures of calls of RJIL, on others Networks.

Operative part of impugned order-

6. The operative part/directions of impugned order dated 21 April 2017 is as under-

By Majority-

> "24 In view of the forgoing, the Commission directs the DG to cause an investigation into the matter under the provisions of Section 26(1) of the Act. Considering the substantial similarity of allegations in all the informations, the Commission clubs them in terms of the proviso to Section 26(1) of the Act read with Regulation 27 of the

Competition Commission of India (General) Regulations, 2009. The DG is directed to complete the investigation and submit investigation report within a period of 60 days from the date of receipt of this Order. If the DG finds contravention, he shall also investigate the role of the persons who at the time of such contravention were in-charge of the responsible for the conduct of the business of the contravening entity/entities. During the course of investigation, if involvement of any other party is found, DG shall investigate the conduct of such other parties also who may have indulged in the said contravention. In case the DG finds the conduct of the Opposite Parties in violation of the Act, the DG shall also investigate the role of the persons who were responsible for the conduct of the Opposite Parties so as to proceed against them in accordance with Section 48 of the Act.

The Commission makes it clear that nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

The Secretary is directed to send a copy of this order to the DG, along with the informations and other submissions filed by the parties.

By Minority-

"28 In view of the forgoing, we are of the considered opinion that on the basis of the material available with the Commission, it is difficult to say that there is a prima facie case to hold that the ITOs OP2, OP5 and OP7 alongwith COAI had acted in a concerted manner to restrict RJIL's entry into the market or to limit or control supply, technical development of provisions of services provided by RJIL. Hence, in our humble opinion, the instant cases ought to be closed under Section 26(2) of the Act.

Details of individual parties-

7. The COAI is a premier Telecom industry association in the telecom Sector. It is a society registered under the Societies Registration Act, 1860 with the Registrar of Societies at Delhi in July 1996. It is an important interface between its member TSPs and the Government, regulators policy and opinion makers, financial institutions and technical bodies for formulation of policies and regulations and addressing the common problems of the telecom sector. Mr. C.A. Ranjan Sardana and Mr. Kantilal Ambalal Puj (informants) are the public spirited person and subscribers of telecom Service Provider RJIL. The Petitioners are the recognized service providers/operators in the Telecom market. CCI is an autonomous statutory authority established under Section 7 of the Competition Act.

The Competition Act.

8. The object and purpose of the Competition Act is to prevent the practice having adverse affect on competition, to promote and sustain the competition in markets; to protect the interest of the consumers and to ensure freedom of trade. Various regulations and rules are framed under it. Its importance is recognized at national

and international market by all the concerned. The "freedom of trade" is also recognized concept revolving around the Constitution of India. Any "Commercial/Business/Service activities" and/or "practice" or "trade" "Custom and Wages" of any nature, need to be based upon the "contract" and "agreement" within the framework of governing laws of the respective market. "Every person" and/or "enterprise", "consumer", needs to work in the "relevant market", within the ambit of laws. There is no issue that, different statutory/regulatory authorities/tribunals are to regulate and control its market subjects, within the defined power and jurisdiction. The authorities/tribunals under the Competition Act, being fact finding authority in nature, is no exception to it.

9. Sections of Competition Act-

Section 2- Definitions-

"2(b) "agreement" includes any arrangement or understanding or action in concert,-

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;"

"2(c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;"

"2(g) "Director General" means the Director-General appointed under sub-section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section;"

"2(m) "practice" includes any practice relating to the carrying on of any trade by a person or an enterprise;"

"2(u) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;"

"Section 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." .....

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

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

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

(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 subsection (1), the powers and functions of the Commission shall include the powers and functions specified in subsections (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.

Section 21A- Reference by Commission.- (1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

Provided that the Commission, may, suo motu, make such a reference to the statutory authority.

(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefore on the issues referred to in the said opinion.]

Section 26 - Procedure for inquiry under Section 19.-(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received 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 a 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.

(5) If the report of the Director General referred to in subsection (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report 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 subsection (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 36- Power of Commission to regulate its own procedure.-

> (1) .....
>
> (2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-
>
> > (a) summoning and enforcing the attendance of any person and examining him on oath;
> >
> > (b) requiring the discovery and production of documents;
> >
> > (c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses or documents;

(e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1972), any public record or document or copy of such record or document from any office.

Section 41 - Director General to investigate contraventions. - (1)The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission under sub-section (2) of section 36.

(3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

Explanation.--For the purposes of this section,

(a) the words "the Central Government" under section 240 of the Companies Act, 1956(1 of 1956) shall be construed as "the Commission";

(b) the word "Magistrate" under section 240A of the Companies Act, 1956(1 of 1956) shall be construed as "the Chief Metropolitan Magistrate, Delhi"]

Section 45 - Penalty for offences in relation to furnishing of information.-(1) Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information,-

(a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or

(b) omits to state any material fact knowing it to be material; or

(c) willfully alters, suppresses or destroys any document which is required to be furnished as aforesaid,

such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission.]

(2) Without prejudice to the provisions of sub-section (1), the Commission may also pass such other order as it deems fit.

Section 60. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Section 61 - Exclusion of jurisdiction of civil courts-No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the [Commission or the Appellate Tribunal] is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Section 62 - Application of other laws not barred.-The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

10. The Competition Commission of India (General) Regulations, 2009-

"Rule 17. Preliminary conference - (1) The Commission may, if it deems necessary, call for a preliminary conference to form an opinion whether a prima facie case exists.

(2) The Commission may invite the information provider and such other person as is necessary for the preliminary conference.

(3) A preliminary conference need not follow formal rules of procedure."

"Rule 18. Issue of direction to cause investigation on prima facie case. - (1) Where the Commission is of the opinion that a prima facie case exists, the Secretary shall convey the directions of the commission [within seven days] to the Director General to investigate the matter.

(2) A direction of investigation to the Director General shall be deemed to be the commencement of an inquiry under section 26 of the Act."

The scope and authority of the Commission-

11. The "Commission" established under Sub-section (1) of Section 7 has been entrusted with duties, power and functions to deal with the issues like eliminating such practices, having adverse effect on the competition, to promote and sustain competition and to Protect the interest of the consumer and ensure freedom of trade, carried on by other participants in market, in India. For that, Sections 7 and 19 contemplate power of the Commission to inquire into alleged contravention of the provisions contained in Sub-section (1) of Section 3 or Sub-section (1) of Section 4, relating to Anti Competitive Agreement and abuse of dominant position, keeping in mind various elements for determining adverse effect on competition in the relevant markets. On the basis of own motion and/or on a receipt of information from any person/consumer, the Competition Commission of India (General) Regulations 2009 ("the Regulations") and its relevant clauses, provide the procedure to be followed by the Commission. The facts, documents, materials, affidavits, evidence in support with details of stated contravention of the provisions of the Act and reliefs sought, should be complete and duly verified by the informant. As per the procedure of scrutiny contents of information are required to be verified by the authority/secretary. The Commission has power to join multiple information and/or to amend the information. The Commission shall maintain the confidentiality of the identity of the informant and the documents contained, except the public documents.

12. The regulations are applicable for the Director-General (DG), so contemplated under Section 41(2) and 36(2) read with Section 240 and 240A of the Companies

Act, 1956. The elements which are required to determine as to whether the direct or indirect agreement has an adverse effect on the Competition under Section 3 and/or 4. The elements so provided under Sections 3, 4 read with Section 19(3) of the Act are required to be noted and/or kept in mind by the Commission at the time of passing "prima facie opinion" for directing the inquiry, as contemplated under Section 19 read with Section 26(1) of the Competition Act. This is in the background that the Section nowhere contemplates to give personal hearing to the informant or to the affected person and/or any other person. However, the scheme of the Act and the regulations so read, including the Rules, the Commission in its discretion may call any such person for rendering assistance and/or to produce the record/material for arriving at, even the prima facie opinion. Therefore, there is no prohibition/restriction on the Commission from not calling material documents and assistance from any person. The Commission, therefore, has discretionary power and/or power to call for material documents, affidavits, even by permitting them to file amended information, materials, data and details. The Commission also has power, in view of the Regulations to hold conferences with the concerned person/parties including their advocates/authorized person.

13. The direction under Section 26(1), after formation of the prima facie opinion to cause and investigate into the matter is to the DG, which is an another Authority under the Competition Act. Both are quasi-judicial Authorities.

14. If the Commission is of the opinion that no prima facie case exists, it may close the case as contemplated under Section 26(2) of the Competition Act. The aggrieved person and/or parties, including informant may invoke the provisions of Appeal under Section 53(A) of the Competition Act. The Appeal, against the directions so issued under Section 26(1) on the basis of prima facie opinion by the Commission is not maintainable. However, the aggrieved party cannot be remediless. Therefore, the Writ Petition, as an alternative and effective remedy is only available.

15. As per the scheme of the Competition Act, the Director General is empowered to make further investigation, as contemplated under Section 26(3) in respect of reference made by the Central/State/Statutory Authority. The Director General's power and authority has been elaborated in Section 41(2) read with Section 37 of the Act and the Regulations so referred above. The power so provided to the DG includes the power to record the evidence on oath, including permission to cross-examine the informant or claimant. Therefore, based upon the prima facie opinion given by the Commission, the DG is empowered to commence further inquiry by even calling witnesses with documents and/or material. The power of DG and the nature of inquiry and trial, so permitted, on various aspects is even more than the power of the Commission. The Commission, as noted above, is not required to give show cause notice and/or hearing to the informant and the aggrieved party. Whereas, the DG is empowered to call the witnesses and permit the parties to file affidavit on oath and give opportunity to the other side to cross-examine the same. Thus, effect is that the investigation by the DG partakes a trial and inquiry like a quasi-judicial body, on the basis of prima facie opinion. The DG and/or the Commission is empowered to add and/or permit to add more information and material. The Commission is empowered to direct the DG to make further investigation. Therefore, even pending the final order by CCI, the DG may be directed and required to investigate and inquire into the affairs so referred. The Commission/DG in view of other provisions of Section 26, is required to proceed with the matter for further trial, which may result into the final order in favour of the informant and against the stated enterprise or vice versa. The final adverse order of Commission is subject to Appeal. It may further lead to

claiming the compensation by the informant and/or claimant, as provided under Section 53-N of the Act. We have to consider, therefore, the impact of initiation of inquiry by the Commission at this stage itself, if the case is made out.

16. In the wake of globalisation and keeping in view the Economic Development of the country, responding to opening of its economy and resorting to liberalization, need was felt to enact a law ensuring fair competition in India by prohibiting trade practices which cause an appreciable adverse effect of competition within markets in India and for establishment of a quasi judicial body in the form of Competition Commission of India which would discharge the duty of curbing negative aspects of competition, the Competition Act, was enacted by the Parliament.

Telecommunication Services-

17. We are dealing with the telecom market and its dealings, based upon the contract between the service providers, in question. The telecom/mobile market is under the control/supervision and the guidance of a Telecom Regulatory Authority of India, ("TRAI") established under the Telecom Regulatory Authority of India and the Rules and Regulations, so made thereunder. They are also governed by license agreements to provide such telephone/telecommunication services to the customers/subscribers, in pursuance to the statutory agreement and the licenses are so issued under Section 4 of the Telephone Act.

18. The Telecom Regulatory Authority of India Act, 1997.

> Section-11 Functions of Authority-[(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-
>
> > (a) make recommendations, either suo moto or on a request from the licensor, on the following matters, namely:-
> >
> > > (i) to (iii) ... .
> > >
> > > (iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
> > >
> > > (v) .....
> >
> > (b) discharge the following functions, namely:-
> >
> > > (i) ensure compliance of terms and conditions of licence;
> > >
> > > (ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;
> > >
> > > (iii) ensure technical compatibility and effective interconnection between different service providers;
> > >
> > > (iv) regulate arrangement amongst service providers of sharing their revenue derived from providing

telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Section 14 - Establishment of Appellate Tribunal-The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to-

(a) adjudicate any dispute-

(i) between a licensor and a licensee;

(ii) between two or more service providers;

(iii) between a service provider and a group of consumers:

Provided that nothing in this clause shall apply in respect of matters relating to-

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969

(54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) the dispute between telegraph authority and any other person referred to in sub-section (1) of section 7-B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

Section 16 - Procedure and powers of Appellate Tribunal- (1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

(2) The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document, from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing an application for default or deciding it, ex prate;

(h) setting aside any order of dismissal of any application for default or any order passed by it, ex prate; and

(i) any other matter which may be prescribed.

(3) Every proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a Civil Court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

Telecommunication laws-binds all-

19. The relevant licences-

Unified License (UL)- The UL issued by Department of Telecommunications, Government of India ("DoT") for providing telecommunication services on a pan India basis. License under Section 4 of Indian Telegraph Act, 1885 therefore they become Telecom Service Provider ("TSP"). Relevant clauses of the UL (UASL) are-

(a) Clause 16 of Part - I: Other Conditions: The Licensee is bound by all TRAI Orders/Directions/Regulations;

(b) Clause 27 of Part - I: Network Interconnection, particularly, Clause 27.4, which requires a Licensee to interconnect subject to compliance with prevailing regulations and determinations issued by TRAI, and contemplates the execution of ICAs to establish interconnection in sufficient capacity and number to enable transmission and reception of messages between the interconnected systems;

(c) Clause 29 of Part - I, requiring a Licensee to ensure QoS Standards as may be prescribed by DoT/TRAI. Specifically, Clause 29.4, empowers DoT/TRAI to evaluate Quality of Service parameters prior to grant of permission for commencement of services; and

(d) Clause 6.2 of Part - II, which requires a licensee to provide interconnection to all TSPs to ensure that calls are completed to all destinations.

20. Inter-connection Agreements-

Similar separate Interconnection Agreements (ICAs) are executed between the parties. The relevant clauses of ICAs are as under:-

Clause 2.4: "...RJIL will be required to establish Interconnection at the Switches of IDEA as listed in Schedule 1. In addition to these specified locations, the Parties may further agree to interconnect at an additional location(s) as mutually agreed to by and between the Parties during the term of this Agreement..."

(emphasis supplied)

Clause 5.7: "...At the end of two years, the Parties shall convert the total E1s existing at the PoIs into one-way E1s for the Outgoing Traffic of each Party on the basis of the traffic ratio existing 3 months prior to the expiry of the initial period of two years. These E1s shall thereafter be continued as one-way E1s for the remaining term of the Agreement at the cost of RJIL..."

Clause 9.1: "...A minimum notice of 4 weeks has to be given by either Party for augmentations of Interconnect Links..."

Clause 9.2: "...Augmentation shall be completed within 90 days of receipt of requisite charges specified in Schedule 2 from RJIL..."

Clause 9.3: "...Any request for augmentation of capacity shall be in writing with Performance reports as prescribed in Schedule 4..."

Clause 9.4: "...Traffic measurements for 7 days shall be taken by both the Parties during agreed busy route hours, every 6 months after commencement of traffic at the POIs to determine further capacity requirements..."

Clause 9.5: "...RJIL shall provide a forecast in writing in advance for its requirement of port capacity for Telephony Traffic for the next 6 months to enable IDEA to dimension the required capacity in its network..."

21. The relevant clauses of the ICAs are-

a) Clause 2 makes clear that the ICA will be applicable and in effect from the date of execution;

b) Clause 2.10 makes clear that the interconnection facilities at each POI will conform to the applicable QoS standards prescribed by TRAI;

c) Clause 3 - Terms and Amendments - again makes clear that the ICA becomes applicable, effective and operational from the date of execution and is valid until both parties hold a valid licence for providing access services;

d) Clause 4 - Applicability and Providing Services - reiterates that the ICA becomes applicable on signing and is subject to the terms and conditions of the telecom licence;

e) Clause 5.2 specifically provides that for the initial two years, provision and augmentation of transmission links shall be at the cost of RJIL;

f) Clause 5.7 contemplates conversion of two-way E1s into one-way E1s only after two years, which in other words mean that for two years all E1s must be two-way E1s;

g) Clause 9 provides modalities for enhancement of ports; and

h) Clause 10.7 again reiterates that Idea is bound to maintain QoS standards prescribed by TRAI.

22. Quality of Service Regulations, 2009-

Quality of Service Regulations ("QoS Regulations, 2009") issued by TRAI under Section 36 read with Section 11 of the TRAI Act. Clause 5(iv) and Clause 14, as relevant, are reproduced as under-

a) Clause 5(iv) prescribes that the congestion at each individual POI cannot exceed 0.5% over a period of one month (no more than 5 out of every 1000 calls can fail).

b) Clause 14 provides that in the event of any doubt regarding interpretation of any of the provisions of the QoS regulations, the view of the TRAI shall be final and binding.

23. The relevant clauses of the Standards of Quality of Service of Basic Telephone Service (wireline) and Cellular Mobile Telephone Service Regulations, 2009 includes, Cellular Mobile Telephone Services. The term "Point of Interconnection (POI)", "Quality of Service (QoS)", "Service Provider, Telecommunication services" have been defined in the Regulations. The term POI congestion is also described in 3.12

and 4.7 of POI.

24. Being the member of the Association of the parties, including the Petitioners and the Respondents, the service providers are aware of the exclusive provisions and power of the Authority under the TRAI Act and Regulations. Therefore, any subject related to augmentation of POI and providing NLD services, cannot falls within the ambit of any authority under any other Act, including the Competition Act, in question.

25. Before adverting to the facts in hand and the law applicable to the facts, we would like to reproduce the existing regime governing the telecommunication industry.

(i) To protect the interest of the service providers and consumers of the Telecom Sector and to permit and ensure technical compatibility and effective inter relationship between different service providers and for ensuring compliance of licence conditions by all the service providers, Telecom Regulatory Authority of India (TRAI) was constituted under the Telecom Regulatory Act of 1998. The TRAI is recommendatory/advisory and regulatory body, discharging the functions envisaged under sub-section (1) of Section 11 of the Act. The TRAI inter-alia is charged with ensuring fair competition amongst service providers including fixing the terms and conditions of entire activity between service provides and laying down the standards of quality of service (QOS) to be provided by service provider. In exercise of its function TRAI has issued detail Regulations for Telecom Services including fixation and revision of tariffs (Tariff Order), fixation of inter connect usage charges (IUC), prescription of quality of service standards etc.

(ii) The Telecom Regulators which include the petitioners namely Idea Cellular, Bharati Airtel, Vodafone Ltd. as well as the respondent Reliance Jio Infocom provides Telecommunication Access Service and are PAN India Telecom Service Providers. The Service Providers are governed by the Cellular Mobile Telephone Service (CMTS)/Unified Access Service Licence (UASL) issued by Tele Communication Department, Government of India under Section 4 of the Indian Telegraph Act.

(iii) The Central Government has exclusive privilege of establishing, maintaining and working telegraphs under the Indian Telegraphs Act and the Central Government is authorised to grant licence on such terms and conditions and in consideration of such payment as it thinks fit to any person to establish, maintain or work as telegraph within any part of the country. By virtue of Section 4 of the Indian Telegraph Act a service provider is duty bound to enter into a licence agreement with the former for unified licence, with authorisation for provision of services, as per terms and conditions prescribed in the Schedule. As a condition of the said licence the licensee agrees and unequivocally undertakes to fully comply with terms and conditions stipulated in the licence agreement without any deviation or reservation of any kind. The licence is governed by the provisions of Indian Telegraph Act, the Indian Wireless Telegraphy Act, 1933 and TRAI Act and the Information Technology Act, 2000 ("IT Act") as modified or regulated from time to time.

As per clause 27.4 of part I of the Schedule to the unified licence, the licensee is duty bound to interconnect with other Telecom Service Providers on the Points of interconnection (POI) subject to compliance of regulation/directions issued by the TRAI. The interconnection agreement inter-alia provides for the following clauses:-

a) To meet all reasonable demand for the transmission and reception of messages between the interconnect systems;

b) To establish and maintain such one or more Points of interconnect as are reasonably required and are of sufficient capacity and in sufficient numbers to enable transmission and reception of the messages by means of Applicable Systems;

c) To connect and keep connected, to the Applicable Systems;

Some of other clauses of the interconnection agreement are enumerated below:-

A minimum Four weeks written notice has to be given by either party for augmentation of Interconnect Links;

Augmentation shall be completed within 90 days of receipt of requisite charges specified in Schedule.

Either party shall provide a forecast in writing, in advance for its requirements of port capacity for "Telephony Traffic" for the next 6 months to enable the other Party to dimension the required capacity in its network.

The Interconnection tests for each and every interface will be carried out by mutual arrangement between signatories of the agreement.

By virtue of the licence, the licencee is obligated to ensure quality of service as prescribed by the licensor or TRAI and failure on their part to adhere to the quality of service stipulations by TRAI, licensor is liable to be treated for breach of terms and conditions of licence.

In order to render effective services, it is mandatory for the licensee to interconnect/provide points of interconnection to all eligible telecom service providers to ensure that calls are completed to all destinations and interconnection agreement is entered into between the different service providers which mandates each of the party to the agreement to provide to the other, interconnection traffic carriage and all the technical and operational quality service and time lines i.e., the equivalent to that which the party provides to itself. The interconnection agreement separately entered into different service providers, is based on the format prescribed in the Telecommunication Interconnection (Reference Interconnect Offer) Regulation 2002.

Provisions of points of interconnect is the pivotal point around the present litigation.

26. On 7 June 2005, the direction was issued under Section 13 read with sub-clause (i), (ii), (iii), (iv) and (v) of sub-clause (b) of Section 11 of the TRAI Act which provides as follows:-

"In exercise of the powers vested in it under section 13 read with section 11(1)(b)(i), (ii), (iii), (iv) and (v) of the Telecom Regulatory Authority of India Act, 1997 and in order to ensure compliance of terms and conditions of licence and effective interconnection between service providers and to protect consumer interest, the Authority hereby directs all service providers to provide interconnection on the request of the interconnection seeker within 90 days of the applicable payments made by the interconnection seeker. Further there is a direction issued by the Government of India, Ministry of Telecommunication dated 29th August, 2005 by which directions have been issued to provide data of subscribers in the prescribed format."

Note is also required to be taken of certain terms used in the agreement.

Points of Interconnection:- (POI) are those points between two network operators which allow voice call originating from the work of one operator to terminate on the network by other operator.

Special Identity Module (SIM card) which is fitted into mobile station after is the mobile station can be activated to make or receive telephone calls.

Subscriber: Means any personal or legal entity which subscribe service from the licensee.

27. It is clear, therefore, taking overall view of above provisions, clauses and the related documents including notifications and circulars, the TRAI has been monitoring the quality of services laid down under the TRAI Regulations to achieve the quality of services, and apart from technology and capacity subject to the region/area, it is required to take the note of network design, the projected traffic and consumer base. This includes, the act of network elements, the service repair and the service level management of all existing and new customers which requires constant attention and continuous monitoring. The Authority, is therefore, required to review the existing service parameters, considering the emerging technology, new services and requirements, apart from setting standards and designing of network. There is ample material on record of the stakeholders including the Petitioners and the Respondents service providers that they have been endeavouring and meeting to develop the telecom sector in the interest of public and consumers. The crux is, the TRAI is the authority under TRAI Act and regulates the quality of service and deal with its every aspects, keeping in mind the competitive market therefore, it is necessary for the TRAI to take into account the interest of the existing providers and the new competitors and also the interest of the consumers. The authority is therefore, required to consider and keep in mind the marketing strategy of the service providers, existing or new, in the interest of the consumers and the market itself. The balance needs to be struck by the Authority, by keeping constant monitoring and making rules and regulations and implementing them effectively.

28. Therefore, taking overall view of the provisions of the TRAI Act and the authority so provided, keeping in mind their obligations and being of regulatory authority in the telecom sector, no other authority and/or Act takes away and/or override the power and the authority of the specified authority and its jurisdiction to deal and decide the aspect of "Quality of Service", in the telecommunication service sectors and the respective obligations of service providers.

Restricted bundle of facts to understand the controversy and to decide the Writ Petitions (Noted from Idea Petition)-

29. By notification dated 7 June 2005, TRAI issued directions under Section 13 read with Section 11 of TRAI Act to all the Service Providers to provide interconnection on the request of the interconnection seeker within 90 days of the applicable payments made by the interconnection seeker. The DoT clarified on 25 August 2005 that test subscribers may include business partners and employees only. TRAI issued the standard of quality of service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations 2009 ("QOS Regulations"), prescribed the quality of service parameters to be maintained with all the TSPs (Telephone Service Providers). Rule 3(1)(v) mandates that the point of interconnection (POI) congestion should not exceed 0.5% on an average in a month. DoT provides various telecommunication licenses (unified license). RJIL is granted license for 22 circles/areas in India. As per the unified license terms all the TSPs executed interconnection Agreement. RJIL executed IC Agreement with various TSPs including Bharti Airtel Limited (Airtel), IDEA Cellular Limited (Idea), Vodafone India Limitec (Vodafone). It is specified that each TSPs is required to meet "reasonable" demands for POIs from each other.

30. The COAI on 11 December 2014 itself in response to TRAI's consultation paper dated 19 November 2014 on Interconnection Usage Charges (IUC) suggested the methodology of computation of IUC based on international standards. On 23 February 2015, the TRAI vide Telecommunication Interconnect Usage Charges (Eleventh) Amendment Regulations, 2015 fixed IUC for wire line to wireless at 0 paise and for wireless to wireless at 0.14 paise per minute with effect from 1 March 2015. The Petitioners/Respondents RJIL entered into interconnection agreements pursuant to their respective licences.

31. On 22 December 2015, RJIL intimated TRAI & DoT about commencement of test launch. On 18 January 2016, RJIL's letter to Airtel requesting augmentation of POIs. On 21 January 2016, Airtel's reply to RJIL's letter dated 18 January 2016, undertaking augmentation of PoIs at 70% utilization. On 7 April 2016, RJIL addressed letter to Idea requesting immediate augmentation of POIs. In May-June 2016, call failures were observed during test phase due to inadequate POIs allocation by ITO's. On 21 June 2016, RJIL issued a letter to the Petitioner informing them that:-

> "...RJIL is currently conducting test trials of its services before its commercial launch..." and that "...RJIL, on reasonable grounds, is expecting over 100 million subscribers in the first year post launch of services. This combined with the initial pent-up demand for services may result in upwards or 25 million subscribers coming on the network within the first quarter post launch. In order to help provide seamless connectivity to the targeted subscribers, RJIL will require sufficient interconnect capacity for inter-operator traffic at the Points of Interconnection ("POIs")..."

32. RJIL provided a forecast for POIs based on inter alia an assumption of "...an average call duration of 54 seconds...": 3,281 POIs (i.e. 2,586 Access POIs and 695 NLD POIs) for initial scenario of 22 million subscribers ("...for which number series is already allotted...") expected in the first quarter after launch. "Immediate demand" for POIs; Demand for 7,056 POIs (i.e. 5,703 Access POIs and 1,353 NLD POIs) for 5(million subscribers at the end of 3 months; Demand for 9,064 POIs (i.e. 7,326 Access POIs and 1,738 NLD POIs) for 75 million subscribers at the end of 6 months; and Demand for 10,070 POIs (i.e. 8,140 Access POIs and 1,930 NLD POIs) for 10(million subscribers at the end of 9 months. RJIL asked the Petitioner (Idea Cellular) to treat its letter as a "firm demand". The similar demands were made by other

providers.

33. On 13 July 2016, Voda's reply to RJIL's Letter dated 21 June 2016, (5 July 16, 8 July 16, 9 July 16, 11 July 16 & 12 July 16) stating that "subject to technical feasibility, we endeavor to complete the augmentation in the most expeditious manner." On 13 July 2016, Airtel's reply to RJIL's letter dated 21 June 16, (5 July 16, 8 July 16, 9 July 16, 11 July 16 and 12 July 16) for the first time stating that relevant circle teams had been advised for argumentation of POIs. On 14 July 2016, RJIL issued a letter to the TRAI and the DoT stating that the POIs provided by the Petitioner and others were substantially inadequate and leading to congestion in all circles. Accordingly, RJIL requested:-

> "...the Authority to immediately intervene and instruct these service providers, namely Airtel, Idea, Vodafone, Aircel and Tata to augment the POI E1 capacities as per the firm demands made by RJIL..."

34. On 15 July 2016, the Economic Times Telecom published a news report stating that the RJIL had already achieved 1.5 million subscribers during the test phase.

35. On 19 July 2016, The TRAI issued a letter to the Petitioner and others requesting them to "...do the needful action and furnish your response on the issues raised by M/s. RJIL within seven days of the issue of this letter..." On 26 July 2016, The Petitioner issued a letter to RJIL stating:-

> "...even though RJIO has still not communicated any expected Launch date to start commercial Subscriber traffic on these POIs, IDEA is continuing to fully support RJIO and we have accordingly instructed our Circle teams to augment further E1s on the basis of traffic congestion..."

36. On 26 July 2016, the Petitioner issued a letter to the TRAI enclosing a copy of the Petitioner's response to RJIL and stating:

> "...At the initial stage itself, we had provided RJIO with 85 E1s across all Circles, and in the period April-July 2016, additional 205 E1s have been augmented and 38 more E1s are in process of augmentation across all circles to support RJIO test traffic..."
>
> "...IDEA is continuing to fully support RJIO and we have accordingly instructed our Circle teams to augment further E1s on the basis of traffic congestion as per the agreement clauses..."

37. On 3 August 2016, Airtel (as leader of IDOs) (deliberately delayed & misleading) reply to TRAI's letter dated 19 July 16 (after 2 weeks), stating that necessary action has already been taken for augmentation of POIs for meeting. On 4 August 2016, RJIL wrote letter to TRAI indicating extreme situation of denial of POIs, giving figures of insufficient POIs. On 8 August 2016, 11 August 2016 and 22 August 2016, Cellular Operators Association of India ("COAI") issued a letter to the DoT stating inter alia that RJIL was providing "...full-blown and full-fledged services, masquerading as tests, which bypass Regulations and can potentially game policy features like the IUC regime, non-predatory pricing, fair competition, etc..." and requesting the DoT's urgent intervention in the matter to ensure compliance to licence conditions and to the TRAI regulations and guidelines. COAI's letters dated 11 August 2016 to the DoT and the TRAI stated that:-

> "...COAI has not solicited RIL Jio in this response. However, the points made herein represent the views of the majority of the members of COAI..."

COAI's August 22, 2016 letter to DoT stated that "...Reliance Jio, which is also a member of COAI, has a divergent opinion on this matter which they have communicated separately to the DoT and TRAI..." On 10 August 2016, RJIL's 3rd Letter to TRAI in response to COAI's Letter dt. 08.08.16 & failure of IDOs to comply. On 11 August 2016, COAI's 2nd letter to DoT & TRAI on RJIL's provisioning of full-fledged services. On 12 August 2016, COAI's 3rd meeting with Government w/o RJIL, RJIL came to know only via media reports. On 19 August 2016, Voda's (deliberately delayed) reply to TRAI's letter dated 19 July 16, after 1 month instead of 1 week, stating necessary action has already been taken for augmentation of POIs. On 19 August 2016, the Petitioner issued a letter to RJIL stating that:-

> "...till date, no clear or specific response has been received by us on the issues highlighted vide Idea letter dated 26.07.2016..."

38. On 31 August 2016, RJIL provided data to TRAI in which it stated that it had "nil" subscribers as on August 31, 2016. On 2 September 2016, COAI wrote to the DoT and the TRAI stating that the media release by RJIL created:-

> "...a grave situation warranting urgent redressal..." and requested "...the authorities to intervene as they deem fit to restore competition..."
>
> "...The issues and views indicated below are the views of the majority of members of COAI and relate to the issue of the financial impact on majority incumbent operators. They may not represent the views of the minority members of COAI, whose views have not been solicited on this issue..."

On the same day, COAI wrote to the Hon'ble Union Minister of Finance requesting intervention of the authorities and clarifying that:-

> "...The issues and views indicated below are the views of the majority members of COAI and relate to the issue of the financial impact on majority incumbent operators. They may not represent the views of the minority members of COAI, whose views have not been solicited on this issue..."; and
>
> "...The views of Reliance Jio, Aircel and Telenor, who are also members of COAI but may hold a minority opinion, are not reflected in this letter and they may represent separately in the matter..."

39. On 1 September 2016, RJIL made public announcement of the commercial launch on 5 September 2016. On 2 September 2016, COI's 5th letter to Dot, TRAI, PMO, Mo & MoC about launch of RJIL's services, stating that they are in no position to provide POIs requested by RJIL. The RJIL wrote to the Petitioner informing them that it would be commencing commercial operations on 5 September 2016. On 5 September 2016, RJIL launched commercial operations. On 6 September 2016, COAI issued letters to the DoT and the TRAI stating that despite the commercial launch of services by RJIL, there was no change from the pre-launch situation. The letter states:

> "...The issues indicated below are the views of the majority members of COAI. They may not represent the views of one or our members namely RJio, whose views have not been solicited on this issue..."

> Further, "...Every member of COAI unanimously agrees with this letter except for RJio and RJio may represent separately in the matter..."

On 9 September 2016, The TRAI convened a meeting of service providers (including the Petitioner and RJIL) to look into RJIL's complaints of inadequate POIs. Between 12 September 2016 to 20 September 2016, the Petitioner, RJIL and the TRAI exchanged 7 letters regarding POI allocation. On 15 September 2016, RJIL's 4th letter to TRAI informing that more than 10.2 Cr calls are still failing every day due to lack of adequate POIs (as per data enclosed) & requests compliance by IDOs with its Firm Demand dated 21 June 2016. On 19 September 2016, (T3), TRAI's letter to IDOs seeking Info wrt provisioning of POIs & traffic, post meeting dated 9 September 2016. On 20 September 2016, the Petitioner and other telecom service providers jointly issued a letter to the TRAI requesting them to "...intervene immediately to stop the illegal service offering..." of RJIL and to "...ensure compliance of the TRAI Telecommunication Tariffs..."

40. On 21 September 2016, CA Ranjan Sardana and Kantilal Ambalal Puj filed information under Section 19(1)(a) of the Competition Act, 2002 before Respondent-1 against the Petitioner and others in Cases 81/2016 and 83/2016 respectively for violation of Sections 3 and 4 of the Competition Act. On 27 September 2016, The TRAI issued a show cause notice to the Petitioner to show cause within 10 days from the date of receipt of the notice, as to why action under the provisions of the Telecom Regulatory Authority of India Act, 1997 should not be initiated against the Petitioner for violation of the Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009 as well as for breach of its licence. On 30 September 2016, RJIL's subscribers totalled 16 million according to TRAI's records. On 27 September 2016 to 20 October 2016, The Petitioner and RJIL exchanged 20 letters regarding POI allocation. On 3 October 2016 (T6), TRAI issued letter to ITOs informing provisioning of POIs post TRAI's meeting dated 9 September 2016 and letter dated 19 September 2016.

41. On 5 October 2016, TRAI issued a show cause notices to the Petitioners to provide reasons for rejection of requests for mobile number portability ("MNP") to RJIL's network between 5 September 2016 and 22 September 2016. On 6 October 2016, the service providers filed their reply to the same. TRAI's Direction u/s 13 r/w S. 11(1)(b) to all TSPs to ensure compliance qua ICA & Qos. On 12 October 2016, RJIL's letter to IDOs seeking requisite POIs, pursuant to TRAI's direction dated 7 September 2016. On 18 October 2016, RJIL's 5th letter to TRAI providing traffic and congestion data for 15 October 2016, pursuant TRAII's meeting dated 30 September 2016. On 20 October 2016, the TRAI issued a letter to the Petitioner and other telecom service providers informing them that RJIL's offer of free services is, inter alia:-

> "...consistent with the guidelines on promotional offers..." and "...the tariff plans filed with TRAI cannot be considered as IUC non-compliant, predatory and discriminatory at present..." ("TRAI Tariff Order").

42. On 21 October 2016, TRAI recommended to the DoT to impose a penalty of INR 950 crore on contesting service providers.

> "...non-compliance of the terms and conditions of license and denial of Interconnection to RJIL..." ("TRAI Recommendation").

On 22 October 2016, the Petitioner provided RJIL with 1,300 dedicated one-way NLD

POIs for RJIL's outgoing traffic. On 2 November 2016, The Petitioner provided RJIL with: (a) 6,000 dedicated one-way Access POIs; and (b) 1,865 dedicated one-way NLD POIs, for RJIL's outgoing traffic. On 3 November 2016, Airtel's letter to RJIL allocating addl. E1s after more than 5 months (re:RJIL's letter dated 21 June 2016 and 12 October 2016) w/o any explanation for the delay; whereas, Airtel accepted to provide 75 million POIs ahead of time in November to meet the projections of December (Acts as virtuous). On 4 November 2016, the TRAI issued a letter to the Petitioner seeking further clarifications regarding rejection of requests for MNP. On 5 November 2016, the Petitioner provided RJIL with (a) 7,500 dedicated one-way Access POIs; and (b) 1,940 dedicated oneway NLD POIs, for RJIL's outgoing traffic. On 8 November, 2016, RJIL filed information under Section 19(1)(a) of the Competition Act before Respondent-1 against the Petitioner and others in Case 95/2016 for violation of Sections 3 and 4 of the Competition Act. On 10 November 2016, The Petitioner provided RJIL with 8,098 dedicated one-way Access POIs for RJIL's outgoing traffic. On 16 November 2016, RJIL issued a fresh location-wise cumulative requirement of POIs without providing any justification for their demand. On 29 November 2016, the Petitioner issued a letter to RJIL rejecting its fresh demand dated November 16, 2016 as the same was inter alia, not as per the terms of their Interconnection Agreement, unreasonable and without any basis or rationale for seeking additional POIs.

43. On 14 December 2016, Vodafone filed WP (C) 11740 of 2016 before Delhi HC against TRAI's Recommendation dated 21 October 2016. On 16 December 2016, the Petitioner provided RJIL with (a) 10,050 dedicated one-way Access POIs; and (b) 3,350 dedicated one-way NLD POIs for RJIL's outgoing traffic. On 19 January 2017,Idea filed WP(C) 685/2017 before Delhi High Court against TRAI's Recommendation dated 21 October 2016 & Cl. 5 of QoS Regulations. On 21 December 2016 to 31 January 2017, thereafter, RJIL issued 22 letters to the Petitioner admitting that-

> "...We acknowledge that you have allocated sufficient E1s vide your various e-mails in last two months to meet the requirements of current traffic levels, however we submit that in view of the rapidly growing traffic more E1s need to be allocated in order to meet QoS benchmarks on POI congestion, at all times..."

44. On 23 December, 2016, The Petitioner provided RJIL with (a) 10,250 dedicated one-way Access POIs; and (b) 3,450 dedicated one-way NLD POIs for RJIL's outgoing traffic. On 16 January 2017, The Petitioner (Idea) filed Appeal No. 1 before the Telecom Disputes Settlement and Appellate Tribunal ("TDSAT") against the TRAI Tariff Order. On 17 January 2017, TRAI, after accepting most of the Petitioner's reasons in its letters dated October 12, 2016 and November 9, 2016, issued an order imposing a nominal penalty of INR 1,90,000 for rejection of MNP requests for 19 numbers only. On 19 January 2017, The Petitioner filed Writ Petition (Civil) No. 685 of 2017 before the Delhi High Court against the TRAI Recommendation. On 27 January 2017, the Petitioner provided RJIL with (a) 11,515 dedicated one-way Access POIs; and (b) 3,960 dedicated one-way NLD POIs for RJIL's outgoing traffic. On 28 January 2017, for the first time since the Petitioner's letter dated November 29, 2016, RJIL issued a letter to the Petitioner providing them with the assumptions behind their demand for additional POIs dated November 16, 2016 inter alia on the assumption of "...an average call duration of 180 seconds..." Further, demonstrating a complete change in its stance, RJIL stated that:-

"...the E1s provided by Idea are significantly less than RJIL's requirement of the E1s to meet the expected traffic. The current number of E1s is also falling short of the actual requirements to meet the QoS requirements..."

45. On 31 January 2017, Bharti Airtel filed an Application under Section 45 of the Competition Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 and prayed for initiative penalty proceedings against the Informant, mainly on the ground of willful suppression and representation of the facts, data, and material documents. On 9 February 2017, the Commission heard the Applicant in the said Application. By order dated 24 August 2017, after the impugned order, pending the representations, communicated the rejection of the said Application to the Applicant. No decision taken on this Application, prior to passing the impugned order.

46. On 31 January 2017, 8 February 2017 and 9 February 2017, Respondent-1 held a preliminary conference with all the parties in Cases 81/2016, 83/2016 and 95/2016. On 5 April 2017, the DoT returned the recommendation to the TRAI for reconsideration. On 21 April 2017, Respondent-1, relying primarily on COAI's letters dated August 8, 2016 and September 2, 2016 as well as the recommendation dated October 21, 2016, passed the majority order under Section 26(1) of the Competition Act and directed the Director General to cause an investigation into the matter ("Impugned Order"). Two members of Respondent-1, dissented from the Impugned Order and held inter alia that:-

"...As stated above, from the various charts placed on record by the ITOs showing the number of POIs provided by them to RJIL, the respective learned senior counsel for OPs have tried to show that the number of POIs provided to RJIL by 08.11.2016 i.e. within the first quarter itself, were much more than what was demanded. In fact, the charts filed by RJIL itself corroborate this fact. The charts show that even if some of the POIs provided (one-way POIs for connecting outgoing calls from ITOs to RJIL) are not taken into consideration, the number of POIs provided by OP-5 and OP-7 were much more than what was demanded by RJIL. Even in case of OP-2, the same were approximately 64% (NLD POIs) and 85.53% (Access POIs) as on 08.11.2016. However, as we have already observed above, we are not expected to go into the question of providing adequate number of POIs. Yet there is ample material on record to show that RJIL was more to be blamed for congestion in its traffic than the ITOs..."

"...we are of the considered opinion that on the basis of material available with the Commission, it is difficult to say that there is a prima facie case..." made out against the Petitioner and others and accordingly, "...the instant cases ought to be closed under Section 26(2) of the Act..." (hereafter "Dissent Note").

47. On 24 May 2017, the TRAI responded to the DoT's reference dated April 5, 2017 and reiterated its position in the TRAI Recommendation, including inter alia recommending to the DoT to impose a penalty of about INR 950 crore (Approximately) on the each Petitioners/Service providers.

48. On 8 June 2017, Respondent-2 issued a letter of investigation to the Petitioner seeking call data records in respect of certain identified mobile numbers by 19 June 2017. On 19 June 2017, Respondent-2 issued a letter of investigation to the

Petitioner seeking detailed information/documents to be furnished by June 30, 2017. On 20 June 2017, the Petitioner filed Civil Writ Petition No. 7164 of 2017 before the Bombay High Court seeking inter alia to quash the Impugned Order. On 21 June 2017, DG issued notices to Idea and COAI for information/documents. On 27 June 2017, the Petitioner issued a letter to Respondent-2 requesting for an extension of time until August 31, 2017 to furnish the information/documents sought by Respondent-2 vide its letter dated June 19, 2017.

49. On 30 June 2017, the Bombay High Court heard the matter where the counsel for Respondent-1 and Respondent-2 made a statement that they-"...shall not proceed with the investigation up to next date of hearing..." The matter was listed for 28 July 2017. On 3 July 2017, the Petitioner issued a letter to Respondent-2 informing them that pursuant to the order of the Bombay High Court on June 30, 2017, the Petitioner shall- "...not be taking any further steps in respect of your Notice until further orders of the Court..."

50. On 17 July 2017, RJIL served its Affidavit-in-Reply dated July 15, 2017 on the Petitioner. On 20 July 2017, Respondent-1 and Respondent-2 served their Affidavit-in-Reply dated July 19, 2017 on the Petitioner. On 27 July 2017, Respondent-4 served a copy of his Affidavit-in-Reply dated 21 July 2017 on the Petitioner. On 28 July 2017, the Petitioner issued a letter to RJIL calling upon them to submit revised charts demonstrating POI allocation by the Petitioner to RJIL that was tendered by RJIL to Respondent-1 during the preliminary conference on February 8, 2017 as these were not a part Annexure 3 of its Affidavit-in-Reply containing "...Copy of the material tendered during the course of hearing..." On 29 July 2017, the Petitioner received a reply from RJIL stating that:-

> *"...Please note that while we circulated copies of the revised charts to all the parties, at the end of the proceedings of the preliminary conference on 8-9 February 2017, however the Hon'ble Competition Commission of India declined to take on record any further documents including those attempted to the tendered by Vodafone India Limited, Vodafone Mobile Services Limited and Bharti Airtel Limited.*
>
> *All documents forming a part of the proceedings have already been annexed by us to our Affidavit in Reply with copies served upon you on 17 July 2017..."*
>
> (emphasis supplied)

51. On 31 July 2017, the Petitioner issued a letter to Respondent-1 requesting them to confirm that the revised charts tendered by RJIL were not taken on record. On 1 August 2017, RJIL replied to the Petitioner's letter dated July 31, 2017 suggesting that the Petitioner undertake an inspection of files of Respondent-1 to confirm that the revised charts were not taken on record. On 2 August 2017, the Petitioner filed its Affidavits-in-Rejoinder to the Affidavits-in-Reply of RJIL, Respondent-1 and Respondent-2 and Respondent-4. On 3 August 2017, the Petitioner received a letter from Respondent-1 confirming that:-

> "...the revised charts do not form a part of the record in respect of Case No. 81 of 2016, and/or Case No. 83 of 2016 and/or Case No. 95 of 2016..."

On 28 July 2017, the Petitioner mentioned the matter before the High Court out of turn to seek time for filing its Affidavits-in-Rejoinder. The High Court was pleased to

grant the Petitioner time till 3 August 2017. The order passed by the Hon'ble High Court also recorded that: "...the statement made on June 30, 2017 by the learned counsel appearing for the respondent nos. 1 and 2 shall continue till next date of hearing..."

52. On 4 August 2017, RJIL served its Further Affidavit-in-Reply dated August 3, 2017 on the Petitioner. On 7 August 2017, the High Court was pleased to grant the Petitioner time to file its Further Affidavit-in-Rejoinder to RJIL's Further Affidavit-in-Reply. The High Court also recorded that the statement made by Counsel for Respondents 1 and 2 will continue till the next date of hearing. On 8 August 2016, COAI's letter to DOT and TRAI stating that "our member operators should no longer be expected to provide POIs while this charade of tests is being played out." The matter was listed for August 11, 2017. On 10 August 2017, the Petitioner served its further Affidavit-in-Rejoinder to RJIL's Further Affidavit-in-Reply dated August 3, 2017 on the Respondents. The matter was to be listed High on Board on 7 August 2017.

53. The learned Senior Counsel appearing for the parties have filed their respective reply affidavit, rejoinder. They have also filed their respective written submissions and convenience compilations. Various Judgments are placed on record in support of their respective rival contentions. This Bench, by consent, heard these matters on day to day basis after admission board, since 11 August 2017 upto 19 September 2017.

Maintainability and Entertainability of the Writ Petitions and Judicial Review-

54. The Competition Commission of India received three complaints in the form of information, one filed by CA Rajnan Sardana and another filed by Kantilal Puj against the COAI, attributing anti - competitive conduct to it and its leading members. In the complaint filed by RJIL against the COAI, Vodafone, Airtel and Idea, the allegations were made that there was contravention of provisions of Section 3 and 4 of the Act. The Commission forwarded the copies to the opposite parties in the complaint and had preliminary conference with the said parties who filed written submissions. The Commission heard all the parties on 31st January, 2017, 8th February, 2017 and 19th February, 2017. The Commission was pleased to pass an order which is impugned in the present writ petition under Section 26(1) of the Competition Act, 2002. It is to be noted that the order of the Commission is split into two parts, one being the majority finding recorded by four members of the Commission including the Chairperson, and the dissent note was delivered by two members of the Commission. The majority members arrived at the conclusion that there is prima facie contravention of Section 3(iii)(b) of the Competition Act, 2002 as ITO's appeared to have entered into an agreement amongst themselves through the platform of COAI to deny the POI to the RGIL. The Commission was further convinced that the impugned conduct of the ITO's and the Commission was not an unilateral action by each of the ITO's. The Commission therefore directed the DG to cause investigation into the matter as per the provision of Section 26(1) of the Act and the Director-General was directed to complete the investigation within period of 60 days. The dissent note/minority view, however, was of the opinion that on the basis of material available with the Commission, it was difficult to say that there is a prima facie case to hold that the ITO'S along with COAI had acted in a concerted manner to restrict RGIL's entry into market or to limit or control supply, technical development of provision of services provided by RJIL. According to the opinion of minority the instant cases ought to have been closed under Section 26(2) of the Act.

Rival contentions of the parties-

55. Learned Senior Counsel Shri Harish Salve appearing on behalf of RJIL raised a preliminary objection on three counts namely:

i) Maintainability of the writ petition in the light of the judgment in case of Competition Commission of India Vs. Steel Authority of India Ltd. MANU/SC/0690/2010 : 2010 (10) SCC 744

ii) Territorial Jurisdiction of the Bombay High Court to entertain the petition;

iii) Forum convenience.

56. As regards the objection of territorial jurisdiction of the Bombay High Court, reliance was placed by Shri Salve in case of Union of India Vs. Adani Exports MANU/SC/0696/2001 : 2002 (1) SCC 567 to demonstrate that the cause of action could not have arisen in Maharashtra on the basis that the "ultimate effect of the impugned order" is felt on the business of the petitioner in Maharashtra and there has to be an immediate effect.

57. It is also argued by learned Senior Counsel Shri Salve that the purport of the Order passed under Section 26(1) of the Act is no more res-integra and the Hon'ble Apex Court in the judgment of Steel Authority of India (cited supra) in unequivocal terms has made the position of law clear and he has taken us through the judgment in detail. According to him, the proceedings under Section 26(1) are administrative in nature and did not entail any civil consequence and the Commission has to only form a "prima facie opinion". He also took us to the Scheme of Section 26 to demonstrate that at the stage of Section 26(2) the Legislature has made a provision for appeal since a finality is reached at that stage and according to him, there are several further stages which reflect different shades of adjudication. However, according to him, Section 26(1) stage is not adjudicatory and according to the judgment of the Apex Court bare minimum reasons to express "prima facie opinion" are sufficient. According to him, the High Court in exercise of writ jurisdiction cannot substitute the prima facie opinion of the Commission unless and until it is found to be suffering from perversity or arbitrariness.

58. Learned senior counsel Shri Salve also argued that the territorial jurisdiction to assail the impugned order would be that the Delhi High Court, if at all a writ petition is to be entertained and not the Bombay High Court. According to him, Vodafone is having his office at Delhi, Airtel is having its office at Gurgaon and Cellular Operators Association India is also stationed in Delhi and, further the investigation is to be ordered in Delhi and the Director-General is stationed in Delhi. Therefore, the appropriate Forum would be the High Court of Delhi. On the point of forum convenience the learned Senior Counsel argued that the respondent had approached the Delhi High Court being aggrieved by the order passed by the TRAI imposing penalty upon them for non supply of points of interconnect, however, since they did not secure any relief there, they have approached this Court.

59. We have heard the respective senior counsel representing the petitioners in response to the said preliminary objection. Shri Khambatta, learned Senior Counsel invited our attention to the fact that the Petitioner Telecom operators provide service in the State of Maharashtra and the effect of the impugned order would be felt in the State of Maharashtra. He argued that since the points of interconnect were to be provide connectivity in the State of Maharashtra, a part of cause of action leading to

the filing of the present writ petition has arisen in the State of Maharashtra and therefore the Bombay High Court would definitely have jurisdiction to entertain the present petition. He relied upon the following judgments to support his contention.

(i) In Navinchandra N. Majithia Vs. State of Maharashtra & Ors. MANU/SC/0549/2000 : (2000) 7 SCC 640 (Also see Rajendran Chingaravelu Vs. R.K. Mishra, Add. Commissioner of Income Tax & Ors. MANU/SC/2105/2009 : (2010) 1 SCC 457, (paragraphs 44 and 45), the Supreme Court held that in case of a writ petition against an order for investigation, the cause of action will arise in the place where a part of the investigation is to be conducted. Consequently, a writ petition against the order would lie in the High Court within whose territories a part of the investigation is being conducted.

(ii) In Barpeta District Drug Dealers Association & Anr. Vs. Union of India & Ors. MANU/GH/1052/2012 : 2013 (5) GLT 30 (paragraphs 27 and 29), the Hon'ble Gauhati High Court held that a writ petition against an order of the Competition Commission of India was maintainable before it since a part of the cause of action i.e. the underlying alleged contravention of the Competition Act had arisen in Assam.

(iii) In Kusum Ingots & Alloys Ltd. Vs. Union of India & Anr. MANU/SC/0430/2004 : AIR 2004 SC 2321 (paragraph 30), the Hon'ble Supreme Court of India held that even if a small part of the cause of action has arisen within the territorial jurisdiction of a court, such court will be competent to entertain a writ petition.

(iv) In Nawal Kishore Sharma Vs. Union of India MANU/SC/0672/2014 : (2014) 9 SCC 329 (paragraphs 16 to 19), the Supreme Court found that a small part of the cause of action against an order of a department of the Government of India situated in Mumbai had arisen within the jurisdiction of the Patna High Court and, consequently, held that the Patna High Court could entertain the matter.

(v) In Damomal Kauromal Raisingani Vs. Union of India(1965) SCC Bom. 129 (paragraph 5) the Bombay High Court, relying on its decision in W.W. Joshi Vs. State of Bombay MANU/MH/0109/1959 : AIR 1959 Bom 363, held that the High Court within whose jurisdiction the effect of an order of an authority is felt will also have jurisdiction to entertain a writ petition challenging the order.

60. Learned senior counsel Shri Khambata argued that the Petitioners have a largest subscriber base in the Maharashtra Circle and the order of investigation in the affairs of the Petitioners for an alleged cartel to deny POIs to RJIL was spread throughout the country and the investigation will also have to be conducted in the State of Maharashtra. According to him, the impugned order will have immediate effect in the State of Maharashtra and looking to the bundle of facts necessitating the filing of the petition as well as the reliefs sought in the petition make it clear that a part of the cause of action has arisen in the State of Maharashtra and, therefore, the Bombay High Court will have jurisdiction to deal with the present writ petitions.

61. As regards the meeting, the argument of the learned Senior Counsel Shri Salve of Forum Convenience, he submits that it is the party who is "dominus litus" and he has to choose amongst the jurisdiction if both the courts have jurisdiction and they

have chosen jurisdiction of this Court.

62. In support Shri Khambata relied upon the judgment in the case of Nasiruddin Vs. State Transport Appellate Tribunal MANU/SC/0026/1975 : 1975 (2) SCC 671. Para 37 of the said judgment reads as follows:

> "It would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular court. The choice is by reason of the jurisdiction of the court being attracted by part of cause of action arising within the jurisdiction of the court."

63. Responding to the preliminary objections of learned senior counsel Shri Harish Salve, learned senior counsel Shri Janak Dwarkadas appearing for the Petitioner in WP No. 7173 of 2017 has argued that the affidavit of RJIL did not raise a ground of lack of territorial jurisdiction in its affidavit-in-reply and according to him this objection is raised for the first time on 03.08.2017. He places reliance upon Section 21(1) of the Civil Procedure Code to the effect that objection about the territorial jurisdiction can be waived by a party, who is entitled to object in any proceedings. He submits that the judgment relied upon by the learned senior counsel Shri Salve in case of Union of India & Ors. Vs. Adani Export Limited & Anr. (supra) has been, in fact, considered in two subsequent decisions of the Bombay High Court, wherein it has been held that a writ petition under Article 226 of the Constitution of India is maintainable in the Bombay High Court, even if the seat of the authority concerned is outside Maharashtra, provided that the effect of decision of such authority falls within the territorial limits of the jurisdiction of this Hon'ble Court. He places reliance on the judgments in the case of R.K. Singh Vs. Union of India & Ors. MANU/MH/0325/2002 : 2002 (4) Bombay Law Reporter 246 and Wills India Insurance Brokers Pvt. Ltd. Vs. Insurance Regulatory and Development Authority MANU/MH/0326/2011 : 2012 (1) BCR 204.

64. In reply to the preliminary objections of learned senior counsel Shri Salve about the maintainability of the writ petition, in the light of the judgments of the Apex Court in the case of SAIL (Supra), learned senior counsel Shri. Dwarkadas has submitted that the judgment of the Apex Court does lay down no law contrary to the settled position namely, be it the administrative or quasi judicial order in exercise of statutory powers or in exercise of jurisdiction conferred on instrumentalities of the State, it is open to judicial review under Article 226 of the Constitution of India and it can always be tested on the parameters of being arbitrary, perverse, unreasonable or in excess of jurisdiction. According to learned senior counsel, the Supreme Court was examining the question as to whether, looking to the nature of findings and powers conferred on the Competition Commission under section 26(1) of the Competition Act, it is obligatory to afford in all cases and in all events, the right to notice and hearing. According to him the Supreme Court also examined the question as to whether it is obligatory for the Competition Commission to record reasons for formation of a prima facie opinion in terms of section 26(1) of the Competition Act. According to the learned Senior Counsel recording the minimum reasons substantiating the formation of opinion is a safeguard and it has been so observed by the Apex court in para 97 of the said judgment and thus it is always open to the judicial review. It is vehemently argued that the Supreme Court in the said judgment was neither concerned with nor it has opined - either in the form of obiter or by way of passing a reference - an order recording "minimum reasons" by which a prima

facie opinion is formed under section 26(1) of the Competition Act, is not amenable to judicial review even if the same was arbitrary, unreasonable, perverse without application of mind and in excess of jurisdiction. According to the learned senior counsel the order of investigation of the nature contemplated by the Competition Act would amount to an unreasonable restriction on the petitioners' fundamental right to carry on business guaranteed by the Article 19(1)(g) of the Constitution of India and hence, this court in exercise of powers under Article 226 would review such a decision. Learned senior counsel Shri Chagla also advanced his arguments of the similar nature to rebut the preliminary objections raised by the learned counsel for the RJIL. He further argued that the argument of "forum Convenience" is offensive qua the Petitioners. No case is made out to justify the submission of forum shopping in the facts and circumstances of the case. It is unsustainable contention.

65. The petitions before us are filed by the three Cellular Operators and one petition is filed by the Association and all the petitions assailed the impugned order on more or less same grounds. We will be dealing those arguments collectively. We have extensively heard learned senior counsel Shri Khambata appearing on behalf of the Idea Cellular, learned senior counsel Shri Dwarkadas appearing on behalf of the Bharati Airtel and learned senior counsel Shri Iqbal Chagla appearing on behalf of the Vodafone Ltd.. We have also heard learned senior counsel Shri Aspi Chinoy, representating the Cellular Operator Association of India.

66. The impugned order passed by the Competition Commission is assailed by the learned counsels for the Petitioners on the ground that the said order is perverse and arbitrary. According to the learned senior counsels appearing for the Petitioner that by applying the test in Barium Chemicals' case, it is necessary to test the order of Commission on the parameters as to whether the subjective satisfaction has been reached by taking into consideration the objective facts. It was argued before us that since there is no provision of an appeal against the order passed under section 26(1) and an appeal is provided against the order passed under section 26(2) of the Competition Act, the minimum safeguard available is power of judicial review. It is submitted that the order passed by the Commission which is quasi judicial authority is to be judged on the basic provisions of administrative law.

67. On merits, learned senior counsel Shri Khambata appearing on behalf of the Idea Cellular Ltd. Submitted before us that the lis between the parties is the points of interconnection. He contended that Idea is providing telecommunication services in India pursuant to CMTS/UASL/unified licence granted by the Department of telecommunication, Government of India. According to him, there is obligation flowing from the licence to provide POIs and according to him, on 14/6/2014 an interconnect agreement was executed with RJIL which contain the following important clauses:-

> a. For the first two years, RJIL is responsible for the provision and augmentation of transmission links interconnecting RJIL's network to Idea's existing switches as specified in Schedule 1 to the interconnection agreement;
>
> b. RJIL is obliged to provide to Idea a forecast six months in advance to enable Idea to augment the required capacity on its network;
>
> c. In case any further POIs apart from switch locations set forth in Schedule 1 is agreed and established between the parties during the initial period of 2

years, the cost is to be borne by RJIL; and

d. Traffic measurement for 7 days during busy hour every six months has to be taken to determine further capacity requirements.

68. According to Senior Counsel, the TRAI fixes Usage Charges under the Telecommunication Interconnection Usage Charges (IUC) Regulation 2003" (The Regulation). According to him, the RJIL started its operation in December, 2015 and on 21st June, 2016 they addressed a letter to the opposite parties informing that RJIL is conducting test trial of its services before its Commercial launch ..." and that RJIL, on reasonable grounds, is expecting over hundred million subscribers in the first year post launch of services. He refers to the particular portion of the said letter which we reproduce as follows:-

"...RJIL is currently conducting test trials of its services before its commercial launch..." and that "...RJIL, on reasonable grounds, is expecting over 100 million subscribers in the first year post launch of services. This combined with the initial pent-up demand for services may result in upwards or 25 million subscribers coming on the network within the first quarter post launch. In order to help provide seamless connectivity to the targeted subscribers, RJIL will require sufficient interconnect capacity for inter-operator traffic at the Points of Interconnection ("POIs") ..."

69. The grievance of the learned Senior Counsel is that RJIL did not announce its date of commercial launch and in pursuance to the demand raised on 21st June, 2016 the Idea Cellular arranged for POI's from time to time and RJIL had in their 22 letters acknowledged the said fact in its various letters and according to the learned Senior Counsel, the petitioner was only conducting test trials and according to the existing regime of Regulation, it was sufficient to provide the points of interconnect for testing. According to him, it was not necessary to augment the entire demand raised by RJIL since they were in test phase. It was not permissible to create subscriber base before its commercial launch and RJIL did not declare its data of commercial launched till 2nd September, 2016 when they declared that they are going to commercially launch on 5th September,2016. The liability to provide POIs commensurates with the demand from the point of commercial launching and not during test phase. It is contended by him that the demand was to be made within a period of 90 days and not immediately as claimed by RJIL and it was only a forecast demand which was not based on the actual subscriber base. He argued that when RJIL approached the Commission being aggrieved by the conduct of the Cellular operators and the COAI attempted to canvass that the operators through the platform of COAI had attempted to prevent the entry of the petitioner into the market by entering into a tacit agreement which was clear violation of Section 3 of the Competition Act, 2002. The order passed by the Commission suffers from grave perversity. He contends that the Commission had permitted them to file their written submissions and invited them for conference of three dates and the Cellular operators have placed material before the Commission. Once the said course was adopted by the Commission it was mandatory on the part of the Commission to look into the said material and before arriving at a prima facie case it had to apply its mind to the material in hand and form a prima facie opinion on the basis of the said material. The learned Senior Counsel argued that the Commission arrived at a finding which is not based on the material placed before the Commission and in fact the very relevant material was kept out of consideration before forming a prima facie opinion and one of the relevant material being the chart submitted by Idea as well as the Cellular

Operators before the Commission demonstrating that the demand raised by RJIL for points of interconnect was met by the Operators from time to time and in fact more points of interconnect were supplied than they were demanded. However, the majority decision of the Commission did not even advert to the said charts. According to him, the non-consideration of relevant material leads to perversity and he relies upon the judgment in the case of Barium Chemicals Limited & Anr. Vs. Company Law Board & Ors. MANU/SC/0037/1966 : AIR 1967 SC 295 wherein the Apex Cour observed as follows:-

> "27. .....No doubt, the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstance leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out."

He also relies on the judgment of Apex Court in the case of Rohtas Industries Vs. S.D. Agarwal & Ors. MANU/SC/0020/1968 : AIR 1969 SC 707 in support of his contentions that the impugned order is vitiated in law on the following grounds:

(a) It disregards relevant undisputed and conclusive material;

(b) Is based on irrelevant consideration;

(c) On account of perversity/on being unreasonable by applying Wednesbury's Principle of Reasonableness.

70. Shri Khambatta argued that formation of prima facie opinion means based on material placed before it and though Section 26(1) of the Act permits the Commission to pass an order without hearing and record the minimum bare reasons, however, once the Commission has chosen to give hearing and recorded reasons for its decision, the same can be judicially scrutinized to determine whether a writ of certiorari will lie or to apply the Wednesbury's test of reasonableness. He placed reliance upon the Classic Statement of Law of Denning, J. in Rex Vs. Northumberland Compensation Appeal Tribunal MANU/UKWA/0001/1951 : (1952) 1 KB 338 (CA) at 349 wherein, it has been held that if Justices of a tribunal choose to give reasons even when they were not bound to, the court of King's Bench would on certiorari inquire into the correctness of those reasons, and, if the reasons were wrong, would quash the decision. He also relies on Lord Sumner in his classic formulation in Rex Vs. Nat Bell Liquors 1922 2 AC 128 at 155 where held that:-

> *"...If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the Court, either by new affidavits or by producing anything that is not on or part of the record..."*
>
> (emphasis supplied)

71. In regard to the maintainability of the writ petition in the light of the judgment in the case of SAIL (Supra), the learned Senior Counsel submitted that the jurisdiction of the Court is not ousted if the Court finds that the finding recorded by the Commission in forming of "Prima facie opinion" is found to be perverse.

72. According to him the order of the Commission speak for itself since two members have recorded a dissent finding and whatever was not considered by the majority members have been reflected in the order of the minority and on consideration of the said material the minority had arrived at a conclusion that no prima facie case exists.

73. The learned senior counsel Shri Dwarkadas submitted that a Telecom Industry is well regulated and the contract is a statutory contract entered into between the service providers. The terms of the contract mandate provision of POIs and the manner, the number, the time at which it is to be provided is stipulated under the Agreement. The grievance is about denial or the delay in provisions of POIs, which is nothing but alleged breach of the contract/agreement between the telecom service providers and there is a forum in the form of Telecom Disputes Settlement and Appellate Tribunal (TDSAT) under the Telecom Regulatory Authority of India Act, 1997. By virtue of Section 14 of the TRAI Act, 1997 the said Tribunal is empowered to adjudicate disputes between two or more service providers and since the ultimate issue around which the complaint is filed by the RJIL revolves around POIs, the forum exists in the form of TDSAT and the Competition Commission has no jurisdiction to enquire as to whether there was breach of the agreement/licence's conditions in not providing POIs under the guise that it was an attempt, resulting into anti-competition phase to stall RJIL's entry in the market. It is also contended that though the issue of jurisdiction of the Competition Commission in the light of the alternate remedy in the form of TDSAT was raised before the Commission but the same was not dealt with at all and thus the Commission has fallen into a jurisdictional error.

74. It is also argued by the learned counsel for the Petitioner that on a careful reading of the complaint filed before the Competition Commission, the RJIL had made grievance about the delay and denial of POIs in terms of the interconnect agreement and by using the platform of Cellular Operators Association of India (COAI) and it was, therefore, prayed before the Commission to cause an investigation into the matter by exercising the power under section 26(1) of the Competition Act and directing the OPs to discontinue their test of dominance, to provide adequate interconnection capacity to RJIL and to provide adequate interconnect capacities whenever it is required in terms of the interconnect agreement. By way of interim directions under section 33, it was prayed that the directions be issued to the OPs (opposite party) to comply with the binding obligations under the QOS regulations by making the provisions for POIs. The complaint necessarily, therefore, revolves around the commissioning of POIs which is necessarily a matter of contract between the two telecom service providers and it is argued that the necessary required POIs were submitted and relevant material produced before the Commission in the form of chart being not disputed, the Commission did not refer to the material placed by the OPs during the hearing before the Commission.

75. As regards the contention that the platform of COAI was used which amounted to cartelisation, our attention was drawn to the complaints made by the COAI and it is argued that it is not an unreasonable complaint as the COAI's was making the grievance to the telecom regulator by pointing out the manner in which the RJIL was functioning and creating the subscriber base in the test phase when it had not commercially launched its services. It is argued before us that it is most appropriate for the COAI to approach the Service Regulator with their grievance and in any sense it can amount to cartelisation. Not only that a representation was also made to the Finance Minister, raising the grievance.

76. The impugned order of the Competition Commission is also assailed on the ground that it takes into consideration irrelevant material like the recommendations of TRAI dated 22.10.2011. It is argued by the learned senior counsel that the Competition Commission, with the majority judgments of the Competition Commission, adheres great importance to the findings of TRAI as a sectoral regulator. The Commission in paragraph 9 of its order refers to the information available on TRAI's Web-site that on 21.10.2016 the TRAI had recommended to the department of Telecom of imposing of penalty of Rs. 50 Crores per license service area (LSA) against the Airtel, Vodafone and Idea, who have made violation of the provisions of the license agreement and standards of quality of service of basic telephone service (wire-line) and Cellular Mobile Telephone Service Regulation 2009. It is observed by the Commission that TRAI has held the said conduct of the ITO, in violation of relevant TRAI regulations, and recommended penal action against them. According to the learned senior counsel the recommendations of TRAI were heavily relied upon by the Commission and the Commission was greatly influenced by the said recommendations when it observed that the penalty recommended had held that the ITOs "have jointly through their associations (COAI) declined the points of interconnection to RJIL" and that the TRAI had observed that RTO's denial of interconnection was with ulterior motive to stifle its production and is anti-consumer. According to the learned senior counsel the majority view of the Commission fail to take into consideration the fact that the recommendations of TRAI had not attained finality since they were only forwarded to the DOT and as the minority opinion recorded that the DOT thereafter had sought comments of TRAI on the said recommendations. After its report on the said recommendations and therefore, the same is not of any consequence and not concerned as far as the competition issues. It is, therefore, argued that the Commission has relied upon the irrelevant material in the form of recommendations of TRAI.

77. Learned Senior Counsel Shri. Iqbal Chagla argued that the Commission had issued notices to the Petitioner Service Providers and called for material from them which they had submitted during the preliminary conference and in this backdrop it was necessary for the Commission to consider the said material placed before it. According to Shri Chagla as per regulation No. 17 of the Competition Commission of India (General Regulations 2009), the Commission can call for a preliminary conference to form an opinion whether a prima facie case exists. According to him, non-consideration of the said material amounted to perversity and he relied upon the judgment of the Apex Court in the case of Achutananda Baidya Vs. Prafullya Kumar Gayen & Ors. MANU/SC/0498/1997 : (1997) 5 SCC 76 and Atlas Cycle Haryana Limited Vs. Kitab Singh MANU/SC/0070/2013 : 2013 (12) SCC 573. According to him the malice in fact is reflected from the order of Commission in view of the non-consideration of the material in the form of the chart in which the petitioner service providers have demonstrated that they had applied for POIs more than what was demanded by the RJIL. According to him, the Commission before arriving at a prima facie case and forming an opinion to make an enquiry into the existence of anti-competitive agreement, ought to have focused whether an agreement exists on the basis of any material submitted before it and whether such an agreement which had effect of delaying/denying POIs to RJIL was anti-competitive and likely to cause an apprehensible adverse effect on competition. However, the Commission has placed reliance on TRAIs' recommendations dated 22.10.2016 though they had not attend finality, without adverting to the effect whether the demand raised by the RJIL was "reasonable demand" and whether there was application on the part of the Petitioners to satisfy the said demand when RJIL was in itself test phase and had not yet commercially launched. According to the learned senior counsel the area as to test

phase was a gray area and this fact is established in view of the fact that TRAI itself had called for a consultation paper of network testing before commercially launched service on 01.05.2017. Thus according to learned senior counsel it was not even the arena of jurisdiction of the competition Commission to form a prima facie opinion that the agreement between the parties was anti-competitive when the sectoral regulator was itself not clear on its application between the parties in the test phase period, prior to commercial launch of the services.

78. We have also heard the learned senior counsel Shri Aspi Chinoy appearing on behalf of the petitioner in a petition filed by the Cellular Operators Association of India. He specifically made a reference to para 19 of the order of the Commission, impugned in the petition, wherein the Commission has observed that COIS has facilitated the joint conduct of the RTOs to collectively decide to prevent a successful entry of RJIL into telecom market. He took us through letters addressed by the Association to the TRAI and it is his contention that as an association they had took up the cause of its members and the findings of the Commission that COAI in its letter dated 08.08.2016 and 02.09.2016 has only protected the interest of its majority members, which was demonstrative of the fact that the TIOS were using the platforms of COAI to collectively refuse to provide POIs to RJIL's is an erroneous finding. According to Shri Chinoy such an observation of the Commission against an association is nothing but a attempt to emasculate the association who represents the interest of its members and though CCI is a market regulator. According to Shri Chinoy it is not a telecom regulator and therefore, CCI could not have passed such an order which is perverse and insists its jurisdiction. It is also the submission of the learned counsel that before 05.09.2016, I.e. is the date of commercial launch of RJIL, the RJIL was not a market subscriber. According to him letters written by RJIL referred the test phase and there was no market of RJIL before 05.09.2016. According to him section 19, clause (3) the parameters of competition Act which mandate the Commission to have regard to certain factors while determining whether the agreement has an apprehensible adverse effect on competition under section 3 pre-supposes an existence of a market. According to Shri Chinoy, the RJIL was not a telecom service provider prior to 05.09.2016 and it had become a service provider only on 05.09.2016 on its commercial launch and in fact he also submitted that the RJIL is also submitted its report of subscriber base and QOS as per the regulations only after 05.09.2016. He attempted to draw distinction between the terms "subscriber" and "customer" and according to him mere acceptance of KYC forms from the consumer do not make them subscriber. As per Shri Chinoy since the said issue of existence of market goes to the root of the matter, the order passed by the competition Commission, declaring the conduct of COAI as anti competitive is totally perverse since it pre-supposes the market.

79. We have heard learned senior counsel Shri Aney, who was ably assisted by Advocate Shri Naushad Engineer appearing on behalf of the competition Commission of India. Learned counsel Shri Aney does not dispute the proposition canvassed by the learned counsel for the petitioner that the court in exercise of its writ jurisdiction would interfere only when a demonstrable perversity is pointed out. No issue about the territorial jurisdiction also. He highlighted the functioning of the Commission enumerated under section 18 of the Competition Act, 2002 and according to him it is the duty of the Commission to eliminate practices having adverse effect on competition in market and to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the markets in India. Shri Anney vehemently argued that the impugned order directs the investigation against the petitioners may cause hardship to them, however, if the law permits such a course,

the consequence of the action could not debar the authority from following the mandate of the statute. According to him, the order passed by the Commission only discloses a prima facie opinion and he heavily relies upon the judgment of the Apex court in the case of SAIL (Supra). He contends that the order passed under section 26(1) is an administrative order and the nature of the powers exercised by the Commission are inquisitorial and not adjudicatory and do not entail any civil consequences. He relies upon the findings of the Apex Court cited supra to canvass that the Commission is expected to record some reasons while forming a prima facie view and it may pass a speaking order but Section 26(1) did not contemplate passing of an order of adjudication but a mere prima facie opinion without following the mandate of "principles of natural justice" in a strict sense. He also places reliance on the judgment of the Bombay High Court in case of Kingfisher Airlines Ltd. Vs. Competition Commission of India MANU/MH/1167/2010 to contend that the purpose of investigation is collection of evidence and as per the scheme of the Act, when an order is passed under section 26(1) a prima facie case being made out, it is never a conclusion of breach or otherwise. According to him, the law is well settled that the court could not stifle investigation at all except for compelling reasons. He also places reliance on the Madras High Court Judgment in the case of Chettinad International Coal Vs. Competition Commission of India MANU/TN/0438/2016. According to Shri Aney the Commission has based its case on looking into the five relevant points namely, (1) the delay/denial of POI, type of (2) types of POI conversion into new way POI (3) conduct of ITOs similar in nature even before the letters from COAI (4) parallel action on behalf of the ITOs and COAIs in the manner of allotment of POI. According to Shri Aney the telecom regulatory authority has already concluded that the denial of POI was in violation of interconnect agreement and fine has been levied. According to him, the COAI has taken a stand on the issue and has not only written communication to the regulatory authority. According to him the qualitative and quantitative aspects of the chart was looked into by the Commission, which lead to an irresistible conclusion that there was breach of terms and conditions of agreement by the petitioners operators and it passed an order on 22 October 2016. The supply of POI was minimal and it increased only after the order of TRAI and according to him the Commission has to look into the conspectus of matters with a view point of consumer and thus there is no perversity in the order passed by the Commission. According to him though the Commission was not a duty bound to call the opposite party for hearing and afford them an opportunity or look into the material, the Commission has looked into the material and arrived at a conclusion since there was sufficient material to order an investigation in exercise of powers under section 26(1). According to him in exercise of powers under Article 226 this court would not substitute the view of Commission.

80. Dr. Sathe, learned Senior Counsel appeared on behalf of RJIL and he supported the order passed by the Commission. According to him, RJIL holds a unified licence issued by the Department of Telecommunication and according to him, the unified licence and unified access services licence entered into by the petitioners and the RJIL governs the rights and obligations of the TSPS. He canvassed that in the event of any conflict between the terms of interconnect agreement (ICA) and the provisions of quality of service (QOS) Regulations, the provisions of QOS Regulations will prevail. According to him, there is no distinction between the "test phase" and "phase before commercial launch" as the recitals in the agreement contained in ICA are effective from the date on which the agreement is entered into.

81. According to Shri. Sathe the ICA defines the term "subscriber" in a inclusive manner and since there is a contractual relationship between RJIL and its test phase

users, it cannot be said that they are not subscribers. He took us through various clauses in the ICA and also through the Quality Of Service (QOS) Regulation, 2009. Shri. Sathe also argued that QOS Regulation prescribes that congestion at each individual POI, cannot exceed 0.5% over a period of one month and RJIL experienced call failures far in excess of QOS standards of congestion.

82. Learned Senior Counsel argued that the Regulations do not create any distinction between obligations of TSP during the test phase and the commencement of services and moresoever when during test phase RJIL made payments of approximately Rs. 10.3 Crores to the petitioners towards charges for terminating calls on their network, made by its test users on the network of the petitioners and the payment has been accepted without any demur. According to RJIL, the petitioners also understood their obligation and therefore they never denied the RJIL request for augmentation on account that it was during "test phase" and contemplated augmentation after 70% utilization levels were reached. He also argued, that reliance on "Consultation Paper of network testing before commercial launch of services" misplaced and merely because consultation paper has been issued did not mean that there was any ambiguity or any gray area in the Regulatory regime. It is also contended that the extensive test phase was necessitated for RJIL since it was using a unique technology in the form of LTE data and office video messaging (OVM) and it wanted to test a new category of device that supported its VVITE technology and therefore there were no definite benchmarks to follow the requirement of testing. According to RJIL, it was deploying cutting edge technology on an unprecedented scale, which would have effect of making high-speed voice and data access available to customer across the country at prices that were a fraction of those offered by competitors and in this background they demanded the POI based on its forecast from time to time which was not timely provided.

83. Shri. Sathe also contended that the Commission was duty bound to find whether there was any agreement in any form whatsoever which was likely to cause an appreciable adverse effect on competition and the complaint of RJIL made to the Commission was that the ITOS with the COAI had entered into such agreement into which had appreciable adverse effect on the competition under Section 3 and formed the prima facie opinion under Section 26(1) and has not adjudicated in any manner. According to the learned Senior Counsel, if the argument of the petitioner is to be accepted then this Court would be passing an order under Section 26(2) of the Competition Act thereby closing the matter. He also placed reliance on the judgment in the case of SAIL (Supra) along with other Judgments. He placed heavy reliance on the TRAI Recommendations dated 22 October 2016 from which four facts had emerged, namely, (a) on recommendations of TRAI there was spike in supply of POI on 29 October onwards, (b) there was no technical difficulty in augmenting the POIs nor there was any financial constrains since the money was paid by RJIL and (c) 90 days was the minimum time and prescribed for augmentation but that was maximum time the petitioners need not have waited till 90th day, (d) There was parallel action and behaviour on part of all the Telecom Operators. According to him, the Competition Commission did not solely rely upon the recommendations but only accepted it as facts. He placed reliance on the judgment in the case of Excel Crop Care Limited vs. Competition Commission of India & Anr. MANU/SC/0588/2017 and Grasim Industries Limited vs. Competition Commission of India MANU/DE/4658/2013.

Learned Senior Counsel Shri Shrinivasan also represented RJIL and took us through the Scheme of the Competition Act, in a great detail. According to him, the

independent decision of the ITOs got converted into a decision in concert with the association supporting the ITOS. According to him, the Competition Act aims at the economic development of the country and prevent practices having adverse effect on competition since anti-competitive agreement affects "economic well being". According to him, it was the existing players who did not welcome the entry of RJIL into the market and he rebutted the contention advanced on behalf of the petitioners that the dispute is between service providers and TDSAT can look into the same. He demonstrated that the Scheme of CCT Act is different and the role to be played by the TRAI as a sectoral regulator under the Telecom Regulatory Authority of India Act, 1997 is different. According to him, in terms of Section 14 that the TRAI can make Regulations and Licencee is bound to follow the Regulations without any reservation and it is not permissible for any Telecom Operator to arrogate the Regulator. Further, according to the learned Senior Counsel, demand was made for POIs since RJIL was ready for launch and the petitioners have refused to provide such POIs and thereby attempted to stop the entry of RJIL into the market when RJIL was ready to arrange for all the expenses. As regards the test phase argument of the Counsel for the petitioners, learned Senior Counsel responded that it was the choice of the TSP to load his network with testers to test the load factor and when he had 22 million subscribers on 21st June, 2017, it was approximately one lakh testors for each State. Moresoever, according to him, the petitioners did not make any grievance with RJIL in respect of test period. Shri Ramji Shrinivasan has bifurcated the period schedule involved in the matter into four periods, first period being from December, 2015 to 21 June 2016, second period from the date of demand on 21 June 2016 till 1 September 2016 i.e. the date of prelaunch, between 1 September 2016 to 8 November 2016 when RJIL had commercially launched and a period 8 November 2016 i.e. after completion of RJIL to the Commission. He took us through various communications extended between the parties during the aforesaid period to demonstrate that the whole attempt of the petitioners was to stifle the competition by RJIL.

84. Shri Amit Sibbal, learned Senior Counsel also advanced his arguments in support of case of RJIL and according to him, causing loss of market by colliding either in person or quality is violative of Section 33(b) of the Competition Act. According to Shri. Sibbal, the petitioners ought to have taken independent decision and by their decisions which were in concert, all of them had caused loss of competition amongst themselves. He heavily relied upon the decision of ITOS not to supply POIs which was not of independent of each other but as action in concert. According to the learned Senior Counsel, the spike in the POIs after the TRAI Recommendations clearly reflected such action in concert and according to him, this finding of Commission is not parasite of TRAI's Recommendations and in fact arranging one way POIs at similar point of time and following the same pattern of shifting from two way to one way POIs is reflecting an Anti-Competitive Agreement amongst the parties and demonstrate collusion. He also argued that the action of the Commission is an "action in rem" and is anti-competitive in nature that the jurisdiction of the Competition Commission is exclusive in view Sections 60 to 62 of the Competition Act.

Fundamental reasons to decide Writ Petitions:-

85. Strikingly, the Supreme Court Judgment in SAIL (Supra) has been read and referred by both the side Senior Counsel in support of their rival contentions. The relevant paragraphs are-

"31. .....

(2) However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17(2) of the Regulations to invite not only the information provider but even 'such other person' which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be 'preliminary conference', for whose conduct of business the Commission is entitled to evolve its own procedure.

(3)(4) ....

(5) In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties."

87. Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami v. Union of India MANU/SC/0222/1993 : (1992) 4 SCC 605 explained the expression 'inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but sui generis.

"91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature ....."

"97. ... . At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the

view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

"119. ... . The Commission, while recording a reasoned order, inter alia, should: (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market."

This Judgment has been followed in following other cases.

(a) Kingfisher Airlines (Supra)-

"24. .....There could therefore be no impediment in taking any action under the new Act. Even otherwise, the provisions of the M.R.T.P. Act and the Competition Act are not identical. Since no action whatsoever is taken or proposed to be taken by the M.R.T.P. Commission, there could be no question of the petitioners being subjected to double jeopardy. Further, the M.R.T.P. Commission now stands abolished w.e.f. 14th October, 2009. There is, therefore, no question of M.R.T. P. Commission now taking any action against the petitioners. This ground of challenge has no substance at all.

(b) Chettinad International Coal (Supra):-

"35. ....This Court refrains from entering into the factual controversy, as the entire issue is at a preliminary stage before the Commission and the Commission has only formed a prima facie view and it would not be the interest of parties to dwell into facts and therefore, this Court has not ventured into examining the merits of the factual contentions raised by the contesting parties."

(c) Aamir Khan Productions Pvt. Ltd. & Anr. vs. Union of India & Ors. MANU/MH/1025/2010 : (2011) 1 BomCR 802

"15. The question whether the Competition Commission has jurisdiction to initiate the proceedings in the fact situation of these cases is a mixed question of law and fact which the Competition Commission is competent to decide. The matter is still at the stage

> of further inquiry. The Commission is yet to take a decision in the matter. There is no reason to believe that the Competition Commission will not consider all the contentions sought to be raised by the petitioners in these petitions including the contention based on Sub-section (5) of Section 3 of the Competition Act.

86. In case in hand, the Commission (majority decision) has given reasons by overlooking the law and the record. The parties and their counsel have participated before the Commission with huge number of documents and charts. This is not a case of "administrative order" only. It is a reasoned order/direction, therefore, Judicial review is permissible.

A case for Judicial Review-

87. The Writ Petitions are maintainable also for the following reasons.

(a) Union of India vs. Gunasekaran MANU/SC/1068/2014 : (2015) 2 SCC 610

> "12. .....In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers Under Articles 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether:
>
> a) the enquiry is held by a competent authority;
>
> b) the enquiry is held according to the procedure prescribed in that behalf;
>
> c) there is violation of the principles of natural justice in conducting the proceedings;
>
> d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
>
> e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
>
> f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
>
> g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;
>
> h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;
>
> i) the finding of fact is based on no evidence.

The case in hand falls within the ambit of above clauses itself. Therefore, a case for judicial review.

88. The following Judgments of Supreme Court on interpretation of Competition Act

required no discussion as it is settled position of law, but we have to consider the facts and circumstances of the case in hand.

(a) Excel Crop Care Limited (Supra)

> "45. ... . Even when the CCI forms prima facie opinion on receipt of a complaint which is recorded in the order passed Under Section 26(1) of the Act and directs the DG to conduct the investigation, at the said initial stage, it cannot foresee and predict whether any violation of the Act would be found upon investigation and what would be the nature of the violation revealed through investigation. If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition. We, therefore, reject this argument of the Appellants as well touching upon the jurisdiction of the DG."

(b) Grasim Industries Limited (Supra)

> **16.** It is also stated in the written submissions of the respondents that violations of provisions of Section 3 may also result in violation of Section 4 of the Act as well. In my view, what is material in this regard is as to what was the information which was considered by the Commission, while forming its opinion and not whether such an information constituted violation of the provisions of Section 3 or Section 4 of the Act."

(c) Google Inc. & Ors. Vs. Competition Commission of India and Anr. MANU/DE/1271/2015 : (2015) 150 DRJ 192 (DB)

> ...
>
> "L) However, a petition under Article 226 of the Constitution of India against an order under Section 26(1) of the Act would lie on the same parameters as prescribed by the Supreme Court in Bhajan Lal (supra) i.e. where treating the allegations in the reference/information/complaint to be correct, still no case of contravention of Section 3(1) or Section 4(1) of the Act would be made out or where the said allegations are absurd and inherently improbable or where there is an express legal bar to the institution and continuance of the investigation or where the information/reference/complaint is manifestly attended with mala fide and has been made/filed with ulterior motive or the like."

89. This is a case for judicial review, also in view of the rival contentions so raised by the Senior Counsel for the parties on various controversy as contended. Therefore, we are going further into the depth of the matters, as even contended by the Senior Counsel for the parties.

90. Admittedly, no Appeal lies against the order passed under Section 26(1) of the Act, expressing prima facie opinion (SAIL Supra). There is no dispute on the said issue. Therefore, the remedy available to the Petitioners and/or like persons is to invoke Article 226 of the Constitution of India. There is no issue about the maintainability of such Writ Petition against the impugned decision as there is no

alternate remedy available.

Administrative direction/or reasoned decision by the quasi judicial authority or Executive Authority-

91. In the present case for the reasons so recorded by the Commission after considering the compilation of documents, charts, filed by the rival parties, the Commission has called the parties for the conferences by exercising its discretion and permitted the counsel to explain the respective charts/case. Such impugned order cannot be treated and/or termed as "administrative order" and/or direction as observed in SAIL (Supra). The principle and interpretation given by the Supreme Court and other High Courts needs no discussion. But at the same time the High Court, under Article 226 of the Constitution of India and/or even otherwise, is required to consider the rival contentions so raised, based upon the records and the law. It is settled that the validity of administrative order is required to be judged by the reasons mentioned therein, and it cannot be supplemented by the additional reasons, through the affidavit and oral and written submissions, in subsequent proceedings. In T.P. Senkumar, IPS Vs. Union of India & Ors. MANU/SC/0494/2017 : (2017) 6 SCC 801 the Apex Court, though in service matter, has considered the nature of "administrative order", as under:-

> **80.** In this context the following passages from M.A. Rasheed Vs. State of Kerala MANU/SC/0051/1974 : (1974) 2 SCC 687, are quite telling on the issue of "satisfaction" of an executive authority:
>
> > "8. Where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them", or when "in their opinion" a certain state of affairs exists; or when powers enable public authorities to take "such action as they think fit" in relation to a subject matter, the courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated.
> >
> > **9 .** Where reasonable conduct is expected the criterion of reasonableness is not subjective, but objective. Lord Atkin in Liversidge Vs. Anderson 1942 AC 206 (HL), said:
> >
> > > "....If there are reasonable grounds, the Judge has no further duty of deciding whether he would have formed the same belief any more than, if there is reasonable evidence to go to a jury, the Judge is concerned with whether he would have come to the same verdict."
> >
> > The onus of establishing unreasonableness, however, rests upon the person challenging the validity of the a cts.
> >
> > *10. Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the courts' own opinion of what is*

reasonable to the criterion of what a reasonable body might have decided. The courts will find out whether conditions precedent to the formation of the opinion have a factual basis."

(Emphasis added)

"85. The law has been well-settled for many years now that when an order is passed in exercise of a statutory power on certain grounds, its validity must be judged by the reasons mentioned in the order. Those reasons cannot be supplemented by other reasons through an affidavit or otherwise. Were this not so, an order otherwise bad in law at the very outset may get validated through additional grounds later brought out in the form of an affidavit.

86. In this context it is worth referring to Commissioner of Police v. Gordhandas Bhanji MANU/SC/0002/1951 : AIR 1952 SC 16, in which it was said:-

"9 ..... Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

This view was affirmed by the Constitution Bench of this Court in Mohinder Singh Gill v. Chief Election Commissioner MANU/SC/0209/1977 : (1978) 1 SCC 405."

"94. The subjective satisfaction of the State Government must be based on some credible material, which this Court might not analyze but which can certainly be looked into. Having looked into the record placed before us we find that there is no material adverse to the interests of the Appellant except an expression of opinion and views formed, as far as he is concerned, as late as on 26-5-2016. This make-believe prima facie satisfaction by itself cannot take out judicial review of administrative action in the garb of subjective satisfaction of the State Government."

92. We are convinced for the reasons recorded above and the ones to follow that case is made out by the Petitioners to interfere with the impugned majority decision/orders. The impugned order, in no way, can be said to be purely an administrative order. We are of the view that judicial review, if the case is made out, is permissible even against the orders passed by the Authority like the Commission, specifically in the facts and circumstances of the case. [Mangalam Organics Limited Vs. Union of India. MANU/SC/0492/2017 : (2017) 7 SCC 221]

93. The objection so raised by the learned counsel who are supporting the impugned order that the present Writ Petition under Article 226 read with Article 227 of the Constitution of India need not be entertained, as the said decision and the directions are not adjudicatory in nature, but merely the administrative and it not entail any civil consequences, is unacceptable. The prima facie opinion, leading to a direction for investigation does not determine any of the rights of the parties is also untenable. There is no adjudication in respect of any dispute by and between the parties, is also

not a correct submission. The Judgments so cited by the CCI and RJIL are required to be considered on the facts and circumstances of the case. The position of law needs no further discussion. The judgments, so cited, are distinguishable on facts and the law for the above reasons itself.

94. In view of the same Supreme Court Judgments and reading the provisions of the Act and the regulations, in fact the Commission has collected the detailed information by holding the conferences, calling material details, documents, affidavits and by recording the opinion and referred the matters for further inquiry and investigation to DG. The impugned order/direction so passed cannot be treated as just "administrative order" and/or "not adjudicatory in nature."

95. There is no total bar in entertaining such Writ Petition, specifically when the case is made out of great injustice, perversity, illegality, hardship and prejudice to the legal rights of the service providers or the enterprises, apart from non-application of mind to the telecommunication laws. This is specifically keeping in mind the consequences of this opinion, so expressed and the investigation so contemplated followed by the final order of compensation under the Competition Act.

Territorial Jurisdiction-

9 6 . The preliminary objection raised that the Petition is not entertainable/maintainable in this High Court of Judicature at Bombay, is also devoid of any merit. There is no issue and/or denial to the facts that the part of cause of action arose in Mumbai and/or the State of Maharashtra. The parties have placed material on record including the affidavits and the averments so made in the Petition, which supports the fact that the part cause of action arose in Maharashtra, including in Mumbai. The relevant averments in this regard of the respective Petitioners, in the Petitions are read and referred by the Senior Counsel.

9 7 . The substantial client/consumer base is in State of Maharashtra. The Respondents/service providers Officers' are at Mumbai. The affidavits and averments and the documents so placed on record, show that the various correspondences/the documents have been exchanged by and between the parties, within the jurisdiction of Maharashtra State including Mumbai. Both the parties have substantially argued the matter by referring to the affidavit and the documents/charts, which are necessary to adjudicate the issues so raised. The Senior Counsel appearing for the CCI has not agitated issue about maintainability or entertainability of the Writ Petitions in this Court. We are inclined to hold that the present Writ Petitions, are maintainable and entertainable in this High Court.

98. We are inclined to accept the submissions/contentions so raised by the learned senior counsel appearing for the service providers/petitioners. The defence/supporting submissions revolving around the majority decision by the senior counsel appearing for the Respondents (RJIL and CCI) are not acceptable. [Kranti Associates Pvt. Ltd. v. Masood Ahmed Khan & Ors. MANU/SC/0682/2010 : (2010) 9 SCC 497 and Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India & Anr MANU/DE/0762/2016 : (2016) 4 Comp LJ 122].

Objections to entertainability of Writ Petitions in light of Section 26(1) of Competition Act-

9 9 . Another factor/objection was that these Writ Petitions are not maintainable against such administrative order/direction under Section 26(1) of the Competition

Act is also unacceptable. The Supreme Court Judgment (SAIL supra) and/or others nowhere dealt with this aspect of entertaining and/or maintaining of Writ Petitions against such order.

100. The impugned decision is by majority five members. The dissent note is of two members. The reasons are given by the majority members in support of the information/complaint so lodged, by two individual persons, including Reliance Jio. The dissent note, rejecting the information/complaint also reflects various reasons based upon the documents/charts placed on record by the parties. In totality, the Commission members have read and referred the respective documents, material, charts and written submissions and pass the reasoned order, including the reason for dissent. The Petitioners are relying upon the dissent note in support of their contentions, in addition to their oral, as well as, written submissions. The Respondents however, supporting the majority opinion in addition to their rival contention and the supporting documents and/or oral and/or written submissions. Therefore, in the facts and circumstances, the impugned order/even if of impugned majority order and/or minority order, no way can be stated to be administrative order/directions and/or not adjudicatory in nature and without any Civil consequences, as submitted by the counsel appearing for the Respondents Jio and CCI. This impugned majority order, in fact, has decided several issues and elements though stated to be in prima facie nature, ultimately entail into the DG to inquire and investigate with clear adverse consequences, so recorded revolving around the Competition Act, by overlooking the provisions of TRAI Act/Contracts, between parties.

Power and jurisdiction under the TRAI Act and the Competition Act:-

101. The information is filed based upon the averments around the various breaches committed by the Petitioners-service providers under the agreement by not providing timely POI, though demanded from time to time, that as stated resulted into failure of calls of Jio/consumers. The stated deliberate "delay", "denial" had resulted into "congestion", as alleged, was with collusive attempt to thwart the launch and/or entry of Respondent-RJIL into the telecom market. This alleged action in concert falls within the ambit of Sections 3 and 4 of the Competition Act. These averments itself make position clear that the parties have entered into the various agreements/contracts, as required under the TRAI Act. Thus, the agreement clauses and its interpretation is necessary for further adjudication of the controversy so raised, as it has direct connection and link with the allegations so made. Therefore, unless these contract conditions are defined clearly, the rights and obligations of the parties by the Authority under the TRAI Act, the Commission, would not be in a position to decide finally the stated tacit or indirect agreements, by the service providers and its association to scuttle the progress and/or launching of RJIL. We have read the impugned decision and referred to the record to ascertain the bundle of the facts which are required to deal with the rival contentions. All these alleged facts and data have direct link and are interwined with the commercial contract clauses between the parties/service providers under the telecommunication laws. The parties are bound to comply with their respective rights and obligations. If there is non-compliance and/or breach of clauses, directly or indirectly, the grievance required to be redressed before the Authority/Tribunal under whose supervision and control such rights and obligations are crystallized. The case of deliberate collusive delay and laches, that resulted into the alleged congestion, certainly falls within the ambit of such binding agreements and it is appropriate that the Competent Authority/Tribunal define their rights and obligations, in the telecom market under the governing laws.

The Commission may initiate inquiry later on, if still the case is made out, but not otherwise. Once the points are settled, the parties may also settle their disputes and the grievances. The elements of commercial settlements are very much available in the matters. No one can be individually blamed for any default or delay.

102. In the present case, as noted, there are no such clear terms and obligations provided and/or crystallized at any earlier point of time. No agreement clauses have provided and dealt with the situation where new entrant, being its business strategy, supply or gives free offer/cards to the millions of "potential Consumers" in six months advance, before commercial launching of its project. Its effect on the existing service providers, who have been running their business, based upon the existing policy and the technology, required to be noted by all the concerns. The free supply of cards to the employees and/or to distributors during test period, is understandable situation. If party or person, service providers, having business understanding in the market, willing to provide as and when demanded the IPOs of any numbers, the Court and/or third person will not be in a position to interfere with it. The parties can sit and settle even such disputes at any point of time. But when the controversy is raised, considering the facts and circumstances, the authority/Tribunal and/or the Court is required to decide it in accordance with law of the market. The Association role, in view of uncleared position in the market or vagueness about the rights and obligations, in such situation, is important. We are considering the power and jurisdiction of the respective statutory authorities under the respective Acts.

103. The Competition Act, in view of the scheme so elaborated in earlier paragraphs, empowered the Commission and/or authorities to exercise functions of prohibitive and constructive in nature. It is vested with inquisitorial investigation, regulatory and adjudicatory and as stated some extent advisory jurisdiction. The Competition Act is entertained to ensure fair competition in India by providing trade practice, which causes appreciable facts in the competition, in the market of India. The Authority, under the Competition Act is basically a fact finding Authority and not empowered to decide the question of law and/or any decision contrary to the other laws. The TRAI Act regulates the telecommunication services, adjudicate the disputes and protect the interest of the service providers and the consumers, of the telecom service. The source of TRAI Act, is Entry 31 of the Union list and source of Competition Act is from Entry 21 of the concurrent list of the Constitution of India. The service providers required to enter into and/or execute the similar type of authority, guided agreements/contracts, for providing and/or getting telecom services.

104. This is further elaborated by Section 21(A) of the Competition Act itself, which is a provision whereby, in case of doubt and/or for the clarification of any issues, the Commission may refer the matter to the experts/authorities pending the inquiry/investigation. Therefore, the Commission ought to have invoked this provision before initiating the proceedings, but has not been done in the present matter. We are not curtailing the power of the Commission to exercise the jurisdiction over the enterprise or person, that are regulated by other Sectoral authorities/Tribunals. The crux is of usurping the jurisdiction to decide the contractual terms and rights and obligations of service providers, who are governed and regulated by the TRAI Act, specially when the controversy, admittedly is pending before the High Court/The Government/Competent Authority under the TRAI Act. The Commission, in such situation, pending the litigation between the parties could not have proceeded further, even for inquiry and investigation, by expressing "prima facie opinion" under Section 26(1) of the Act, unless the position of governing law and the regulations of the concerned market are clear. Sections 60 to 62 of the

Competition Act, in the facts and circumstances, are of no assistance.

105. The Authorities/Tribunals under the TRAI Act, provide for various measures to facilitate the competition and to promote efficiently in the operation in telecommunication services, including aspects of technical compatibility. All are bound by their respective rights and obligations, arising out of the contracts, they enter into under the prescribed contract terms and under the supervision of the authorities under the TRAI Act. Therefore, if any dispute and/or issue and/or any question of interpretation arises in respect of any terms and conditions and/or policy decision and/or of any rights and obligations of the respective service providers, it is the authorities under the TRAI Act, which is specifically empowered to deal and decide the same. The Government and the concerned department, in the interest of development of such market, keeping in mind the technology and need, made it compulsory for every service providers to work and run their respective telecom business in the concern market within the framework of guided principles. The TRAI Act, Section 11(1)(a)(b), empowers to make recommendation on the specified subjects so provided. The same is recommendatory and has no binding effect on the Central Government being executive power/decision. But, this by itself, is no reason for other authorities, like the Commission under the Competition Act, to treat the same, as final and binding. Admittedly, the recommendation is under challenge and the matters are pending in the High Court. The informant, in fact has asked for the specific performance of the contracts. The Commission under the Competition Act provides and permits to check the stated anti-competition, cartelisation and adverse effect on the new project/entry, but under the TRAI Act, also the concerned Authority is empowered and considered to see the market development and to facilitate the competition and prompt efficiency, based upon the existing policy. The interest of all the service providers and consumers, is required to be treated equally, fairly, keeping in mind new technology, the supply and the developing telecom market. The Commission independently without keeping in mind the provisions of the TRAI Act in fact by overlooking it, on presumption and assumption, proceeded and initiated the stated inquiry. The scope and power of the Commission to initiate investigation by giving prima facie opinion, inspite of pendency of the issues and existing provisions of telecommunication laws, therefore, is perverse, illegal and impermissible.

TRAI recommendations treated as final-

106. The majority decision reflects the reliance on TRAI recommendation dated 21 October 2016 (the recommendation), which is the subject matter pending in the High Court Writ Petition. Department of Telecommunication (DOT) had, returned the same for further clarification. The recommendations are not binding, unless it is settled and decided by the Competition Authority finally. The observation by the TRAI that "other ITOs have jointly, through their Association, declined the interconnection to RJIL, appears to be ulterior motive to stifle the competition and is anti-consumer", this itself is contested and disputed by the Petitioners/Service Providers, throughout. The reasons of actual congestion at POI required to be dealt with finally by the High Court and/or Authorities under the TRAI Act. The submission that the recommendations are only noted but not relied upon, is unsustainable. The decision of the majority itself reflects that the Commission (majority), has proceeded to initiate the inquiry, as if the law in this regard is settled by the recommendations. The imposition of penalty by the TRAI has also influenced the Commission to pass the impugned order. The service providers have challenge to the recommendation in Writ Petition on various grounds, including the ground of natural justice and non-consideration of detailed letters dated 11 July 2016, in response to the show cause notice, still required final

adjudication. The recommendation also could not have been used as a material evidence and/or the settled position of controversy arising out of the agreements. The dissent note expressly observed that the recommendation cannot be relied upon. Though subsequently, the TRAI has reiterated its recommendation, but the DOT- the licensor, has not yet acted upon it. The fact of the pending challenge in the high Court against the order recommendations also is relevant factor in favour of the Petitioners' submission. The submission that the TRAI, in any way, cannot determine the service providers' collusion and cartelisation, is wrong approach, unless the contractual terms of ICAs and respective rights and obligations are finalized. Definitely, the Commission has no jurisdiction to decide it. It is therefore, clear that the majority decision has wrongly relied upon the recommendations and proceeded upon it. The reliance of recommendation was impermissible to initiate the inquiry. In any way, the impugned order/decision cannot be explained by additional reasons and/or by the oral submission, during the course of the arguments. The market complexity because of lack of clarity revolving around these important issues be left for final decision with the High Court or the Authority under the Telecommunication laws.

Free Subscribers and card holders and the Obligations of other Service Providers-

107. The majority decision and the submission of RJIL that RJIL's demand for "POI" during the testing phase was legitimate and therefore, augment of POI has to start from 21 June 2016. This was treated as a possible view even in their CCI's submission. This is on the foundation that "obligation to provide POI is only on the date of commencement of launch i.e. 5 September 2016 is prima facie disputed fact that needs to be gone into." This is with emphasis that there is a material to indicate the same. Such disputed issue pertaining to the obligation arising in the test phase and or the commercial phase are required to be determined before any issue pertaining to the anti-competitive activity action and/or initiation of any proceedings. Such controversy cannot be adjudicated by the Competition Authority. The words "test phase" and/or "test users", "subscribers", "test service cards" "employees" and its meaning and purpose are the part of the clauses of various agreements between the parties. The license fees as required to be shared during the test fee with the licensor DOT was not discussed and/or shared. The tariff plan was required to be filed only after commercial launch. No QoS reports available on TRAI's website before announcement of launch which is stated to be statutory requirement as per regulation 10 of PoS. All these aspects were not considered in majority decision. The dissent note however, recorded the issues around the same. The interpretation given by the RJIL to the definition of "subscriber" thereby stating that it includes any legal person or entity, therefore, it falls within the ambit of "subscriber" even during the test phase to include test phase users is not acceptable. At the same stroke, it is further stated by the RJIL that the test users seamlessly de-migrated as RJIL subscribers. On 31 August, 2016, RJIL reported approximately 5.3 million test users to the TMRL Cell. Therefore, this is by treating the test phase user after announcement of service as "subscribers". This justification is not specifically provided and mentioned anywhere in the agreement clauses and/or not even recorded in the majority decision.

108. DOT circular dated 29 August 2005 provides that "test service card" can be given to the business partners or employees. The circular clarifies that the test/service cards and cards given to the employees are to be deducted in order to arrive at "subscriber" of the TSP. The test user, therefore, cannot be treated as subscriber. The majority view no way dealt with and decided the said important issue and has not even made any observation, rightly so, for want of jurisdiction in itself.

It is clear from the explanation to the said circular that this test/service cards are required to be given free of costs to business partners including the operator to check the quality of service from time to time, so is the position that of the cards given to the employees, on which no revenue is generated. These persons, therefore, are test trial users during this test period and cannot be treated as "subscriber". Whether this circular and/or the clauses revolving around the same covered the case and situation of test phase or period is itself another issue which the Commission even after collecting the information could not have decided. The TRAI, while in penalty recommendation referred to congestion data of post launch from 15 September 2016 to 19 September 2016 and 3 October 2016 onwards. The circular further makes position clear that the utility of the test phase appears to be only to test the network and its quality. It cannot be used and utilized to test the market. The free service, as announced and/or declared by one provider, if has direct communication and or it required to link with the other providers, both the parties are required to act within the framework of agreement, but there is no such agreement and/or clause made out and/or pointed out and certainly not referred in the majority decision. The Commission is required to wait for the decision of the authorities/tribunals based upon the policy and/or circular already declared for the telecom market. The distribution of millions of test cards to the general public though may be a business strategy, but if the issue is raised about its feasibility in the terms of contract and regulation on the date of such action, then there existed a confusion and the clarification as sought by the service providers independently and/or through the Association, in no way can be stated to be action within the purview of Section 3 of the Competition Act.

The charts and the details-

109. All the Senior Counsel read their respective charts referring to access to POIs and NLD POIs. The charts of call failure also part of record. More we read these charts and correspondence, more we also felt the importance of the interpretation and the clarifications of this complex issues. We have also noted, after hearing the parties at length and after noting the charts so submitted by the rival parties that even at the end after collecting the information/investigation by the Director General, the Commission for want of specific power and jurisdiction could not have dealt with such telecommunication laws and terms and conditions and interpretations. The Commission could not have proceeded further to pass any final effective and executable order for want of clarification on the issues. The Commission, ought not to have invoked general provisions of law of cartelisation and anti-competitive law, without waiting for final decision of the TRAI recommendations. The submission that the Commission's order and directions are of administrative nature and decides no legal rights and effects, is unacceptable in the facts and circumstances of the case.

110. We are not inclined to accept the situation that both the Authorities, under the respective Acts to continue the proceeding and after final decision by the TRAI Authority, the Commission will pass final order under the Competition Act. The Commission ought not to have proceeded with inquiry in view of pendency of the litigation in High Court, arising out of the same terms and conditions and rights and obligations of the service providers from same agreements.

111. The collection of information, pending legal issues before the Competent Authority in advance, is impermissible and unjustifiable. It definitely, cause injustice, and affect the rights of reputation, name and fame in the market.

112. As scope and challenge is limited, we are not dealing the merits of the matters, arising out of it. But definitely, considering the scope and object of the Competition Act and the power of Authorities, keeping in mind the telecom sector markets, governing law and the government policy. The Judgments so cited by the Respondents/CCIA/RJIL, are distinguishable on the facts and the law itself. No case has decided the situation and the fact like one in hand. There were no such parallel proceedings pending, dealing with the same contract conditions and its interpretation under telecom communication laws, in these Judgments.

113. The submission that the CCI has also power of a Civil Court, while conducting any inquiry/investigation and penalty can be levied and/or compensation for cartelisation, that itself is no reason to usurp the jurisdiction to decide the rights and obligations of the parties, arising out of the contracts under the TRAI Act.

Telecommunication regulations are binding-

114. Under he TRAI Act, as recorded, there are various regulations, including (i) Telecommunication Interconnection (Port Charges) Regulations, 2001 (TIPCR, 2001) to ensure effective interconnection arrangement between the service providers and to claim the charges. (ii) The TRAI (Levy of Fees and other Charges for Tariff Plans) Regulation, 2002 (TRAI Fees Regulation, 2002) provides and deals with the levy of fees and other charges, as per the rate determination. (iii) The Telecommunication Interconnection Usage Charges Regulation, 2003 (TIUC Regulation 2003) also fixed the terms and conditions of interconnectivity between the service providers and for sharing the revenue between the providers, (iv) Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009, further set aside the quality of services mechanism. The issue is that the Commission cannot adjudicate and/or decide, in any manner, the breaches of terms and conditions/regulations and interpret any policy decisions and/or even provide any guidelines, in case of doubts and/or confusion in the telecom market. The TRAI, being the Sectoral regulator, has all technical expertized to deal and decide of the issues required for the telecom Sector. The TRAI Act and the Regulations read together is complete code. [Union of India Vs. Tata Teleservices (Maharashtra) Ltd. MANU/SC/3396/2007 : (2007) 7 SCC 517]. We are not observing in any manner that the existence of Commission and its power to curb the abusive and anticompetitive conduct is curtailed. The existence of Commission cannot be stated to be redundant, otiose and nugatory, merely because we are interfering the order so passed, in the circumstances so recorded.

115. Section 14 of the TRAI Act, as defined the jurisdiction of Telecom Dispute Settlement and Appellate Tribunal "TDSAT", by excluding the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) Tata Teleservice (Supra), the Consumer Protection Act. There is no issue that under the TRAI Act, as per the provisions of the Competition Act, related orders/actions/compensation cannot be awarded. There is no question of conflict of laws, in view of above position. The Judgment of Telefonakiebolaget LM Ericsson (PUBL) (Supra) para 168 and 175 are of no assistance. Above all, the supporting submissions so read/made by the learned counsel appearing for the Respondents, including CCI, not dealt and decided and/or even touched by the CCI in the impugned majority order. It is settled that the authorities cannot act and/or substitute the reasons, through their submissions and/or affidavit for the first time while defending such orders. The law is settled in this regard.

116. Once the aspect of jurisdiction goes to the root of the matter, non-challenge of earlier decision in other matters that itself, no way, empower the Commission to have a jurisdiction to deal with the controversy in hand. In the present case, we are not inclined to accept the submission that, to initiate the proceedings, is a mixed question of law and the fact. The Judgments cited by the learned counsel appearing for the CCI and RJIL, even arising out of the Competition Act, are distinct and distinguishable on facts reflected in this Judgment. The Supreme Court Judgment in Aires Rodrigues Vs. Vishwajeet P. Rane & Ors. MANU/SC/0078/2017 are of no assistance, being the matter arising out of the distinguishable Criminal proceedings. Section 8 of the General Clauses Act 1897 is of no assistance. The submission of CCI that there are sufficient material for issuing such directions, is unacceptable. There is no question of prima facie opinion on assumption and/or presumption on a foundation that the governing law of the telecom market is settled on the issues so raised. (1) Aamir Khan Productions Pvt. Ltd. (Supra), Shri Niraj Malhotra Vs. North Delhi Power Limited & Ors. MANU/CO/0026/2011 and Mr. P.K. Krishnan Proprietor, Vinayaka Pharma Vs. Mr. Paul Madavana, Divisional Sales Manager M/s. Alkem Laboratories Limited MANU/CO/0108/2015. All these judgments are revolving around the respective Acts of the concerned market. The Acts involved are the Copyright Act, 1956 Aamir Khan Productions Pvt. Ltd. (Supra), The Patents Act, 1970 Telefonaktiebolaget LM Ericsson (PUBL) (Supra), The Electricity Regulatory Commission, Shri Niraj Malhotra (Supra) and The Drugs (Prices Control) Regulation, Mr. P.K. Krishnan Proprietor, Vinayaka Pharma (Supra). All these Acts governed their respective area but not regulated by statutory authority like under the telecommunication laws. The Commission has jurisdiction if any, once the position of law and the terms and conditions between the parties are clear and settled by the telecommunication Authority and the High Court and not otherwise. "The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no Authority can confer upon its jurisdiction which it otherwise does not possess." (A run Kumar Vs. Union of India MANU/SC/3995/2006 : (2007) 1 SCC 732)

117. The contesting Respondents, in any way, unable to take note of the position of the law at relevant time, cannot be permitted to give any clarification and/or explanation and/or justification for the first time in the High Court by placing on record the explanation through the charts, data and material and the Affidavits. The law is settled in this regard (T.P. Senkumar, IPS (Supra). We are dealing with, as contended, the majority decision. There was no specific challenge raised by the Respondents to the decision given by the minority members of the Commission. The other Respondents, therefore, cannot be permitted to challenge in argument, for the first time, the minority decision. The majority decision for the reasons so recorded in the Judgment, is without jurisdiction. The majority decision/action/order is liable to be quashed and set aside, being perverse. [Atlas Cycle Haryana Limited (Supra)]. The Supreme Court has reiterated the position that a finding, by overlooking the material on record would amounts to perversity and in Writ jurisdiction it can be interfered with. [Achutananda Baidya (Supra)].

118. The Co-operation and co-ordination if volunteered by one provider to other, irrespective of such demand, and if both the parties act accordingly with adjustment and settlement, there is no issue which is required to be considered by the Authorities under both the Acts. However, when the issues are raised and created because of a new practice and in absence of precedent, it required to be settled by the competent Court/Tribunal under the market governing laws.

119. Admittedly, the concern Respondent launched with 2.2 million subscribers,

which was unprecedented, specifically because it offers free services, as a business strategy. Everything is required a pre-contract, pre-notice, specific pre-agreements/clauses and reasonable phase-wise demand in the existing telecom market. The conduct of Respondents was noted in the dissent note, but not in majority decision. Having once offered free services, and even if there are call failures that itself ought not to have been reason to hold that it was only due to deficiency of POIs. The various issues of informants, network and/or operationalization of POIs, non-utilization of POIs and various other technical factors apart from match and/or mismatch of new technology with the existing technology may be the relevant factors. All these aspects unless settled and decided by the Competent Authority/Tribunal under the TRAI Act, the prima facie majority decision is unsustainable and unacceptable even for issuance of any direction. We are reiterating that all these disputes where there is delay and denial in providing reasonable POIs; whether there is an obligation to provide one way POI instead of two 2 way POIs; whether there is breach of such obligations; whether the test phase extends only to business partners or employees; whether cards could be supplied for testing quality of network and not for testing the market and; whether this amounts to creation of subscriber base,- all these are issues to be decided by the authorities and tribunals (TDSTD) and not by the High Court and definitely not by the Commission under the Competition Act.

Role of Association (COAI)- "Every majority decision is not cartelisation"-

120. The TRAI's recommendation and observations against the role of COAI, in the facts and circumstances, for above reasons itself are untenable and unsustainable. Every majority decision by the Association and/or its members, cannot be termed and/or stated to be "cartelisation". Heavy reliance was placed by the Commission on letters of COAI which forming its prima facie opinion. The representation made by the COAI to the DOT and the TRAI, referred to the issue about RJIL's conduct of providing full-fledged services to more than 1.5 million subscribers on its network and that the traffic between the RJIL and other service providers was one sided due to its free services. The Reliance's free services/offer during the test phase period in huge number, was the issue in the telecom market, since it was unprecedented. The commercial innovation of one service provider, based upon the new technology is always welcome, but, it is also depend upon the others' connectivity and/or interconnection and the concerned authorities are required to deal and facilitate the solution for all. There was admittedly no agreed specific clause and/or provisions and/or agreement entered into by and between the service providers, in question. The confused/gray area is required to be dealt with and handled by such Association, in representative capacity. Therefore, any representation made in this background commenting upon huge "Free Service/cards" not only to the employees and/or close relatives, but to the millions new potential consumers in test phase period, who were not prescribed "Subscribers" cannot be treated as an attempt to thwart the progress of new Entrant. The co-ordination and co-operation and the guidance are needed, as it has direct bearing on the interconnection and/or interlinked with other existing service providers as a part of commerce. It cannot be said to be one sided and unilateral decision. The representations made to the Government or regulatory Authorities, cannot be stated to be with intention to thwart the entry of RJIL. The whole purpose and object of the Association, is always in the interest of the members and the market development. Any members' representation for clarification for want of specific clause, just cannot be overlooked, if it directly or indirectly affect the other members. The concerned statutory authorities, based upon the existing policies, even otherwise, are required to deal with the same, keeping in mind the new

technology based project and old technology of existing service providers and the basic implementable effective service. The Competition Act, nowhere debar and/or prevent such Association from acting in the interest of the members and the concerned telecom market within the framework of their law. The Judgment, so sited by the Respondents in the case of Competition Commission of India Vs. Coordination Committee of Artistes and Technicians of West Bengal Film and Television & Ors. MANU/SC/0262/2017 : (2017) 5 SCC 17 is distinguishable on the facts. In the present case, the representation was to the statutory Authority, as there was apparent doubt and confusion in the market and as those authorities are controlling and supervising the telecom market in every aspects. The judgments cited by the learned counsel appearing for the CCI, as well as, RJIL in this regard, are distinguishable on the facts and circumstances of the case itself. The concepts of "Judgment in rem" and/or "in personam" itself means serious consideration of the subject by the competent Authority within the framework of the respected laws and the proved facts. There is no case of inconsistency or conflict between two Acts. The provision of Competition Act is additional and not in derogation of any law.

121. We have gone through the CCIA's letters and communications and its contents. It nowhere can be read to mean that the intention was to thwart the progress of the RJIL. No case is made out that the action of the Association was aimed at boycotting the new entrant, or such conduct could be presumed to be anti-competitive. The judgments cited by the RJIL, are of no assistance to accept the case of collusion and/or conspiracy. The failure to provide "unreasonable demands" and/or the "reasonable demands", for want of conditions in the respective licenses (Unified licenses) and the clarification sought, in no way, can be stated to be with intent to stifle the launching by RJIL. Some Petitioners/service providers have shown the charts to demonstrate that from time to time they had supplied the sufficient POIs, keeping in mind the terms of the contract to provide "reasonable POIs on demand".

122. The unreasonable demand, if objected and clarification sought from the Department/Government through the Association, in no way can be stated to be in breach of any provisions. RJIL information itself has shown there existed doubt and the issue revolving around the respective rights and obligations of the parties inter se. The recommendation was based upon the complaint/representation. Strikingly, as recorded and conceded that on 31 August 2016, RJIL has "nil subscribers". Nothing is pointed out either in form of any practice, obligation and/or circulars and/or regulations, to provide such huge demand of POIs, in the "test phase". The issuance of consultation paper by TRAI on this controversy of POIs during the test phase, supports the case of the Petitioners/providers. The splitting of E1's on the foundation of the recommendation that there is an embargo on the splitting the trunk groups under the interconnection agreement for a period of two years, is again an issue. As there is no specific bar under the interconnection agreement that restricts the parties from splitting the trunk groups even before the expiry of such period. Therefore, for the traffic management, is to be based on the custom and practice and not on the basis of averments made by one party. Merely because the telecom service providers adopted the similar approach to split the trunk groups, that cannot be stated to be a collusive approach and/or treated as an anti competitive agreement. At the appropriate stage, even RJIL has not recorded any objection on the provisions of one way E1S, as reflected from the letters submitted by the RJIL. The dissent note, even recorded that "....it appears it was not any concerted action of the ITOs but the situation created by RJIL itself which seems to have led to huge congestion on its network....". The percentage of satisfaction of the demand so set out in the RJIL information, just cannot be relied in the above background. The Commission

(majority) decision, based upon the media report and allegations of RJIL by overlooking the above position cannot fall within the ambit of requisite ingredients of Section 3 of the Act.

No case of tacit agreement or joint decision and/or attempt to hamper the RJIL commercial launching.-

123. There is no material, except the correspondence so referred against the COAI. There is no other evidence or material to justify that all the Petitioners/service providers, excluding the Respondents and other two, formed any internal and discrete Association directly or indirectly attempting to thwart the progress of the RJIL. Every parallel conduct will be regarded and/or presumed to be action in concert and/or in collusion, specially in a oligopolistic market. The RJIL conduct and free services, as stated to be a business strategy, was an issue concerning the telecom market itself and therefore, the steps and the representations so made by COAI, in no way can be concluded as a "cartelisation". The Respondent's reproach of interdiction in the stated supply by the Petitioners and its Association is unjust, unreasonable and unsustainable and also premature.

"Cartelisation"

124. The concept of "cartelisation" is not new in any national or international, and/or commercial transaction and the market. The concept of "cartel" and "agreement" are defined under the Competition Act. There is no direct and/or written agreement on record to justify such impugned agreement/cartel. The Authorities are required to consider the facts and circumstances and such allegations, based upon the supporting material and the documents. The Apex Court in Competition Commission of India Vs. Coordination Committee of Artistes and Technicians of West Bengal Film and Television & Ors.(Supra) has considered the aspects of stated cartelisation, though based upon the facts and circumstances of the given case. All in all, the Authorities are required to consider the facts and circumstances of the case and the stated agreements by and between the parties. The individual member and/or majority members and/or through Association attempted to control and/or thwart the progress of new entry is again a matter of evidence. Every majority decision of any Association cannot be treated and/or declared as cartelisation. The presumption of cartelisation and/or action in concert cannot be, opined, by overlooking the governing laws, regulations of the respective market. (Union of India Vs. Hindustan Development Corporation MANU/SC/0219/1994 : (1993) 3 SCC 499).

125. The role of the COAI, of making representations, even for some members but, in view of the uncleared position of the market, cannot be termed as stated "cartelisation". It cannot be treated/read to mean the deliberate, collusive action, only to thwart and/or to scuttle the new entry. The whole action of COIA is bonafide within their power and the authority, in the interest of telecom market and the consumers. The findings, based upon these action of COIA that it breaches the provisions or falls within the ambit of Section 3(2) of the Competition Act, is unjust and untenable.

Show cause notices issued by DG-

126. For the reasons so recorded above, the issuance of notice and asking for various details by the DG, not only for the elements under Section 3, but the stated contravention itself is impermissible and contrary to the scheme of the Competition Act. The impugned majority order itself is unjust, without jurisdiction therefore, such

inquiry and investigation and the show cause notices issued by the DG are also unsustainable. As the investigation will definitely cause irreparable and immense damage to the Petitioner's name and fame and reputation, specifically when they are in the market for long time and having huge area wise customers base. Service providers business depends upon its credibility in the national and international market, including the global lenders, investors, suppliers and the partners. Such investigation/inquiry, at the instance of the rival competitor, will affect their business and reputation. The Supreme Court in Rohtas (Supra) has recorded, "the adverse effect of investigation on the companies". The Apex Court in Sri Ramdas Motor Transport Ltd. & Ors. Vs. Tadi Adhinarayana Reddy & Ors. MANU/SC/1193/1997 : AIR 1997 SC 2187 has recorded that unless proper grounds exist for investigation, such investigation will not be undertaken. The Bombay High Court in Parmeshwar Das Agarwal and Ors. Vs. The Additional Director (Investigation) Serious Fraud Investigation Office, Ministry of Corporate Affairs and Ors. MANU/MH/2038/2016 : [2016] 199 Comp. Cas 353 Bom., has observed that, if there is lack of requisite material to arrive at the requisite opinion and record the necessary satisfaction, then, in exercise of such powers is subject to the judicial review.

127. Therefore, taking overall view of the matter, we are also of the view that the rights and obligations to provide POIs arise under the terms of the license, granted by the DOT and the terms of supply are governed by the interconnection agreements entered into by service providers with each other. It is relevant to note that the consultation paper of TRAI on these issues, further reiterates the fact of confusion and the controversy so agitated by the service providers and the COAI. Such grievances are genuine and bonafide. Therefore, no case is made out of any cartelisation by and through the COAI.

The Parties material and/or suppression of material facts and/or incorrect information.

128. We have gone through the material placed on record. The controversy regarding denial/delay of POIs and/or correctness and/or suppression of facts and/or information and/or non-consideration of material information in the majority decision on merits, though we have heard substantially, as submitted by the parties to consider the bundle of facts, as necessary to decide the case in hand, but considering the reasons we are mainly dealing with the jurisdictional aspects of the matter. Therefore, we are not recording any further reasons on the rival contentions of the parties on the merits of the same, keeping in mind the scope and jurisdiction of this Court under Article 226 of the Constitution when it comes to deciding the disputed questions of fact and since we do not intend to substitute the decision by our own. We are inclined to accept the basic submission of jurisdiction and power of Commission and of the TRAI authorities as submitted by the senior counsel appearing for the Petitioners. We are not accepting the submissions, counter submissions/defences of the senior counsel appearing for the RJIL and the Commission, on the aspects of respective powers and jurisdiction under the Acts. Therefore, for the reason so recorded above, we are inclined to quash and set aside the majority decision given by the Commission and the consequential action of issuance of notices by the D.G under the Competition Act and all further actions arising out of it, in the facts and circumstances of the case.

129. We are of the view that, the observation of the Commission that the service providers/Petitioners had an understanding, agreement and acted in concert to deny or delay the provision of POIs, and they as individual members, through their

Association have breached the provisions of Section 3(3)(b), ought not to have been opined, even prima facie, unless their respective rights and obligations under the Telecommunication laws are clarified and/or decided by the Regulatory authorities/Tribunal and the High Court. The initiation of enquiry, at this stage, by the Commission by holding that the alleged parallel conduct of individual members and Association establishes prima facie, that there is a collusive conduct that limits provision of services and the technical development as per Section 3(3)(b) is unacceptable, including further action of investigation so ordered, being without jurisdiction, illegal and perverse. This is also for the reason that the clarification/justification revolving around jurisdiction and power of Commission though not specifically discussed and decided in majority decision is attempted to be justified by affidavits or contentions, for the first time raised in writ jurisdiction, in reply, is also unacceptable and impermissible to maintain the impugned majority decision. The order of Commission cannot be explained/clarified in such manner. The Commission should speak through its order and initiate the proceedings if case is made out to collect the stated facts and information. It is unacceptable to permit the Commission to collect the facts and/or information when it has not itself concluded the controversy about the rights and obligations of the parties based upon statutory agreements/regulatory authority's guidance/circulars. The stated conduct and/or cartel could not have been tested or inquired into unless their rights and obligations based upon the governing laws in the market are clear and settled, as the same binds all the respective service providers of the telecom sectors.

130. conclusions-

a) All the Writ Petitions are maintainable and entertainable. This Court has territorial jurisdiction to deal and decide the challenges so raised against impugned order (majority decision) dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act arising out of it.

b) The telecommunication Sector/Industry/Market is governed, regulated, controlled and developed by the Authorities under the Telegraph Act, the Telecom Regulatory Authority of India Act (TRAI Act) and related Regulations, Rules, Circulars, including all government policies. All the "parties", "persons", "stakeholders", "service providers", "consumers" and "enterprise" are bound by the statutory agreements/contracts, apart from related policy, usage, custom, practice so announced by the Government/Authority, from time to time.

c) The question of interpretation or clarification of any "contract clauses", "unified license" "interconnection agreements", "quality of service regulations", "rights and obligations of TSP between and related to the above provisions", are to be settled by the Authorities/TDSAT and not by the Authorities under the Competition Act.

d) The concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/or practice", arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only.

e) The Competition Act and the TRAI Act are independent statutes. The statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the object, for which they are established. There is no conflict of the jurisdiction to be exercised by them. But the Competition Act itself is not sufficient to decide and deal with the issues, arising out of the provisions of the TRAI Act and the contract conditions, under the Regulations.

f) The Competition Act governs the anti-competitive agreements and its effect- the issues about "abuse of dominant position and combinations". It cannot be used and utilized to interpret the contract conditions/policies of telecom Sector/Industry/Market, arising out of the Telegraph Act and the TRAI Act.

g) The Authority under the Competition Act, has no jurisdiction to decide and deal with the various statutory agreements, contracts, including the rival rights/obligations, of its own. Every aspects of development of telecommunication market are to be regulated and controlled by the concerned Department/Government, based upon the policy so declared from time to time, keeping in mind the need and the technology, under the TRAI Act.

h) Impugned order dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act proceeded on wrong presumption of law and usurpation of jurisdiction, unless the contract agreements, terms and clauses and/or the related issues are settled by the Authority under the TRAI Act, there is no question to initiating any proceedings under the Competition Act as contracts/agreements go to the root of the alleged controversy, even under the Competition Act.

i) The Authority like the Commission and/or Director General, has no power to deal and decide the stated breaches including of "delay", "denial", and "congestion" of POIs unless settled finally by the Authorities/TDSAT under the TRAI Act. Therefore, there is no question to initiate any inquiry and investigations under Section 26(1) of the Competition Act. It is without jurisdiction. Even at the time of passing of final order, the Commission and the Authority, will not be in a position to deal with the contractual terms and conditions and/or any breaches, if any. The uncleared and vague information are not sufficient to initiate inquiry and/or investigation under the Competition Act, unless the governing law and the policy of the concerned "market" has clearly defined the respective rights and obligations of the concerned parties/persons.

j) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act, therefore, in the present facts and circumstances, are not mere "administrative directions".

k) Impugned order dated 21 April 2017 and all the consequential actions/notices of the Director General under the Competition Act, are therefore, illegal, perverse and also in view of the fact that it takes into

consideration irrelevant material and ignores the relevant material and the law.

l) Every majority decision cannot be termed as "cartelisation". Even ex-facie service providers and its Association COAI, have not committed any breaches of any provisions of the Competition Act.

131. Hence the following order-

ORDER

a) Impugned order dated 21 April 2017, passed by the Competition Commission of India (CCI) under the provisions of Section 26(1) of the Competition Act, 2002 in case Nos. 81 of 2016, 83 of 2016 and 95 of 2016 and all the consequential actions/notices of the Director General under Section 41 of the Competition Act, are liable to be quashed and set aside, in exercise of power under Article 226 of the Constitution of India. Order accordingly.

b) All the Writ Petitions are allowed.

c) There shall be no order as to costs.

d) In view of the above, nothing survives in Civil Application (Stamp) No. 17736 of 2017 in Writ Petition No. 7164 of 2017 and the same is also disposed of. No costs.