NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 01 of 2022

In the matter of :

Amazon.com NV Investment Holdings LLC
2215-B, Renaissance Drive,
Las Vegas, Nevada,
USA – 89119 **….. Appellant**

V

1. Competition Commission of India & Ors.
Through its Secretary
9th Floor, Office Block-I
Kidwai Nagar (East), Opposite Ring Road,
New Delhi – 110023, India **…..Respondent No.1**

2. Future Coupons Private Limited
2nd Floor, Sobo Central Mall,
Pt. Madan Mohan Malviya Road,
Haji Ali, Tardeo, Mumbai – 400034
Maharashtra **…..Respondent No.2**

3. Confederation of All India Traders
Through its General Secretary,
Mr. Praveen Khandelwal,
Vyapar Bhawan, 925 / Gali No.1
Pocket B1, Nai Walan,
Karol Bagh, New Delhi – 110005 **…..Respondent No.3**

Present:

For Appellant : Mr. Gopal Subramanium, Mr. Arun Kathpalia and Mr. Amit Sibal, Senior Advocates Mr. Pavan Bhushan, Ms. Ujwala Uppaluri, Ms. Hima Lawrence, Ms. Bani Brar, Mr. Kaustubh Prakash, Mr. Aishvary Vikram Singh, Mr. Swapnil Singh, Mr. Saksham Dhingra, Mr. Vinay Tripathi, Mr. Anand Pathak, Mr. Shashank Gautam, Ms. Sreemoyee

Deb, Mr. Rajat Moudgil, Ms. Anubhuti Mishra, Mr. Amit Kr. Mishra, Mr. Vijay Purohit, Mr. Mohit Singh, Mr. Shivam Pandey, Ms. Samridhi Hota, Ms. Nikita Bangera, Mr. Chetan Chawla, Ms. Didon Misri, Mr. Rishabh Juneja, Mr. Sanyam Juneja, Mr. N. Subramaniam and Ms. Nandini Sharma, Advocates

For Respondent-1 : ASG Mr. N. Venkataraman with Mr. Manu Chaturvedi, Mr. Chandrashekhar Bharathi and Sanyat Lodha, Advocates.

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

For Respondent-2 : Mr. Mukul Rohatgi and Mr. Harish Salve, Senior Advocates
Mr. Ramji Srinivasan and Mr. Dayan Krishnan, Senior Advocates with Mr. Mahesh Agarwal, Mr. Pranjit K Bhattacharya, Mr. Rishi Agrawala, Mr. Raghav Shankar, Ms. Rajshree Chaudhary, Advocates.

For Respondent-3 : Mr. Krishnan Venugopal and Mr. Saurabh Kirpal, Senior Advocates with Mr. Rajat Sehgal, Advocate.

With

Competition Appeal (AT) No. 02 of 2022

In the matter of :

All India Consumer Product Distributors Federation
Through its Authorised Signatory
Mr. Dhairyashil Patil
3B, 9149, Multani Dhanda
Paharganj, New Delhi – 55 **….Appellant**

V

1. Competition Commission of India & Anr.
Through its Secretary
9th Floor, Office Block-I
Kidwai Nagar (East), Opposite Ring Road,
New Delhi – 110023, India **…..Respondent No.1**

2. Amazon.com NV Investment Holdings LLC
2215-B, Renaissance Drive,
Las Vegas, Nevada 89119,
United States of America **…..Respondent No.2**

<u>Present:</u>

For Appellant	:	Mr. Darpan Wadhwa, Senior Advocate with Mr. Arvind Kumar Gupta, Ms. Purti Gupta, Ms. Henna George, Ms. Shivani Sharma, Ms. Surbhi Dhanuka and Mr. Amer Vaid, Advocates
For Respondent-1	:	ASG Mr. N. Venkataraman with Mr. Manu Chaturvedi, Mr. Chandrashekhar Bharathi and Sanyat Lodha, Advocates. Ms. Shama Nargis (Deputy Director Law, CCI, R1)
For Respondent-2	:	Mr. Gopal Subramanium, Mr. Arun Kathpalia and Mr. Amit Sibal, Senior Advocates Mr. Pavan Bhushan, Ms. Ujwala Uppaluri, Ms. Hima Lawrence, Ms. Bani Brar, Mr. Kaustubh Prakash, Mr. Aishvary Vikram Singh, Mr. Swapnil Singh, Mr. Saksham Dhingra, Mr. Vinay Tripathi, Mr. Anand Pathak, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Rajat Moudgil, Ms. Anubhuti Mishra, Mr. Amit Kr. Mishra, Mr. Vijay Purohit, Mr. Mohit Singh, Mr. Shivam Pandey, Ms. Samridhi Hota, Ms. Nikita Bangera, Mr. Chetan Chawla, Ms. Didon Misri, Mr. Rishabh Juneja, Mr. Sanyam Juneja, Mr. N. Subramaniam and Ms. Nandini Sharma, Advocates

With

Competition Appeal (AT) No. 03 of 2022

In the matter of :

Confederation of All India Traders
Through its General Secretary,
Mr. Praveen Khandelwal,
Vyapar Bhawan, 925 / Gali No.1
Pocket B1, Nai Walan,
Karol Bagh, New Delhi – 110005 **…..Appellant**

V

1. Competition Commission of India
Through its Secretary
9th Floor, Office Block – Tower I
Kidwai Nagar (East), Opposite Ring Road,
New Delhi – 110023, India **…..Respondent No.1**

2. Amazon.com NV Investment Holdings LLC
2215-B, Renaissance Drive,
Las Vegas, Nevada 89119,
United States of America **…..Respondent No.2**

3. Future Coupons Private Limited
2nd Floor, Sobo Central Mall,
Pt. Madan Mohan Malviya Road,
Haji Ali, Tardeo, Mumbai – 400034
Maharashtra **…..Respondent No.3**

Present:

For Appellant : Mr. Krishnan Venugopal and Mr. Saurabh Kirpal, Senior Advocates with Mr. Rajat Sehgal, Advocate.

For Respondent-1 : ASG Mr. N. Venkataraman with Mr. Manu Chaturvedi, Mr. Chandrashekhar Bharathi and Sanyat Lodha, Advocates.

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

For Respondent-2 : Mr. Gopal Subramanium, Mr. Arun Kathpalia and Mr. Amit Sibal, Senior Advocates Mr. Pavan Bhushan, Ms. Ujwala Uppaluri, Ms. Hima Lawrence, Ms. Bani Brar, Mr. Kaustubh Prakash, Mr. Aishvary Vikram Singh, Mr. Swapnil Singh, Mr. Saksham Dhingra, Mr. Vinay Tripathi, Mr. Anand Pathak, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Rajat Moudgil, Ms. Anubhuti Mishra, Mr. Amit Kr. Mishra, Mr. Vijay Purohit, Mr. Mohit Singh, Mr. Shivam Pandey, Ms. Samridhi Hota, Ms. Nikita Bangera, Mr. Chetan Chawla, Ms. Didon Misri, Mr. Rishabh Juneja, Mr. Sanyam Juneja, Mr. N. Subramaniam and Ms. Nandini Sharma, Advocates

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Mr. Ramji Srinivasan and Mr. Dayan Krishnan, Senior Advocates with Mr. Mahesh Agarwal, Mr. Pranjit K Bhattacharya, Mr. Rishi Agrawala, Mr. Raghav Shankar, Ms. Rajshree Chaudhary, Advocates.

JUDGMENT

(Virtual Mode)

Justice M. Venugopal, Member (Judicial) :

Preamble:

Competition Appeal (AT) No. 01 of 2022:

The Appellant/Amazon.com NV Investment Holdings LLC has preferred the instant Competition Appeal (AT) No. 01 of 2022 as an `Aggrieved Person' (under Section 53 (B) of the Competition Act, 2002) on being dissatisfied with the `impugned order' dated 17.12.2021 (vide Ref No.C-2019/09/688/7099), passed by the `1st Respondent/Competition Commission of India (CCI)' in proceedings under Sections 43A, 44 and 45 of the Competition Act, relating to certain findings of the `1st Respondent/CCI' and the consequential directions imposing a penalty of INR Rs.202 Crores and a further direction that the `Approval' accorded to the Combination Registration No. 688 was kept in abeyance till disposal of the `Notice' under Form I with a direction to the `Appellant' to refile `for Approval' in Form II.

2. Earlier, the `1st Respondent/Competition Commission of India' while passing the `impugned order' dated 17.12.2021 (in Ref No. C-2019/09/688/7099) against the `Appellant' (Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act, 2002), among other things at Paragraph Nos. 33 to 40, 41 to 47, 57, 60, 68, 69, 75, 77, 80, 82, 83, had observed the following:

33. "Prior to the Approval Request, a situation update relating to the negotiation between the parties, seen as a part of another internal e-mail dated 10th July, 2018 of Amazon (Situation Update), elaborates on the background and purpose with which the Combination was contemplated between Amazon and Future Group. The relevant extract of the Situation Update is reproduced below:

"10 July 2018

Project Taj – Investment in National Multi-category Copperfield-seller Situation Update:

The Taj group is India's largest and multi-category offline retailer with 280 multi-category stores, 620 grocery stores and 400 fashion only stores in top 50 cities. The Taj group's retail company, Taj Retail Limited (TRL) is publicly traded and has a market cap of $4.1B[1] (July 9, 2018). Amazon's India team likes Taj's management team, store footprint, private label capability and believe they are one of the key players in the offline retail market to partner with. For an overview of relevant Taj group businesses, please refer to Annexure I.

On 24 May, 2018, we received an approval from ... to indicate interest (to Taj's founder) to invest between $400 to $500 MM for upto 9.99% stake in TRL. In India, our ability to pursue investments / acquisitions of retailers is limited because laws restrict foreign investment in multi-brand retail assets (i.e., retailers selling multiple brands across categories under one roof). However, because TRL is a listed company, Alpha [Amazon] can acquire upto 9.99% of TRL directly (as a foreign portfolio investor). Eventual ownership will vary upon final pricing discussions.

Upon receiving ... approval, we engaged into deeper discussion with Taj on pricing / valuation, investment structure and strategic rights that we could get through an investment. As of last week, we have aligned with Taj on an investment framework to proceed

further with this transaction. A Business Commercial Framework (BCF) to build and accelerate Ultra-Fast Delivery across top-20 cities in India leveraging Taj's national stores footprint as a Copperfield seller, is agreed in principle with Taj team; please refer to Annexure II for investment rationale and more details of the BCF. This note provides background on the transaction, details of the investment framework and FAQs addressing the key points to consider before going back to Taj team with our offer…

FAQs

1. What are the strategic objectives that we want to achieve through Taj?

We are looking to secure the following business objectives through this transaction:

a. Ability to become the single largest shareholder in India's largest offline retailer (TRL) when foreign direct investment (FDI) opens up in this sector.

b. Precluding / blocking competitive interest in TRL, and preventing an IC from acquiring TRL.

c. Together with the investment, Alpha will enter into a commercial agreement to utilize TRL's pan-India store infrastructure to bolster Alpha's ultra-fast delivery program, exclusively carry private label portfolio in grocery and value fashion, and drive higher fees for Alpha.

2. What is our business rationale and BCF for Taj?

We believe that a two-hour delivery promise, for 15,000 SKUs across top-20 cities will be a unique differentiating capability. It will allow us to cover 85% of our Prime members and 63% of all customers. To serve this customer base, we believe working closely with a large Copperfield seller is important. We believe that Taj is one of two key pan-India retailers worth pursuing (the other being Brigade). Taj has a strong portfolio of private label selection in

grocery (450+SKUs, across packaged foods, home and personal care) and value fashion (27 brands with a median ASP of $9.2 (INR 600), contributing to 80% of their GMS for fashion). Against our investment of $400 to 600MM in TRL, we estimate the discounted cash flow value of BCF over 10 years of $702MM (INR 45.6B); please refer to Annexure II for investment rationale and more details of the BCF. When foreign investment laws are relaxed and higher stake or acquisition of multi-brand retail assets is permitted beyond today's possibilities, we would have a foot-in-the-door to acquire more in this strategic asset, should we so desire at the time. For further details please refer to Annexure II – BCF Strategic Value. Importantly, our investment in TRL will be liquid given that TRL is publicly traded in the Indian stock market, and therefore, we can recover our investment in case TRL fails to deliver.

3. What is the proposed transaction?

An overseas Amazon entity, registered as a 'foreign portfolio investor', will acquire 9.99% (through a fresh issuance of shares) of TRL. Simultaneous with the investment, Alpha India will enter into a commercial agreement (BCF) with TRL, and Taj Consumer Limited (TCL), and Taj Lifestyle Fashion Limited (TLFL) in relation to the matters listed in FAQ 2…

6. If we were to execute both Taj and Brigade, why is a Call Option important in both situations?

Our ICs (BB, FK, Paytm Mall) are aggressive on grocery, general merchandise and general electronics categories. Specifically in grocery and fresh categories, we are lagging behind BB and FK is also nipping at our heels. Walmart's expertise in offline retail will likely spur FK and Alibaba's investment and technology will continue to push BB ahead.

Given the above, we need to build deep strategic alignments with offline grocery retailers to leverage their execution capabilities to power our fresh and grocery offering. India has 6 offline retailers

(Taj, Brigade, Reliance Retail, D-Mart, Spencers and Nature's Basket). With a process of elimination on parameters of asset quality, partner quality and availability, only two i.e. Taj and Brigade remain. If we are able to close our investment in Brigade, we would secure a high quality asset, however it will lack the scale and national footprint that Taj offers. Further, Brigade is our bet to own a high quality grocery operation. Taj, on the other hand, is an investment in a multicategory Copperfield seller with a larger pan-India footprint. Getting a Call option in both assets allows us to acquire and raise our bet, at our discretion, in the player we feel best meets our objectives after having tested close operational alignment with both in 3-7 years following investment; when regulations permit.

7. If we were to execute both Taj and Brigade, how would we decide which Call Option to exercise then?

Keeping aside our tenets of Financial Discipline for the moment; holding a Call Option in both assets keeps our options open and it also serves as an incentive / deterrent to Brigade / Taj. If Brigade executes flawlessly, we can exercise our Call Option (when legally permissible) and make Brigade a spearhead of our 1P grocery operations. If Brigade doesn't execute to our bar, then we can choose to pull back from further investments in Brigade and double down on our investments in Taj, provided that it meets our expectations. If Taj executes well both on BCF as well as an independent retail asset, when regulations relax, we will have the ability to increase our stake in India's largest offline retailer and keep our competition. If Taj doesn't execute well, we can exit our ownership in listed stock. Holding Call Options in both assets, thus allows us to control our destiny in a thoughtful manner in the future…

Annexure II - Strategic value accruing to Amazon as a result of the Business Commercial Framework (BCF).

We started working with Taj, couple of years ago, as a Copperfield seller in three cities (across 23 stores) to learn and develop the ultrafast delivery model in India. In April-2018, we served about 2000 orders per day with an AOV of $12.3 (INR 802) and UPO of 9.3. We earn merchant fee of 5.4% and have a CPLF of -$4.55 (-INR 296) per order (55.5%). If we improve the order economics, we believe Taj's footprint of physical infrastructure can offer a unique 2-hour-delivery service across multiple categories in top-20 cities. Therefore, we constructed a BCF to estimate value creation from this partnership across their retail assets and private label capabilities.

1. Offer 2-hour-ready selection in top 4 cities with improved economics: An average hypermarket store carries an in-stock selection of about 15,000 SKUs - 8500 in softlines, 5500 in grocery and 2000 in general merchandising (primarily home and kitchen). There are 104 stores in top 4 cities. In five years we can scale to 21K orders/day with an AOV of $24 (INR 1549) and GMS of $181MM (INR 11B). In this model we will bear only the last mile costs with increase in SoA fee for grocery at 13.5% (+810bps over current levels) and 32% for softlines. Therefore, we will improve our order economics with an OP per order of -$0.8 (- INR 53) or (+2495bps vs. 2021 LRF). OP less infra will be $1.3 (INR 84) (+2466 bps vs. 2021 LRF)

2. Build and expand 2-hour-delivery service in the next 16 cities: These cities are likely to grow faster than the top-4 cities and therefore will lead in retail consumption. Taj has nearly 120 stores in these cities and carry an average selection of 12,000 SKUs. We expect to expand the Copperfield-service to these cities within three years and scale to 31K orders per day with an AOV of $20.9 (INR 1,363) by year 5. The order economics will be similar to that in top-4 cities.

3. Carry Taj's private label selection across grocery and softlines exclusively: We will leverage Taj's private label selection to substitute and accelerate the private label selection in Pantry. Our

2020-LRP assumes private-label penetration of 7.0% as proportion of Consumables GMS. We believe we can expand private-label participation to 18% by year-3 (current penetration of Taj is at 30% in FMCG and 60% in Staples). This will give incremental margins of INR 26 per order in Pantry. Taj has capabilities from design to manufacturing for fast and value-fashion brands in apparels, shoes and luggage. Leveraging this capability, we can improve the share of private labels to overall Softlines business by 10% (+500bps) in Year-5. Secondly, we expect Taj's fashion stores Fashion-Big-Bazaar, Central and Brand Factory to list as a seller, similar to Shopper Stop (we invested for a 5% stake in India's largest offline fashion department store to onboard 200K+ ASINs across 300 fashion brands) and generate additional 0.5MM order per month. We expect to improve Softlines CP by 507bps by year- by a combination of accelerated PL penetration, increased selection of Central and Brand Factory and improvement in SOA fees.

4. Foot-in-the-door and a strategic option value: Laws in India currently do not permit foreign investment in offline retail companies engaged in both food and non-food retail. This could change in the next 3-5 years, as government of India, is slowly relaxing the laws. At that point, Taj will likely still be the largest asset with pan-India footprint and the possibility of greater control."

[Emphasis Supplied]

34. Another important internal document of Amazon that shows the basis of entering into the Commercial Arrangements and the share acquisition is its internal note dated 24th May, 2018, the relevant extract of which is reproduced as under:

"Project Taj – National Multi-category Copperfield-seller Background:…Amazon's India team likes Taj's management team, store footprint, private label capability and believe they are one of the key players in the offline retail space to partner with. In January 2018, the founder of Project Taj had visited Seattle and

presented the Taj Group's capabilities to Jeff Bezos and the senior leadership team. Since then, we engaged with Taj and discussed a Business Commercial Framework (BCF) to build and accelerate Ultra-Fast Delivery across top-20 cities in India leveraging Taj's national stores footprint as a Copperfield seller. In India, our ability to pursue investments / acquisitions of retailers is limited because laws restrict foreign investment in multi-brand retail assets (i.e., retailers selling multiple brands across categories under one roof). However, because Taj's Retail entity is a listed company, we could invest up to 9.99% of the company directly as foreign shareholders. To execute on the above Business Commercial Framework (BCF) the founder of Taj believes a close alignment via a strategic investment with an online player is important. We seek your approval to indicate our non-binding interest (to Taj's founder) to invest between $400 to $500 MM for up to 9.99% stake in the company. Eventual ownership will vary upon final pricing discussions. This indication of interest to invest in Taj will allow us to get engaged deeper into discussion on pricing / valuation (given fluctuating stock price & regulatory pricing guidelines), deeper financial performance of Taj, regulatory hurdles/challenges and strategic rights…

Investment Rationale: We believe that a two-hour delivery promise, for 15,000 SKUs across top-20 cities will be a unique differentiating capability. It will allow us to cover 85% of our Prime members and 63% of all customers. To serve this customer base, we believe working closely with large Copperfield seller is important. We believe that Taj is one of two key pan-India retailers worth pursuing. Other retailers are sub-scale or part of business groups, or are unsuitable to partner with. Taj has a strong portfolio of private label selection in grocery (450+SKUs, across packaged foods, home and personal care) and value-fashion (27 brands with a median ASP of $9.2 (INR 600), contributing to 80% of their GMS for fashion). An investment in Taj will allow us to provide the following benefits, based the commercial terms we have been discussing with Taj: (a) expand coverage in top four

cities with improve the merchant fee to 13.5% (+850bps); (b) build a two-hour-delivery service in next 20 cities; (c) exclusively carry their private label portfolio in grocery and value-fashion; and(d) obtain option value to increase our equity stake when laws change. In summary, against an investment of $400 to 500MM in Taj we estimate the discounted cash flow value of BCF over 10 years of $702MM (INR 45.6B). Our investment will be liquid given that Taj is publicly traded in the Indian stock market…"

[Emphasis Supplied]

35. The Commission notes that the above three internal documents (Internal Correspondence) of Amazon Group are relevant to understand its focus during negotiation with Future Group and what were its objectives to be achieved by way of entering into the Combination. As may be seen, the negotiations between the parties relating to the Combination were taking place as early as May, 2018, wherein Amazon initially planned to partner with Future Group, being a key player in the offline retail market, by acquiring 9.99% shareholding in FRL as well as entering into a business commercial framework to build and accelerate ultra-fast delivery services across the top-20 cities in India, leveraging the national footprints of Future Group. Through these transactions, Amazon Group wanted to secure its ability to become the single largest shareholder of FRL when the foreign direct investment opens up in the retail sector; preclude/ block competitive interest in FRL and utilise the pan-India store infrastructure of FRL to bolster the ultra-fast delivery program and exclusively carry private label portfolio in grocery and value fashion; and drive fees for Amazon. The rationale to enter into such Combination included the need for Amazon to build deep strategic alignments with offline grocery retailers to leverage their execution capabilities to power the fresh and grocery offerings of Amazon.

36. The Approval Request dated 18th July, 2019 suggests that, in view of certain developments relating to foreign investments in India, instead of directly acquiring 9.9% shareholding in FRL, Amazon would use a twin-entity investment structure to invest in FRL i.e., Amazon would acquire 49% shareholding in FCPL which, in turn would hold 8 – 10% of the

shareholding in FRL. It was further stated that the number of equity shares of FRL to be held by FCPL was calculated such that Amazon can indirectly hold the same number of shares of FRL that Amazon would have acquired if it had directly invested the consideration in FRL. Further, the consideration has been arrived at on the basis of traded price of FRL shares, and a 25% premium is paid on account of the strategic rights and call option. Furthermore, it is evident that acquisition of shares in FRL/FCPL by Amazon was envisaged as a pre-requisite to enter into commercial agreements between Amazon and Future groups.

37. Seen against the above backdrop, the purpose of the Combination, including the rights over FRL and the Commercial Arrangements with FRL, as enlisted in the summary dated 18th July, 2019 appended to the Approval Request was for investment in FRL and establishing a strategic alignment/partnership between Amazon and Future groups, in the Indian retail sector.

38. Now coming on to the Notice, it is relevant to look at Item 5.3 of Form I, which requires the notifying party to disclose 'Economic and Strategic purpose (including business objective and rationale for each of the parties to the combination and the manner in which they are intended to be achieved) of the Combination'. Amazon submitted the following as its purpose for the Combination:

> *"The Investor [Amazon] believes that FCL [FCPL] holds a potential for long term value creation and providing returns on its investment. The Investor has decided to invest in FCL with a view to strengthen and augment the business of FCL (including the marketing and distribution of loyalty cards, corporate gift cards and reward cards to corporate customers) and unlock the value in the company."[18]*

39. In terms of Regulation 13A of the Combination Regulations, the notifying party is required to provide a summary of the combination containing, inter alia, the nature and purpose of the combination. The relevant extract of the summary filed by Amazon against this requirement states that:

"The Investor [Amazon] believes that FCL [FCPL] holds a potential for long term value creation and providing returns on its investment. The Investor has decided to invest in FCL with a view to strengthen 18 Para 30, at pp. 30 and 31, of the Notice Page 32 of 57 and augment FCL's business relating to marketing and distribution of corporate gift cards."[19]

40. Upon examination of the Notice, a specific query was posed to Amazon, vide letter dated 9th October, 2019, in relation to Item 5.3 of the Notice viz., '2.13'. With reference to item 5.3 of Form I, please provide the following: ... (c) According to media articles and statements of Mr. Kishore Biyani, the investment by Amazon is strategic to become a part of the ecosystem. Please elaborate'. In response, Amazon had elaborated the gift card business of FCPL and the interest of Amazon to expand its portfolio in the payments landscape in India and stated that:

"In this backdrop, it is submitted that the Proposed Combination will enable the Parties to: (i) enhance Investor's [Amazon] existing portfolio of investments in the payments landscape in India, (ii) provide an opportunity to FCL [FCPL] to learn global trends in digital payments solutions and launch new and innovative product offerings; and (iii) offer innovative payments solutions to entities so as to enhance consumer convenience and user experience"[20].

41. A further query on the rationale of the rights under FRL SHA was posed to Amazon vide letter dated 24th October, 2019 viz. '2.5. As per the notice, Acquirer will get certain rights over the FRL. You are required to provide details of shareholding (directly / indirectly), affirmative rights/veto rights/ rights not available with ordinary shareholders in FRL or rights with respect to FRL being acquired by Amazon and strategic and or economic rationale for such rights'. In response, Amazon, inter alia, stated that:

"It is submitted that the Investor's [Amazon] decision to invest in FCL [FCPL] is, inter alia, based on the following considerations: (a) the unique business model of FCL addresses an existing gap in the payments landscape in

India, thereby making it a strong and sound investment opportunity for the Investor (who holds similar existing investments in entities engaged in business activities within the payments market in India); and (b) while FCL has a strong growth potential, in the short term, to add credibility to its financial position, it has invested in, and proposes to invest in FRL, which is a publicly traded company with strong financials and futuristic outlook. In other words, the Investor has considered all the above-mentioned factors in totality to arrive at the value of the proposed investment...[21]"

[Emphasis Supplied]

42. Amazon had further claimed in the said response that it does not have any direct or indirect shareholding in FRL[22], and with a view to protect its investment in FCPL, certain rights have been granted with respect to FCPL's investment in FRL. These rights were stated to be: (a) 'contractual investor protection right... with no voting rights, with a view to protect its investment in FCL [FCPL]'[23]; (b) 'standard investment protection rights that are commonplace in investment agreements'[24]; (c) 'it would be important to note that not only are investors rights limited in scope, they also not extend to any subject matter that encroaches upon the commercial and operation decision making process of the FRL...[25]'; and (d) 'investor drives value of its investment from FCL and FRL (by virtue of being an underlying asset of FCL). Therefore, it is essential for the Investor to secure certain rights to protect its investment'[26].

43. In stark contrast to the Internal Correspondence of Amazon, the disclosures made against Item 5.3 of Form I, summary filed pursuant to Regulation 13A of the Combination Regulations, query 2.13(c) of letter dated 9th October, 2019 and query 2.5 of the letter dated 24th October, 2019, did not indicate a possibility of the Combination being pursued by Amazon for having a 'foot-in-door' in the Indian retail sector, acquire strategic rights over FRL or entering into any commercial partnership with FRL to expand the ability of Amazon in ultra-fast delivery services. Instead, the business potential of FCPL was shown as the driving factor

for Amazon to pursue the Combination and FRL was merely shown as a factor of financial strength. The Internal Correspondence of Amazon makes it abundantly clear that Amazon was all along focussed/interested in FRL. The Internal Correspondence of Amazon does not speak about the business potential of FCPL, as has been claimed and projected in the Notice and in the responses to the letters of the Commission. Similarly, the Notice presents the rationale of indirect rights over FRL, as protection to investment in FCPL but the Situation Update dated 10th July, 2018 identifies the same set of rights as answer to the following question 'What strategic rights do we get through this investment.' The expressions used by Amazon to describe the rationale behind the indirect rights over FRL varied from time to time: 'strategic rights' in its Internal Correspondence; 'protection to investment in FCPL' in the Notice given to Commission; and 'rights derived from FRL SHA are to protect the interest of the investor [Amazon]' in the response to SCN. While the object and purport of mere investor protection rights are limited to protect the investment made, the object and purport of strategic rights, such as those reflected in the Internal Correspondence, are much different. Such difference is of significance in establishing a proper understanding of a combination and its purpose, and accordingly, deciding the appropriate line of inquiry to assess the effects of the combination on competition. The Commission observes that, in every case of investment, the acquirer would want to protect the value of its investment and the returns therefrom. However, when a strategic acquisition is contemplated to achieve synergies amongst the business activities of acquirer and target enterprise through acquisition of shareholding (or) integration of whole/part of their business (or) commercial contracts/arrangements (or) a combination of these, any right accruing to acquirer pursuant to such acquisition would be beyond, but not limited to, mere investor protection. The purpose of securing strategic interest over FRL and commercial partnership with FRL is much different from FRL, a company with strong financials and futuristic outlook, being merely taken as an element of financial strength and protection to the investment in FCPL.

44. In the Notice, Amazon had represented that its rationale behind the Combination was the business potential of FCPL to create long term value and provide return on the investment made by Amazon. However, the Internal Correspondence of Amazon clearly shows different purposes for envisaging the Combination (i.e., 'foot-in-door' in the Indian retail sector, secure rights over FRL that are considered as strategic by Amazon and Commercial Arrangements between the retail business of Future Group and Amazon). In its response to the letters dated 9th October, 2019 and 24th October, 2019 of the Commission, Amazon had continued with the suppression of actual purpose of the Combination. Amazon has not contested the genuineness of the Internal Correspondence or their contents. It is obvious that the purpose of Amazon to pursue the Combination was not the potential of the gift and loyalty card business of FCPL, as has been claimed in the Notice. Rather, FCPL was envisaged only as a vehicle in the Combination to which no value or purpose is ascribed in the Internal Correspondence. Further, it is clear from the above discussed e-mail dated 19th July, 2019 that the entire consideration of the Combination has been arrived at on the basis of 25% premium to the regulatory price of FRL shares and that such premium was paid on account of the strategic rights and the call option provided to Amazon. Thus, the instant matter is a clear, conscious and willful case of omission to state the actual purpose of the Combination despite the disclosure requirement under Item 5.3 of Form I read with Regulation 5 of the Combination Regulations and Section 6(2) of the Act. Further, Amazon has failed to provide any material or plausible explanation in its response to the SCN and in the subsequent submissions to demonstrate that its disclosures against Item 5.3 are correct and that the business potential of FCPL was a consideration for Amazon to pursue the Combination. Seen in the context of the Internal Correspondence and failure to provide any of the said material and/or explanation, it is evident that Amazon, in addition to the omission to state the purpose of the Combination, has misrepresented the Commission by stating that the purpose of the Combination is an opportunity arising from the business potential of FCPL and to add credibility to FCPL's financial position, FCPL invested and proposed to further invest in FRL, a company with strong financials and futuristic outlook. Seen against the backdrop of

Internal Correspondence, the statements of Amazon in the Notice and subsequent submissions dated 15th November, 2019 regarding the purpose of the Combination, stand belied. It is evident that these statements have been made with full knowledge that the same are false in material particulars. Amazon had misled the Commission to believe, through false statements and material omissions, that the Combination and its purpose were the interest of Amazon in the business of FCPL.

45. At this juncture, it also relevant to look at the disclosure of Amazon against Item 8.8 of Form I, which requires a notifying party to furnish documents, material (including reports, studies, plan, latest version of other documents), etc. considered by and/or presented to the board of directors and/or key managerial person of the parties to the combination and/or their relevant group entities, in relation to the proposed combination. The purpose of this requirement is to understand the commercial and economic contours of the given combination in addition to the legal contracts submitted as trigger documents against Item 8.7 of Form I. True and complete disclosure against Item 8.8 enables the Commission to determine the appropriate framework for competition assessment of the Combination. In response to Item 8.8, Amazon had furnished a presentation titled 'Taj Coupons - Business Plan for 5 years'. The eightpage presentation provides only a brief idea of the gift voucher business of FCPL, its business operating model, estimated five-year business size, organisation design, sales team and financial summary, without any reference to FRL.

46. Considering the disclosures in the Notice, including that against Item 8.8, a specific query was posed to Amazon vide letter dated 24th October, 2019 of the Commission: '2.1 It is noted that in terms of query 8.8 of Form I, Parties have not furnished requisite documents. Accordingly, you are required to provide documents, material (including reports, studies, plan, latest version of other documents), etc. considered by and/or presented to the board of directors and/or key managerial person of the parties to the combination and/or their relevant group entities, in relation to the proposed combination. Further, for each document, indicate the date of preparation and the name and title of the addressee(s)'.

47. In response, Amazon furnished copies of resolution authorising the execution of FCPL SSA and FCPL SHA, and copies of the reports on legal due-diligence and key tax issues relating to FCPL. Neither copies of the above discussed Internal Correspondence nor any other document containing the actual purpose reflected in the said documents was furnished to the Commission. It is noted that no purpose elaborated in the Internal Correspondence surfaced in any of the material furnished against Item 8.8 of Form I or query 2.1 of the letter dated 24th October, 2019 of the Commission. Similarly, the purpose of the Combination stated in the Notice and subsequent submissions of Amazon, were not a consideration in the Internal Correspondence. These clearly establish that Amazon had knowingly suppressed relevant and material documents to be furnished under Item 8.8 of Form I.

57. It is observed that, in response to Item 5.1.1, no reference was given to FRL SHA or the Commercial Arrangements. Amazon had merely submitted that the value of assets and turnover of FRL is higher than the jurisdictional threshold prescribed under Section 5(a)(i)(A) of the Act. Based on the information relating to the constituent steps of the Combination provided in pages 2 and 3 of the Notice and the disclosure against Item 5.1.2, it is apparent that the financials of FRL were taken into consideration as it was identified as the target enterprise in Transaction II. However, no reference was made to FRL SHA in the disclosures against Items 5.1.1 and 5.1.2. FRL SHA and the commercial agreements, being inter-connected parts of the Combination, their details ought to have been furnished in Item 5.1.2 of Form I. In response to Item 5.1.3, Amazon had given a list of rights to be acquired by it in terms of FCPL SHA to protect its investment in FCPL (Table 3 – The rights proposed to be acquired by the Investor in terms of the SHA to protect its investment in FCL) 34. In this section, it has been brought out that FCPL has to take Amazon's consent for exercising some of its rights under FRL SHA. However, it has never been the case that Amazon disclosed the fact that FRL SHA was negotiated as a part of the Combination and was executed to achieve one of the objectives of the Combination. Similarly, no reference about the commercial agreements was made in this section of the Notice. The Commission observes that mere consideration of the

values of the asset and turnover of FRL cannot be considered as notification of FRL SHA and BCAs, as parts of the Combination.

60. As may be seen above, details of FRL SHA were not mentioned in Item 5.2. As has emerged now, FRL SHA and the commercial agreements were inter-connected parts of the Combination and accordingly, their details ought to have been disclosed against Item 5.1.2 and in the above table.

68. The Internal Correspondence of Amazon clearly highlights that the rights of Amazon over FRL are at the heart of the negotiations and the need for FRL SHA was to achieve the said objective of the Combination. It is for these strategic rights and for the call option, that Amazon had paid a premium of 25% over the regulatory share price of FRL. This makes it clear that neither FRL SHA would have been executed in the absence of other steps/transactions of the Combination nor would Amazon have gone ahead with Transaction III in the absence of FRL SHA. However, in blatant disregard of Regulation 9(4) and 9(5), read with Items 5.1.1, 5.1.2, 5.2 and 8.7 of Form I, FRL SHA was not disclosed in the Notice in its actual context; its inter-connectedness to FCPL SSA and FCPL SHA were suppressed in spite of the disclosure requirements under the said provisions of Combination Regulations. In other words, the mentioning of FRL SHA in footnote 3 of the Notice can, in no manner, be considered a notification of the same as a part of the Combination either in substance or form. This is more so when there were repeated or categorical assertions that the rights over FRL are limited to investor protection and no influence over FRL is acquired and FRL SHA was negotiated independent of the combination. Therefore, Amazon failed to give a single notice covering all the inter-connected steps of the combination, as required in Regulation 9(4) read with Regulations 9(5) and 5 of the Combination Regulations, and Section 6(2) of the Act. Further, Amazon also failed to give true and complete disclosure with respect to substance of its combination in this case, as the FRL SHA was pursued to ensure that the business of FRL become a strategic asset for Amazon to expand and enhance its ultra-fast delivery services.

69. The Internal Correspondence show that the strategic rights over FRL though FRL SHA and FCPL SHA were contemplated by the parties to establish and cement their strategic partnership through a series of commercial agreements. The inquiry in pursuance of the SCN reveals that the Commercial Agreements were essential and inter-connected parts of the Combination and those were the trigger for Amazon to acquire shareholding in FCPL as well as secure rights over FRL. The fact that the commercial agreements are integral parts of the Combination was suppressed in the Notice and the subsequent submissions of Amazon. Amazon had consistently represented that BCAs are independent of the Combination. In para 65 of the Notice, the arrangements between Amazon and FRL for listing of the products of the latter in Amazon marketplace were claimed as "neither inter-connected with, nor part of, the Proposed Combination". In para 96 of the Notice, the arrangement between ARIPL and Future Consumer for supply of food category products to the formers was stated as "not related to the Proposed Combination, in any manner whatsoever". Further, in para 100 of the Notice, in relation to the memorandum between APIPL and FRL to offer the option of making payments through the Amazon Pay semi-closed wallet to end consumers making purchases across retail outlets and websites operated by FRL and entities controlled or wholly owned by FRL, it was clarified that the MoU is not related to the Proposed Combination, in any manner whatsoever. Amazon continued with these assertions in paragraphs 45 and 72 of the written submissions dated 15th November, 2019, filed in response to the letter dated 9th October, 2021 of the Commission and paragraphs 4 and 44 of the written submissions dated 15th November, 2019, filed in response to the letter dated 24th October, 2021 of the Commission. These repeated assertions invariably suggest that these commercial contracts were negotiated and executed in the normal course of business of the concerned parties independent of the Combination. The distorted disclosures and omissions in the Notice and subsequent submissions dated 15th November, 2019 of Amazon, as discussed above, do not allow to even suspect that the Commercial Arrangements were parts of the Combination to establish a strategic alignment between the parties in retail sector.

75. A holistic appreciation of the Notice and material brought on record reveals that there has been a wilful and deliberate design threaded across the Notice and subsequent submissions dated 15th November, 2019 of Amazon, to suggest that the Combination consists of only Transaction I, Transaction II and Transaction III; and that FCPL SSA and FCPL SHA are the only two agreements entered into between the parties in relation to the Combination. The manner and extent of assertions regarding FRL SHA is that the same was a pre-existing arrangement amongst the shareholders of FRL, executed pursuant to the Warrants Transaction, and it was negotiated independent of Transaction III i.e., acquisition of 49% stake in FCPL by Amazon. The inter-connection between FRL SHA and the Combination was suppressed. Similarly, the BCAs, although disclosed, were claimed as neither inter-connected with, nor a part of the Combination. However, the Internal Correspondence brings out that BCAs and acquisition of strategic rights over FRL, through the acquisition of shares in FCPL, had been considered together as parts of one composite package, viz., 'Project Taj [Future Group] – Investment in National Multi-category Copperfield Seller'. FCPL was merely a vehicle for Amazon to acquire interest over FRL, and such interest was considered necessary to implement strategic alignments between the business activities of Future and Amazon groups in India.

77. The Commission notes that the details of overlap between FRL and Amazon Group, provided in the Notice, and subsequent submissions of Amazon as well as the competition assessment conducted in the Approval Order are in the context of FCPL holding warrants in FRL. However, the said assessment is definitely not from the perspective of strategic alignments between FRL and Amazon Group. This is obvious from the Approval Order as it does not make any reference to FRL SHA or the BCAs. The Commission observes that the effect of commercial contracts entered into between FRL and Amazon Group entities, in their normal course of business, would be considerably different from parties contemplating strategic alignments between their business through strategic investments. The regulatory process of notification by the parties that would follow an admission of the commercial contracts being part of the combination and also the purpose of the strategic acquisition

of shares and rights would entail consequential presentation of facts, representations, clarifications and undertakings, if any, which would not be present when such contracts are independent of the combination. The nature of inquiry by the Commission in these cases would also be necessarily with due regard to the acquisition and contracts being part of one single understanding to establish a strategic partnership. This regulatory process, in itself, makes the notifying party to furnish true, correct and complete information regarding the actual combination pursued by the parties and thus, meet the requirements of the Act and the Regulations framed thereunder. Concurrently, such process would enable the Commission to appreciate the combination in its actual sense, and accordingly, discharge its functions in terms of the Act. If one were to argue otherwise, it would be sufficient that the notice filed with the Commission merely describes the name of the parties and their business activities and there would be no need to give any other detail as required in Form I or Form II, including the scope of arrangements, their purposes and context of the combination. This is ex facie contrary to the scheme and intendment of the Act and Combination Regulations.

80. Given that the Combination is between players who are known in the online marketplace and offline retailing and they have contemplated strategic alignment between their businesses, the Commission considers it necessary to examine the combination afresh based on a notice to be given in Form II with true, correct and complete information, as required therein. Accordingly, in exercise of the powers conferred under sub-section (2) of Section 45 of the Act, the Commission hereby directs Amazon to give notice in Form II within a period of 60 days from the receipt of this order, and, till disposal of such notice, the approval granted vide Order dated 28th November, 2019, in Combination Registration No. C-2019/09/688, shall remain in abeyance.

82. In the instant case, all the contraventions discussed above arise from a deliberate design on the part of Amazon to suppress the actual scope and purpose of the Combination, and the Commission finds no mitigating factor. Resultantly, the Commission considers it appropriate to levy the maximum penalty of INR One Crore each under the provisions of Section

44 and Section 45 of Act. Accordingly, Amazon is directed to pay a penalty of INR Two Crore.

83. As regards failure to notify combination in terms of the obligation cast under Section 6(2) of the Act, Section 43A of the Act enables the Commission to impose a penalty, which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination. Accordingly, for the above mentioned reasons, the Commission hereby imposes a penalty of INR Two Hundred Crore upon Amazon.

and `Amazon' was directed to pay the `monetary penalty' as imposed (vide paras 82 and 83), within a period of 60 days from the date of receipt of this order."

<u>Appellant's Submissions in Competition Appeal (AT) No. 1 of 2022:</u>

3. The Learned Counsel for the `Appellant/Amazon' submits that the `Investor Affiliate', `Amazon Seller Services Private Limited' (`ASSPL') is not acquiring any `Shares' or `Voting Rights' or `Assets' or `Control' in `Future Retail Limited' (`FRL') and as such, Section 5 of the Competition Act, 2002 is not attracted in the instant case.

4. The Learned Counsel for the `Appellant' contends that as a matter of fact, the transaction is between the `Investor' and `Future Coupons Private Limited' (`FCPL'), through a set of three transactions and the `Proposed Transaction II' has `FRL' as the target. Indeed, `FRL' was

notified as a `party' to the combination (bearing Combination Registration No.2019/09/688) (`Combination').

5. According to the Learned Counsel for the `Appellant', the `Combined Share' of the `Investor Affiliate', ASSPL and FRL in the overall Indian Retail Market was less than 1% in the period between the Financial Year 2016-2017 to Financial Year 2018-19, which fact is not disputed by the `1 Respondent/CCI', in the `impugned order'.

6. The Learned Counsel for the `Appellant' points out that when a `Notice' in Form I was filed, the `1 Respondent/CCI' discharged its obligation as per Regulation 5 (5) and in the alternative, it is projected on the side of the `Appellant', that there is no finding of any appreciable adverse effect on competition (`AAEC') as a consequence of which, a direction to file a fresh `Notice' in Form II can be issued.

7. The Learned Counsel for the `Appellant' adverts to the fact that the direction to file a `Notice in Form II', in regard to a transaction that was consummated two years ago after the receipt of the `1st Respondent/Commission's' approval is `arbitrary' and `contrary' to the Scheme of the Competition Act, 2002.

8. Added further, the Learned Counsel for the `Appellant' submits that the `proviso to Section 20 (1) of the Competition Act, 2002, bars the

`1st Respondent/CCI' from enquiring into a consummated transaction, more than one year, after the said transaction had taken effect.

9. The other contention advanced on behalf of the `Appellant' is that, the date on which the combination took effect is considered to be the date of payment and that the payment was effected on 26.12.2019 and that `FCPL SHA' came into effect on 26.12.2019 and that the limitation under Section 20 (1) of the Competition Act, 2002 for the `1st Respondent/CCI' to `inquire' into the notified Combination, expired on 25.12.2020, being a `Holiday', the `Limitation' came to an end on 26.12.2020.

10. It is the stand of the `Appellant' that assuming but not conceding that the `FRL SHA' was liable to be notified that the `FRL SHA' came into effect on 19.12.2019 and hence the limitation would expire on 18.12.2020, as per proviso to Section 20 (1) of the Competition Act, 2002.

11. The Learned Counsel for the `Appellant' contends that as per proviso to Section 20 (1) of the Competition Act, 2002, the `1st Respondent/CCI' cannot cause an `inquiry', after one year, from the date on which the `Combination' took effect.

12. It is the version of the `Appellant' the Competition Act does not empower revisiting or reopening the `Approvals' granted after 210 days in case a notification is filed under Section 6 (2) of the Competition Act or one year from the date on which a combination took effect, in respect of cases covered under `Section 20 (1) of the Competition Act, 2002'.

13. The Appellant's submission is that in the instant case, the `Notification' was filed by the `Appellant' on 23.09.2019 and the `1st Respondent/Commission' having passed an order under Section 31 of the Competition Act, could not have directed the filing of `FRL SHA' as a `Combination' when the same stood disclosed and was also not the direct trigger for the Notification.

14. The Learned Counsel for the `Appellant' projects an argument that the `1st Respondent/Commission' issued a `Show Cause Notice' dated 04.06.2021 under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 and assuming without admitting that there was no `notification' of the `FRL SHA', then, the bar of one year under the proviso would operate and that the `1st Respondent/CCI', had failed to appreciate this aspect of the matter.

15. The Learned Counsel for the `Appellant' submits that penalty under Section 44 and 45 of the Competition Act, 2002 is only attracted where the alleged omission / suppression / misrepresentation is material to the `1st Respondent/CCI' assessment of the notified combination.

16. The Learned Counsel for the `Appellant' contends that the complaint dated 25.03.2021 was filed by `FCPL' with full knowledge that `FCPL' and `FRL' through their Legal Counsel M/s. Trilegal, were actively involved in the preparation of and had approved all submissions made by the `Investor' in the Notification.

17. The Learned Counsel for the `Appellant' brings it to the notice of this `Tribunal' that the `impugned order' primarily relies upon the internal correspondence of the `Investor' dated 24.05.2018, 10.07.2018 and 19.07.2019 and that the emails relating to the year 2018 relate to the period when `Amazon' was exploring various investment structures, including direct investment in `FRL' under the `Foreign Portfolio Investment Route'.

18. The Learned Counsel for the `Appellant' takes a plea that only such facts which impinge upon assessment of whether a notified combination causes or is likely to cause `AAEC' in terms of the factors

mentioned in Section 20 (4) of the Competition Act would be considered as `material' for the purposes of Section 44 and 45 of the Act, and therefore, `no penal action' much less a `revocation' is warranted. Furthermore, all information pertaining to `BCAs' was disclosed and `BCAs' would be given effect to, only after the receipt of the approval from the `1st Respondent/CCI'.

19. The Learned Counsel for the `Appellant' emphatically takes a stand that an `Authority' created by a `Statute' must not trespass into the arena of the matters of `Adjudication' to be made by an `Arbitral Tribunal'. Moreover, the `1st Respondent/CCI' had proceeded to conduct its `AAEC' analysis on the assumption of the Contemplated Integration of the `Investor Affiliates' with `FRL' (even before the `Investor' is in a position to exercise the `Call Option').

20. The Learned Counsel for the `Appellant' submits that only Section 44 of the Competition Act, 2002 is applicable to the instant case, as it applies to parties to a `combination', filing a notice under Section 6 (2) of the Competition Act. However, in the present case, there is no `misstatement' or `misrepresentation' or `false information' that was material to the commission's assessment of the `notified Combination'

and hence the said provision is `inapplicable' to the present case.

21. The Learned Counsel for the `Appellant' contends that `any order' passed by the `Commission' must be consistent with the ingredients of the Competition Act, 2002, and any `condition' mentioned in the `Approval Order' must be pursuant to the exercise of a power which is expressly conferred on the `1st Respondent/Commission' and available under the Competition Act, 2002.

22. It is the stand of the `Appellant' that the self same contention of `inconsistency in positions' was urged by the `FCPL', the `Promoters' and `FRL' before the `Arbitral Tribunal' and rejected in the `Partial Award' dated 20.10.2021 and that the `Partial Award' can be questioned only when the `Final Award' is passed as per the `Arbitration and Conciliation Act, 1996 and as such it is not permissible to canvass the same point in the instant proceedings.

23. The Learned Counsel for the `Appellant' contends that in the instant case, the `1st Respondent/CCI' had acted in breach of the `Principles of Natural Justice' when it considered entirely a new case against the `Appellant' resting on the confidential internal documents/emails dated 24.05.2018, 10.07.2018, 04.04.2019 and

19.07.2019 without issuing a separate `Show Cause Notice' to the `Appellant'.

24. The Learned Counsel for the `Appellant' submits that neither the `Show Cause Notice' nor the `FCPLs' complaint dated 25.03.2021 (which formed basis) contained even a `whisper' to either the emails / internal documents or the allegations relating to the failure to notify the `BCAs' as part of the `notified Combination'. According to the `Appellant' later, these documents/emails were filed by `FCPLs' as part of its `Response' dated 22.11.2021.

25. The plea of the `Appellant' is that in the absence of a separate `Show Cause Notice' setting out the case being considered by the `1st Respondent/CCI' against the `Appellant', the `Appellant' was not provided with an adequate opportunity to clarify its position in regard to the emails/documents. If the `Appellant' was apprised that an explanation was required about the context and contents of the internal documents/emails, it could have put forward relevant evidence to explain the purpose and the context of these internal documents/emails.

26. The Learned Counsel for the `Appellant' points out that the `Appellant' had raised an objection that the "material adduced by FCPL

before the Commission being pleadings before the arbitrators are disclosures made in contravention of the provisions of Section 42A of the Arbitration and Conciliation Act, 1996”, although, was noted in the `impugned order’ by the `CCI’, this objection, was dismissed by the `1st Respondent/CCI’ based on the reason that the proceedings before the `CCI’ and the `Arbitration Proceedings’ were mutually independent.

27. It is represented on behalf of the `Appellant’ that the `impugned order’ had failed to address the Appellant’s objection regarding the fact that `CAIT’s’ participation in the `Show Cause’ proceedings, inspite of the fact that `CAIT’ was a `stranger’ to the proceedings initiated based on `Show Cause Notice’ issued only to the `Appellant’ in violation of the established `Principles of Confidentiality’.

28. The Learned Counsel for the `Appellant’ submits that the `impugned order’ passed by the `1st Respondent/CCI’ had failed to deliberate pertaining to the fact whether it has the power to `revoke’ an `approval’ inspite of the objections raised by the `Appellant’ in the `Show Cause Notice’ proceedings, keeping in `abeyance’, an `Approval Order’ more than two years ago and initiating a fresh enquiry disregarding the limitation imposed as per Section 20 (1) of the Competition Act and the indifferent observations pertaining to `Fraud’, without any `prima facie’

as to how the alleged Misrepresentation/Suppression/ nondisclosures had an impact on the `1st Respondent's assessment of the notified transactions all of which may have been given `due consideration' in the presence of a `Judicial Member' which the `1st Respondent/CCI' is presently lacking and on these grounds, the `impugned order' of the `1st Respondent/CCI' is to be set aside by this `Tribunal'.

29. The Learned Counsel for the `Appellant' comes out with an argument that the `1st Respondent/CCI', being a `Statutory Authority' is not to be permitted to improve its `case' in `Appeal' as per decision of the `Hon'ble Supreme Court' in `Mohinder Singh Gill V Chief Election Commissioner, reported in 1978 1 SCC at page 405, wherein at paragraph 8 it is observed as under:

> *8.``The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji (Commissioner of Police, Bombay V Gordhandas Bhanji, AIR 1952 SC 16 C127).*

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 actings *and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*

Orders are not like old wine becoming better as they grow older."

30. The Learned Counsel for the `Appellant' takes a stand that there is no inconsistency in `Appellant's position taken before the `Arbitrational Tribunal' and the `Constitutional Courts' and the `1st Respondent/Competition Commission of India'.

31. Expatiating his argument, the Learned Counsel for the `Appellant'/`Amazon' submits that the context of the `submissions' made in the `Notification' was to `notify' a transaction based on the `Agreements' executed between the `parties to the Combination'. But the context of `submissions' advanced before the `Arbitration Tribunal' was the `Violation of the Agreements' between the `parties'. In reality, it is pointed out on behalf of the `Appellant' that all `submissions' made in the `Notification' were vetted and approved by the common Learned Counsels for `FCPL' and `FRL' and it was a `conjoint effort'.

32. The Learned Counsel for the `Appellant' proceeds to point out that at the time of filing of the said `Notification', the `parties' had not anticipated `any violation' and this fact was omitted from `consideration' in the `impugned order' passed by the `1st Respondent/CCI' and hence, the said order is vitiated.

33. Advancing his arguments, the Learned Counsel for the `Appellant' points out that the `Notification' filed under Section 6 (2) of the Competition Act is made with a view to enable the `1st Respondent/CCI' to carry out an ex-anti assessment of the `notified Combination'. Further, the information submitted in the `Notification' broadly relates to the `Agreement' executed between the `Parties' the rights being acquired under these `Agreements' overlaps in the `Business Activities' of the `Parties' and the existing and potential vertical and complimentary linkages and market share of the `Parties' in the relevant market(s).

34. According to the Appellant's plea, there is no express requirement under `Form I' for a notifying party to submit `emails' exchanged between the parties and their Learned Counsel (such as the email dated 04.04.2019, being relied upon by the `1st Respondent/CCI' in the `impugned order. Likewise, there is no requirement under Form I to disclose the factors considered in deciding the amount of consideration

paid by an `Acquirer'. In reality, the `price of shares' is not within the `purview of enquiry' in as much as, it is based on `mutual agreement' and `multiple Business Factors'.

35. The Learned Counsel for the `Appellant' points out that the `Arbitrational Proceeding' is an `International Commercial Arbitration', as per Part I of the `Arbitration and Conciliation Act, 1996' seated in New Delhi. In this connection, it is the contention of the Learned Counsel for the `Appellant' that it was led to believe that the case being considered by the `1st Respondent/CCI' based on `purported inconsistencies' in the pleadings, set out before the `Arbitration Tribunal' and those made before the `1st Respondent/CCI'.

36. It is the clear cut stand of the `Appellant' that the `Arbitration Tribunal' had considered the `submissions' projected before by the `Parties' before it, and held that the `Appellant' has not taken any `contradictory stand' before the `1st Respondent/CCI' and the `Arbitration Tribunal'.

37. The Learned Counsel for the `Appellant' by adverting to the complaint dated 25.03.2021 submits that the `2nd Respondent/FCPL' mentioned that the submissions made by the `Appellant' before the

`Emergency Arbitrator' and the `Indian Courts' on the one hand and the submissions projected before the `1st Respondent/CCI' indicate that the `Appellant' misleading representations regarding its intention while seeking an `Approval' from the `1st Respondent/CCI'.

38. The Learned Counsel for the `Appellant' contends that the `Purview of Combination' was disclosed to the `1st Respondent/CCI'. In this regard, it is the plea of the `Appellant' that there was no `misrepresentation' on Appellant's part because of the fact that (i) The Warrants Transaction (whereby FCPL had acquired warrants amounting to 7.3% of the share capital of FRL on a fully diluted basis) and the FRL SHA were disclosed as constituting the background to the Appellant's Investment (vide page 1 of the main Notification Form). (ii) Proposed Transaction II (whereby FCPL was acquiring an additional 2.52% shares in FRL) was identified as a condition precedent to the Appellant's investment (iii) It was expressly mentioned in the response to query 5.1.1 which required details of acquisition or merger or amalgamation, as the case may be, with reference to relevant clause of Section 5, that the combination was notified solely because of FRL. (Para 14 of the notification form @ page 19 (Volume 1) of Convenience Compilation) and the combination was notified as a composite combination,

(Paragraph 21 of the notification form at page 22 (Volume 1) of the Convenience Compilation). (iv) FRL was identified as a party to the notified combination and the only Material Entity. (Table 1 @ page 6 (Vol 1) of Convenience Compilation; Paragraph 37 of the response to the First RFI @ page 679 (Vol 3) of Convenience Compilation). (v) A copy of the FRL SHA was provided and all inter-connected rights arising from the FRL SHA, including in relation to FRL (and its retail assets) were disclosed in the table of rights produced in the main notification form as well as the subsequent submissions."

39. The Learned Counsel for the `Appellant' submits that the `impugned order' of the `1st Respondent/CCI' fails to exhibit which material particulars were suppressed/not disclosed by the Appellant in the `Notification', which would otherwise have, even `ex facie' changed the outcome of `1st Respondent's Competitive Assessment', in the teeth of information it now claims to have, since the contents of email dated 19.07.2019 (internal document relevant to the notified transaction) stood disclosed in the `Notification' including (a) the structure of the transaction; (b) the amount and type of investment; (c) the board composition (d) the protective rights beg acquired by the Appellant (e) the restriction in relation to the transfer of shares of FCPL (f) the

restriction in relation to the transfer of the Retail Assets of FRL (g) the Call option (h) the exit rights (i) the proposal to enter into commercial agreements contemporaneous with the investment, and (j) the advantages of the commercial agreements, were disclosed in the `Notification'.

40. According to the `Appellant', in response to query 6.7 Form I, it was expressly mentioned that `the Proposed Combination' pertains to the overall `Retail Market' in India and the applicable `legal framework' governing `Foreign Investment' in the `Retail Sector' was also disclosed.

41. It is represented on behalf of the `Appellant' that in the main `Notification Form' that "neither `FCRPL' nor `FCL' is engaged in `business activity' relating to the Indian Market". Moreover, it was expressly stated that `FRL' was the `Flagship retail entity of the Promoter Group'. Apart from that, details of the `Appellant's Affiliates' engaged in Business Activity in India were provided and details of `Portfolio Companies' and the `Subsidiaries' of these `Portfolio Companies' which were engaged in the `Retail Business' , such as (Shopper's Stop, More Retail Limited, Cloudtail and Appario) also, were furnished.

42. The Learned Counsel for the `Appellant' takes a plea that it was submitted that the `Acquirer' and target `Affiliates' `undertake

overlapping business activities in the Indian Retail Market'. Furthermore, `the only plausible relevant market in relation to the Proposed Combination is the overall retail market in India'. Also that, it was mentioned that `FRL' was a registered `Seller' on the Online Market Place', operated by the `Appellant's Affiliate', including under the `Prime Now Program' which permitted the customers to get products delivered from the local Kirana Stores or Neighbourhood Stores (including Big Bazaar Stores of FRL) within two hours of placing the order or at the preschedule time.

43. The contention of the `Appellant' is that the details of all existing and contemplated Commercial Arrangements between the Appellant's `Affiliates and `FRL Affiliates', were disclosed in response to the query 6.5 of the `Form I' and copies of all the five `Business Commercial Agreements' were provided. Besides this, the details of the `rights' accruing to the `Appellant's `Affiliates' under the `Business Commercial Agreements' were disclosed along with the rationale behind these rights, and the justification for the exclusivity covenants contained in the `Business Commercial Agreements' were also furnished. Continuing further, the `Competitive Assessment' pertaining to the `Business Commercial Agreements' was also presented as part of the `Notification

Form' and therefore, all information relating to the `Business Commercial Agreements' which was relevant for the`1st Respondent assessment of the notified was furnished in the `Notification'.

44. The Learned Counsel for the `Appellant' comes out with an argument it was expressly mentioned that `FCPL' was not engaged in any `Business Activities' in the `Retail Market'. In fact, the combined and incremental shares of the `Appellant's Affiliates' (`ASSPL') and (`ARIPL') and (`FRL') including its subsidiaries were provided in regard to the `overall Indian Market' as well as within the `Organized Segment' and in each of the overlapping product Categories.

45. It is represented on behalf of the `Appellant' that the details of `Commercial Agreements' between the `Appellant's Affiliates' and `FRL' and / or its `Affiliates' Viz. Future Consumer Limited and Future Life Styled and Fashions Limited were furnished. Besides these, it was also submitted that the `Business Commercial Agreements' were unlikely to cause any `AAEC' as (a) sales made by Future Lifestyle and FRL through third party online channels was less than one percent (< 1%) in FY 2019 (b) the sales made through the online channel constituted less than one percent (<1%) of Future Consumer's total revenue in FY 2019 and (c) wide availability of substitutes across various substitutable

distribution channels (for instance, Maggi is available in local Kirana Stores, large format supermarkets such as Big Bazar, Reliance Fresh and online marketplaces such as Amazon, Flipkart, Big Basket. Blinkit, Insta Mart by Swiggy). Therefore, it is pointed out on behalf of the Appellant that the `Competitive Assessment', presented to the `1st Respondent/CCI' in the `Notification' was carried out resting on an assumption of `Complete Integration' between the `Appellant's Affiliates' and the `FRL and its Subsidiaries'.

46. The Learned Counsel for the `Appellant' contends that it was evident from the queries posed by the `1st Respondent/CCI' in the `RFIs' dated 09.10.2019, 24.10.2019 (queries 2.8, 2.18, 2.21, 2.22 and 2.25) of the `1st RFI (vide page 648-650 of Vol 3 of Convenience Compilation) and (queries 2.2, 2.3, 2.5, 2.6, 2.9 and 2.10 of `2nd RFI (vide page 721 of Vol 3 of convenience Compilation)' as well as Part VI of Form I, read with notes to Form I that the `1st Respondent/CCI' that the Commission had proceeded on the assumption of `Complete Integration' between the `Appellant' and the target group irrespective of the immediate parties to the Combination.

47. The Learned Counsel for the `Appellant' submits that the `impugned order' of the `1st Respondent/CCI', is `untenable and bad in

Law' because of the fact that it is passed in the absence of a `Judicial Member', in complete disregard to the observations made by the `Hon'ble Supreme Court India in State of Gujarat V Utility Users Welfare Association, 2018 (6) SCC 21, as relied upon by the Hon'ble High Court of Delhi in the matter of `Mahindra Electric Mobility Limited and Another V Competition Commission of India and Others, reported in 2019, (SCC Online Del 8032). In this regard, it is brought to the notice of this `Tribunal' that the said `Judgment' was not stayed by the Hon'ble Supreme Court inspite of an `Appeal' preferred by the `Union of India and the 1st Respondent / CCI', which among other things, also prayed for an interim relief of staying the operation of the direction pertaining to the appointment of a `Judicial Member'.

48. The Learned Counsel for the `Appellant' contends that the `issue' of whether the `1st Respondent/CCI' actually assessed notified combination in the context of `FRL' being a Coupons Issuer' or as a player in the `Indian Retail Market', can be decided on the basis of report prepared by the `1st Respondent/CCI' case Team which was presented to the `Members of the 1st Respondent/CCI'.

49. The Learned Counsel for the `Appellant' points out that the `1st Respondent/CCI's stated position is that it was robbed of its jurisdiction

to conduct an `AAEC analysis' because the `disclosures' made by the `Appellant' were accompanied by `Caveats'.

50. According to the `Appellant', the `1st Respondent/CCI' had argued that though information pertaining to `FRL' was provided, it was submitted with a `Caveat' that the `Appellant' was ``not acquiring any indirect shareholding or control over `FRL''. Further, it was stated that `FCPL' was an Indian owned and controlled company and the `IOCC' Structure was disclosed to the `1st Respondent/CCI' and as per the terms of `FDI Policy' any downstream investment made by an Indian Company which had received `Foreign Investment' but is owned and controlled by `Resident Indian Citizens (such as `FCPL) as not considered while calculating indirect `Foreign Investment'. As such, an Indian owned and controlled company' structure, in the `eye of law' does not constitute and an `Indirect Foreign Shareholding' in the downstream entity as long as the recipient of the `Foreign Investment' (which is `FCPL' in the instant case), is owned and controlled by `Resident Indian Citizens. In as much as the `Appellant' does not exercise any control over `FCPL', it cannot be said to exercise control over `FRL'. In fact, this is the position prevailing under the `FDI Policy', `NDI rules', and they are binding on the `CCI',

51. The Learned Counsel for the `Appellant' submits that the characterization of the rights as `Investor Protection Rights' is appropriate and this was in accordance with `FCPL SHA' which itself characterized some of these rights as `Investor Protective' matters (vide Section 8 read with Schedule IX of `FCPL SHA' (Vol I Page 179 of Convenience Compilation). Moreover the `FCPL SHA' makes it clear that the `Appellant' would not control the affairs of either `FCPL' or `FRL' (vide Clause 10.1, 16.1 in regard to `FCPL' and Clause 15.17 in relation to `FRL' (vide Vol I pages 185, 209 and 210). In fact, the `Appellant' does not exercise control over the day-to-day operations of `FCPL' and therefore, cannot be said to have acquired control over `FCPL' (or) by `extension of `FRL'.

52. The Learned Counsel for the `Appellant' contends that Section 26 of the `FCPL SHA' further states that the `Appellant' shall not be deemed to be a `Promoter' of `FCPL' or `FRL' until the `Call Option' is exercised. With specific reference to the SEBI (Substantial Acquisition of Shares and takeover (Regulations), which defines a `Promoter' with reference to SEBI (issue of Capital and Disclosure Requirements (Regulations) , wherein a `Promoter' is defined as `shall include a person' ... (2) control over the affairs directly or indirectly whether as a

shareholder or director or otherwise' and the term `Control' is defined as `Control includes the right to a point majority of the Directors or to control the Management or Policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreement or voting agreements or in any other manner. This is the widest definition of `Control' which is echoed in the explanation (b) to Section 5 of the Competition Act, 2002, which defines `Control'.

53. The contention of the `Appellant' is that until the `Call option' is exercised by the `Appellant' it cannot be said the Appellant has acquired Control over `FCPL' or `FRL'. Indeed, the `Call option', was negotiated so that the `Appellant may have a chance to acquire control in future, if and when the `Indian Law' permit the same and such an exercise of the `Call option' will be the subject matter of a future combination and further that there was a lockin period of 3 years from the effective date which would lapse on 24.12.2022 and hence, the question of any `control' was rendered an ineffectual one.

54. The Learned Counsel for the `Appellant' points out that there was no `caveat' in the submissions made in `Notification' pertaining to the `Business Commercial Agreements' and per contra, there was an

endorsement that the `1st Respondent/CCI', is required to analyse the `Business Commercial Agreements' in its `Competitive Assessment' because they are between the parties to the `Notified Combination' and their `Affiliates'.

55. Furthermore, the `Form I' (especially with reference to queries 6.5.5 and 6.6) requires the `1st Respondent/CCI' to consider the cumulative impact of the `BCAs' together with the `Notified Combination', in its `Competitive Assessment', whether or not the `BCAs' are part of the `Notified Combination' and this is because of the fact that the `BCAs' are between the parties to the `Notified Combination' and their `Affiliate Entities'. As such, it is not correct to suggest that the `1st Respondent/CCI' would or would not analyse the `BCAs' depending on whether or not they are stated to be part of the `Notified Combination'. In fact, the `Appellant' had mentioned in the main `Notification' that the `BCAs' are being disclosed `with a view to assist the `Commission' in its assessment of the `Proposed Combination'.

56. In short, the relevant facts the `1st Respondent/CCI' should have considered and considered are the rights accruing to the `Appellant's Affiliates' under these `BCAs' which stood disclosed.

57. The Learned Counsel for the `Appellant' submits that the `1st Respondent/CCI's own practice is that it necessarily disregards `caveats' or `qualified submissions' made by the parties while carrying out `Competitive Assessment' of a `Notified Combination'.

58. The Learned Counsel for the `Appellant' contends that there is `No Fraud' in the present case and in reality, the `Finding of Fraud' necessarily requires a decision that the information/documents purportedly `suppressed/undisclosed' as a `material impact' on the assessment of the Combination. In this connection, the Learned Counsel for the `Appellant' cites the decision of the `Hon'ble Supreme Court in the matter of `Electrosteel Castings Limited V UV Asset Reconstruction, reported in 2021 SCC OnLine SC 1132, wherein the Hon'ble Supreme Court held that `as per the settled proposition of law, mere mentioning and using the word `Fraud'/`Fraudulent' without any material particulars, would not amount to pleading of `Fraud'.

59. The Learned Counsel for the `Appellant' takes a plea that the `impugned order' passed by the `1st Respondent/CCI' does not disclose what / which `material' particular(s) were undisclosed/suppressed by the `Appellant in the `Notification'.

60. In regard to the email dated 19.07.2019, it is represented on behalf of the `Appellant' the Appellant was under the `Bonafide Belief' that the contents of this email should disclose in the `Notification', and that the said email had contained a summary of the agreements that the `Appellant' proposed to execute and copies of these agreements were provided along with the `Notification', and as such, `no case of fraud' can ever be said to be made out merely on account of failure to disclose an `information / document' that was purportedly required to be disclosed.

61. The Learned Counsel for the `Appellant' adverts to the decision of Hon'ble Supreme Court in the matter of `Bhaurao Dagdu Paralkar V State of Maharashtra and Others, reported in 2005, 7 SCC 605, the aspect of `fraud' in public Law and `fraud' in private Law was differentiated an it was held at Paragraph 12 that (i) fraud in relation to a statute must be a colourable transaction to evade the provisions of a statute; (ii) it must result in exercise of jurisdiction which otherwise would not have been exercised; and (iii) the non-disclosure of a fact not required by a statute to be disclosed would not amount to fraud.

62. The Learned Counsel for the `Appellant' contends that the internal emails dated back to 2018 are not relevant as they contemplated a

different Investment Structure Viz. a direct investment in `FRL' under the `Foreign Portfolio Investment Route, which was not ultimately undertaken in the transaction notified to the `1st Respondent/CCI'.

63. Yet another plead of the Appellant's side is that the email dated 04.04.2019, was an email exchanged between the Learned Counsel for the `Appellant' and the Future Group and there is no requirement under query 8.8 (or any other part of the Form I to disclose legally `privileged communication' between the Learned Counsels of the parties to a `Combination'.

64. Furthermore, it is the stand of the `Appellant' there is no requirement under Form I of the Competition Act, 2002, to disclose the factors considered in deciding the sum of consideration paid by the `Acquirer'. However, it was disclosed by the `Appellant' FCPL's underlying shareholding in `FRL', was also considered by the `Appellant' in deciding the value of the `Proposed Investment'.

65. The Learned Counsel for the `Appellant' submits that there was `no requirement' to disclose `any future intent' of the `Appellant' to acquire a foot-in-the-door in `Retail Sector', as it was not the subject matter of the present `Combination'. In fact, the expression `foot-in-the-

door' reflected in the emails/internal documents refers to the `Call option' which provides the Appellant an `Option' in the future (not an obligation) to become the single largest Shareholder in `FRL', only when the applicable `FDI Norms' allow.

66. The emphatic stand of the Appellant is that the `email' dated 19.07.2019 acknowledges that the `Appellant' would have exercised control over the affairs of `FRL' only upon the exercise of the `Call option' which, in turn, was subject to several conditions including the occurrence of the change in Law event.

67. In this regard, the Learned Counsel for the `Appellant' refers to a decision in Reliance/Bharti AXA (vide Combination Registration No.C-2011/0/1), wherein AXA had an `Option' to acquired up to 24% shares of Bharti AXA Life Insurance and Bharti AXA General Insurance and when FDI Regulations permit, the 1st Respondent/CCI itself had observed that `such an acquisition by AXA at a later date is not part of the present determination and shall be dealt accordingly as per the applicable laws at that time'. Also that, it was mentioned expressly in the `Notification' that any `Acquisition of Shares' in `FRL' in future, would be notified to the `1st Respondent/CCI' in the later `Notification'.

68. The Learned Counsel for the `Appellant' puts forward an argument that the bundle of rights acquired by the `Appellant' has part of the notified transaction was reviewed by `EA' and `AT' and none had concluded that these rights amount to control over the affairs of `FRL'. In this connection, it is represented by the `Appellant' that `EA' order was upheld by the Hon'ble Supreme Court of India as per Section 17 of the `Arbitration and Conciliation Act, 1996, through an order dated 06.08.2021. As a matter of fact, the Arbitration Tribunal's order, is an `order of court', as per Section 17 of the `Arbitration and Conciliation Act, 1996'. As such, the aspect of whether or not the bundle of rights accruing to the `Appellant' amounted to controlling the affairs of `FRL' was the legal submission made by the `Appellant' which `per se' cannot amount to `Misrepresentation of Fact' or `Fraud'.

69. The Learned Counsel for the `Appellant' points out that the `Appellant' had highlighted the `synergies' envisaged in regard to the payments market in response to the specific query 2.13 (c) of the RFI dated 09.10.2019, which referred to a statement by Mr. Kishore Biyani (Promoter of FCPL and FRL), which referred to the `payments ecosystem'. However, the `1st Respondent/CCI' had relied on the response of the `Appellant' in a out of context manner to allege that when

asked as to how the `Appellant' envisaged a part of the `Retail Ecosystem', the `Appellant' gave misleading explanations about the business of `FCPL' and other `Amazon Portfolio Companies' in the payments market.

70. The Learned Counsel for the ` Appellant' contends that the `1st Respondent/CCI' had failed to consider that `FRL SHA' was disclosed in the 1st stage of the main `Notification' Form as constituting the background to the `Appellant's Investment'.

71. The Learned Counsel for the `Appellant' submits that the `1st Respondent/CCI' had failed to consider that Section 43A of the Competition Act, 2002, is applicable where a party fails to notify a transaction (Viz., a merger, amalgamation or acquisition) in terms of Section 2 (a) that constitute a `combination' as per Section 5 of the Competition Act, 2002. In short, what is required to be notified to the `1st Respondent/CCI' is the transaction which constitutes a `combination' and not an argument executed in furtherance of the said transaction, per se. In any event, the `Appellant' had provided copies of `FRL SHA', the five `BCAs' to the `1st Respondent/CCI' along with the `Notification' and disclosed all information pertaining to the rights accruing to the `Appellant' under the `FRL SHA' as well as `BCAs' and urged the

`Commission' to assess the notified combination in the light of such disclosures. In any case, neither the `FRL SHA' nor the `BCAs' were given effect to before the receipt of `1st Respondent/CCI's approval.

72. The Learned Counsel for the Appellant points out that the Competition Act 2002 does not contemplate any power for the `Revocation Of Approval' granted by the `1st Respondent/CCI' as per Section 31 (1) of the Competition Act, 2002. Further, it is projected on the side of the `Appellant' that in the instant case, there is no `Misstatement of False Information' or `Misrepresentation' that was material to the `1st Respondent/CCI's assessment of the `Notified Combination'.

73. The Learned Counsel for the `Appellant' urges that the `residuary powers' conferred upon the `1st Respondent/CCI's, as per Section 45 (2) of the Competition Act, 2002, were not available to the Commission, in the instant case. In this regard, the Learned Counsel for the `Appellant' refers to the decision of the Hon'ble Supreme Court in Sukhdev Singh V Bhagatram Sardar Singh, reported in 1975 1 SCC, at page 421, Spl pages 433, 438 and 439, wherein at paragraph 15 and 33, it is observed as under:

> *15.`` The words "rules" and "regulations" are used in an Act to limit the power of the statutory authority. The powers of statutory*

bodies are derived, controlled and restricted by the statutes which create them and the rules and regulations framed thereunder. Any action of such bodies in excess of their power or in violation of the restrictions placed on their powers is ultra vires. The reason is that it goes to the root of the power of such corporations and the declaration of nullity is the only relief that is granted to the aggrieved party.

33. There is no substantial difference between a rule and a regulation in as much as both are subordinate legislation under powers conferred by the statute. A regulation framed under a statute applies uniform treatment to every one or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Industrial Finance Corporation are all required by the statute to frame regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violation of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employees a statutory status and impose restriction on the employer and the employee with no option to vary the conditions. An ordinary individual in a case of master and servant contractual relationship enforces breach of contractual terms. The remedy in such contractual relationship of master and servant is damages because personal service is not capable of enforcement. In cases of statutory bodies, there is no personal element whatsoever because of the impersonal character of statutory bodies. In the case of statutory bodies it has been said that the element of public employment or service and the support of statute require observance of rules and regulations. Failure to observe requirements by statutory bodies is enforced by courts by

declaring dismissal in violation of rules and regulations be void. This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute."

74. The Learned Counsel for the Appellant contends that the `Power of Recall', `Review' or `Revocation' are `Prescriptive Functions', to be specified by the `Parliament' in its `Primary Legislation' and further that there is no `Power of Revocation', contemplated under the `Statute'.

75. The Learned Counsel for the `Appellant' submits that in `Law', the `General Provisions' are not to be used where a specific provision was enacted with a specific purpose in mind, as per decision of the `Hon'ble Supreme Court' in J K Cotton Spinning Weaving Mills V State of Uttar Pradesh, reported in (961) 3 SCR 185, at paragraphs 8 and 9, wherein it is observed as under:

8.``It is hardly necessary to mention that this rule in Clause 23 was made with a definite purpose. The provision here is very similar to Section 33 of the Industrial Disputes Act before its amendment, though there are some differences. It is easy to see however that the rule making authority in making this rule was anxious to prevent as far as possible the recrudescense of fresh disputes between employers and workmen when some dispute was already pending and that purpose will be directly defeated if a fresh dispute is allowed to be raised under Clause 5(a) in the very cases where Clause 23 in terms applies.

9. There will be complete harmony however if we hold instead that Clause 5(a) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of Clause 23. We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In Pretty v. Solly (quoted in Craies on Statute Law at p.m. 206, 6th Edition) Romilly, M.R. mentioned the rule thus: "The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply". The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: De Winton v. Brecon (28 LJ Ch 598), Churchill v. Crease (5 Bing 177), United States v. Chase (135 US 255) and Carroll v. Greenwich Ins. CO. (199 US 401).”

In effect, the plea of the `Appellant’ is that Section 45 of the Competition Act, 2002, does not provide for `Revocation of Approvals’.

76. The Learned Counsel for the `Appellant' fervently advances an argument that there is no power to keep the `Approval Order' passed by the `1st Respondent/CCI' in abeyance, on account of the violation of Section 43 A of the Competition Act, 2002. That apart, an `order' to keep an `Approval' in `Abeyance' and `Reassess' the `Combination' after receipt of `Notice' from the `Appellant' in Form II is totally contrary to the `Rule of ex ante Analysis' and it is barred by the one year period of limitation, as per proviso to Section 20(1) of the Competition Act, 2002, as the `FCPL SHA' came into effect on 19.12.2019 (over two years' before).

77. The Learned Counsel for the `Appellant' contends that there is no power enjoined up on the `1st Respondent/CCI's to direct the filing of Form II as combined share of parties was less than 1%. In this connection, the Learned Counsel for the `Appellant' comes out with a stand that between the Financial Year 2016 to 2017, Financial Year 2018 to 2019, the combined share of the `Appellant's Affiliates ASSPL and FRL' in the overall Indian retail market was less than 1%.

78. The Learned Counsel for the `Appellant' submits that the `Power to Approve' does not include the `Incidental Power' to `Revoke' and refers to the decision of the `Hon'ble Supreme Court' in Indian National

Congress (I) V Institute of Social Welfare, reported in 2002 5 SCC, page 685, wherein at paragraphs 39 to 41, it is observed as follows:

> *39.``We have already extensively examined the matter and found that Parliament consciously had not chosen to confer any power on the Election Commission to de-register a political party on the premise it has contravened the provisions of sub-section (5) of Section 29A. The question which arises for our consideration is whether in the absence of any express or implied power, the Election Commission is empowered to cancel the registration of a political party on the strength of the provisions of Section 21 of the General Clauses Act. Section 21 of the General Clauses Act runs as under:*
>
> > *21. Power to issue, to include power to add to amend, vary or rescind, notification, orders, rules or bye-laws. Where by any central Act or regulation, a power to issue notifications, orders, rules or bye-laws is conferred then that power includes a power exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."*
>
> *40. On perusal of Section 21 of the General Clauses Act, we find that the expression 'order' employed in Section 21 shows that such an order must be in the nature of notification, rules and bye-laws etc. The order which can be modified or rescinded on the application of Section 21 has to be either executive or legislative in nature. But the order which the Commission is required to pass under Section 29A is neither a legislative nor an executive order but is a quasi-judicial order. We have already examined this aspect of the matter in the foregoing paragraph and held that the functions exercisable by the Commission under Section 29A is*

essentially a quasi-judicial in nature and order passed thereunder is a quasi-judicial order. In that view of the matter, the provisions of Section 21 of the General Clauses Act cannot be invoked to confer powers of de-registration/cancellation of registration after enquiry by the Election Commission. We, therefore, hold that Section 21 of the General Clauses Act has no application where a statutory authority is required to act quasi-judicially.

41. It may be noted that the Parliament deliberately omitted to vest the Election Commission of India with the power to de-register a political party for non-compliance with the conditions for the grant of such registration. This may be for the reason that under the Constitution the Election Commission of India is required to function independently and ensure free and fair elections. An enquiry into non-compliance with the conditions for the grant of registration might involve the Commission in matters of a political nature and could mean monitoring by the Commission of the political activities, programmes and ideologies of political parties. This position gets strengthened by the fact that on 30th June, 1994 the Representation of the People (Second Amendment) Bill, 1994 was introduced in the Lok Sabha proposing to introduce Section 29-B whereunder a complaint to be made to the High Court within whose jurisdiction the main office of a political party is situated for cancelling the registration of the party on the ground that it bears a religious name or that its memorandum or rules and regulations no longer conforming the provisions of Section 29-A (5) or that the activities are not in accordance with the said memorandum or rules and regulations. However, this bill lapsed on the dissolution of the Lok Sabha in 1996, (See p. 507 of "How India Votes : Election Laws, Practice and Procedure" by V.S. Rama Devi and S.K. Mendiratta).”

79. The Learned for the `Appellant’ submits that the `Approval Order’ (under section 31 (1) of the Competition Act, 2002), passed by the `1st

Respondent/CCI' is a `Quasi-judicial Order', as it requires the `1st Respondent/CCI' to form an `opinion' whether a `notified Combination' has or is likely to have any `AAEC' in the relevant market based on consideration of numerous factors mentioned in Section 20 (4) of the Competition Act, 2002.

80. The Learned Counsel for the `Appellant' contends that the `Penalty' of INR 200 Crores imposed in the `impugned order' is without any basis or justification and under the 1st Respondent/CCI had imposed a maximum penalty of INR 5 Crores in approximately 40 cases for `Breach of Section 43A of the Competition Act, 2002', during the past eleven years period.

81. The Learned Counsel for the `Appellant' refers to the decision of the Hon'ble Supreme Court in Excel Crop Care V Union of India and Ors., reported in (2017) 8 SCC, page 47, Spl. pages 113 and 114, wherein at paragraph 109, it is observed as under:

> *109. ``At this point, I would like to emphasize on the usage of the phrase 'as it may deem fit' as occurring under Section 27 of the Act. At the outset this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of*

penalty. This discretion should be governed by rule of law and not by arbitrary, vague or fanciful considerations. Here we may deal with two judgments which may be helpful in deciding the concerned issue. In Dilip N. Shrof v. Joint CIT (2007) 6 SCC 329, this Court while dealing with the imposition of the penalty has observed that: (SCC pp. 353-54, para 42)

> *42. The legal history of section 271(1)(c) of the Act traced from the 1922 Act prima facie shows that the Explanations were applicable to both the parts. However, each case must be considered on its own facts. The role of the Explanation having regard to the principle of statutory interpretation must be borne in mind before interpreting the aforementioned provisions. Clause (c) of sub-section (1) of section 271 categorically states that the penalty would be leviable if the assessee conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing of inaccurate particulars alone, the assessee does not ipso facto become liable for penalty. Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings as has been noticed in some of the decisions of this court, inheres on the face of the statutory provisions. Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo Committee, only to harass the assesse. The approach of the Assessing Officer in this behalf must be fair and objective."*

(emphasis supplied)

82. The Learned Counsel for the `Appellant' raises an argument that the `1st Respondent/CCI' had failed to take into account about the aspect

that `FRL SHA' or `BCAs' came in to effect before the `Approval Order' and the `Investment' made by the `Appellant' had already flown down to `FRL' and `Appellant, the `Appellant' is actually a party suffering monetary damages due to the `Contractual Breaches' by the `Future Group'.

Appellant's Decisions:

83. The Learned Counsel for the Appellant relies on the decision of the Hon'ble Supreme Court in State of NCT of Delhi and another V Sanjeev Alias Bittoo (2005) 5 SCC at page 181 at Spl. page 190, wherein at paragraph 15, it is observed as under:

> *15.`` One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See State of U.P. and Ors. v. Renusagar Power Co. and Ors., AIR (1988) SC 1737. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly*

summarized as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires."

84. The Learned Counsel for the Appellant cites the decision of the Supreme Court in Kishore Samrite V State of Uttar Pradesh (2013), 2 SCC, Page 398, at Spl. pgs: 421 and 422, wherein at paragraph 32 to 32.8, it is observed as under:

32.``The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is

difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

(32.1) Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

(32.2) The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

(32.3) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

(32.4) Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

(32.5) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

(32.6) The Court must ensure that its process is not abused and in order to prevent abuse of process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty-bound to impose heavy costs.

(32.7) Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

(32.8) The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well justifies it (Refer : Dalip Singh V State of Uttar Pradesh (2010) 2 SCC 114; Amar Singh V Union of India (2011) 7 SCC 69; and State of Uttaranchal V Balwant Singh Chaufal (2010) 3 SCC 402."

85. The Learned Counsel for the Appellant adverts to the decision of the Hon'ble Supreme Court in Amar Singh V Union of India, reported in (2011) (7) SCC, Page 69, at Spl. pages 87 to 89, wherein at paragraphs 53 to 61, it is observed as under:

53.``Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

54. In Dalglish v. Jarvie[10] the Court, speaking through Lord Langdale and Rolfe B., laid down: (Mac & G p.231: ER p. 89)

> *"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the*

importance of any facts which he has omitted to bring forward."

55. In Castelli v. Cook[11], Vice-Chancellor Wigram, formulated the same principles as follows: (Hare p. 94: ER p. 38)

"... a plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not property brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go."

56. In Republic of Peru v. Dreyfus Bros. & Co.[12] Kay, J. reminded us of the same position by holding: (LT p. 803)

"...If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications' are made."

57. In one of the most celebrated cases upholding this principle, in the Court of Appeal in R. v. Kensington Income Tax Commissioner ex p Princess de Polignac[13] K.B. Scrutton, L.J. formulated as under: (KB p. 514)

"...and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, now law. He must not misstate the law if he can help it - the court is supposed to know the law. But it knows nothing about the facts, and the

applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."

58. It is one of the fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings and especially when it contains a prayer for injunction. A prayer for injunction, which is an equitable remedy, must be governed by principles of `uberrima fides".

59. The aforesaid requirement of coming to Court with clean hands has been repeatedly reiterated by this Court in a large number of cases. Some of which may be noted, they are: Hari Narain v. Badri Das - AIR 1963 SC 1558, Welcome Hotel v. State of A.P. - (1983) 4 SCC 575, G. Narayanaswamy Reddy v. Government of Karnataka - (1991) 3 SCC 261, S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1, A.V. Papayya Sastry v. Government of A.P. - (2007) 4 SCC 221, Prestige Lights Limited v. SBI – (2007) 8 SCC 449, Sunil Poddar v. Union Bank of India - (2008) 2 SCC 326, K.D.Sharma v. SAIL - (2008) 12 SCC 481, G. Jayashree v. Bhagwandas S. Patel (2009) 3 SCC 141, Dalip Singh v. State of U.P. (2010) 2 SCC 114.

60. In the last noted case of Dalip Singh (supra), this Court has given this concept a new dimension which has a far reaching effect. We, therefore, repeat those principles here again:

"(a) For many centuries Indian society cherished two basic values of life i.e. "satya"(truth) and "ahimsa (non-violence), Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-

independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

(b) In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

However, this Court is constrained to observe that those principles are honoured more in breach than in their observance.

61. Following these principles, this Court has no hesitation in holding that the instant writ petition is an attempt by the petitioner to mislead the Court on the basis of frivolous allegations and by suppression of material facts as pointed out and discussed above. In view of such incorrect presentation of facts, this court had issued notice and also subsequently passed the injunction order which is still continuing."

86. The Learned Counsel for the Appellant seeks in aid of the decision of the Hon'ble Supreme Court in Dalip Singh V State of Uttar Pradesh, reported in (2010) 2 SCC, Page 114 at Spl. pgs: 116 and 117, wherein it is observed as under:

"(a) For many centuries Indian society cherished two basic values of life i.e. "satya"(truth) and "ahimsa (non-violence), Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

(b) In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

87. The Learned Counsel for the Appellant refers to the decision of Hon'ble Supreme Court in Union of India and Ors. V Cipla Ltd. and Ors. (2007) 5 SCC, wherein at paragraph 150, it is observed as under:

150``A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. This occurred in Rajiv Bhatia v. Govt. of NCT of Delhi and others [MANU/SC/0552/1999 : (1999) 8 SCC 525]. The Respondent-

mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of the child granted by the Delhi High Court to the Respondent-mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping."

88. The Learned Counsel for the Appellant refers to the decision of the Hon'ble Supreme Court in Commissioner of Sales Tax, Uttar Pradesh V R.P. Dixit Saghidar, (2001) 9 SCC Page 324, Spl. pg: 325, wherein at paragraph 5, it is observed as under:

> *5.``We are unable to subscribe to the view of the High Court. The aforementioned passage quoted from the Tribunal's order shows that the Tribunal was of the view that once the order is quashed by the Assistant Commissioner, he could not in law remand the case for a decision afresh. As has been noted, before the Assistant Commissioner the counsel for the respondent had contended that the ex parte order should have been set aside because no notice had been received. When principles of natural justice are stated to have been violated it is open to the appellate authority, in appropriate cases, to set aside the order and require the Assessing Officer to decide the cases de novo. This is precisely what was directed by the Assistant Commissioner and the Tribunal, in our opinion, was clearly in error in taking a contrary view."*

89. The Learned Counsel for the `Appellant' refers to the decision of the Hon'ble Supreme Court in P. Malaichami V Andi Ambalam and Others, reported in (1972) 2 SCC, page 170 at Spl. pg: 188, wherein at paragraph 31, it is observed as under:

> *31.``Finally, we must deal with the appeal made to us that the justice should be done irrespective of the technicalities. Justice has got to be done according to law. A Tribunal with limited jurisdiction cannot go beyond the procedure laid down by the statute for its functioning. If it does so it would be acting without jurisdiction."*

90. The Learned Counsel for the `Appellant' cites a decision of the Hon'ble Supreme Court in Pancham Chand and Others V State of Himachal Pradesh (2008) 7 SCC, Page 117 at Spl. pg: 124, wherein at paragraph 19, it is observed as under:

> *19.``Apart from the fact that nothing has been placed on record to show that the Chief Minister in his capacity even as a member of the Cabinet was authorised to deal with the matter of transport in his official capacity, he had even otherwise absolutely no business to interfere with the functioning of the Regional Transport Authority. The Regional Transport Authority being a statutory body is bound to act strictly in terms of the provisions thereof. It cannot act in derogation of the powers conferred upon it. While acting as a statutory authority it must act having regard to the procedures laid down in the Act. It cannot bypass or ignore the same."*

91. The Learned Counsel for the `Appellant' adverts to the decision of the Hon'ble Supreme Court in National Securities Depository Limited V Securities and Exchange Board of India, reported in (2017) 5 SCC at page 517, Spl. pgs: 523 and 528: wherein at paragraph 8, 9 and 21, it is observed as under:

> *8.`` It is interesting to note that under Section 15-M, a person shall not be qualified for appointment as the Presiding Officer of the three member Appellate Tribunal unless he is a sitting or retired Judge of the Supreme Court, or a sitting or retired Chief Justice of a High Court, or is a sitting or retired Judge of a High Court who has completed not less than 7 years of service as a Judge in a High Court. This is one indicia of the fact that the Appellate Tribunal, being manned by a member of the higher judiciary, is intended to hear appeals only against quasi-judicial orders.*
>
> *9. Also, appeals are to be filed by persons aggrieved not only by an order of the Board made under the SEBI Act, Rules or Regulations, but by orders made by an adjudicating officer under the Act. Under Section 15-I, the Board can appoint an officer not below the rank of a Division Chief to be an adjudicating officer to hold an inquiry, give a hearing to the person concerned and thereafter impose a penalty, all of which points to only quasi-judicial functions being exercised by such officers. Under sub-section (3) of Section 15-T, every appeal is to be filed within a period of 45 days from the date on which a copy of the order made by the Board or the adjudicating officer, as the case may be, is received by him. Generally administrative orders and legislative regulations made by the Board are never received personally by "the person aggrieved". This is another pointer to the fact that the order spoken of in sub-section (1) of Section 15-T is only a quasi-judicial order. Also, it is important to note under sub-section (4)*

that the Appellate Tribunal may ultimately pass orders confirming, modifying or setting aside the order appealed against. In the Clariant judgment referred to hereinabove, paragraph 74 clearly states that: (SCC p. 550)

> *74."The jurisdiction of the appellate authority under the Act is not in any way fettered by the statute and thus, it exercises all the jurisdiction as that of the Board".*

[emphasis supplied]

This being the case, it is clear that the appeal being a continuation of the proceeding before the Board, the proceeding can only be quasi-judicial in nature."

21. A judgment of this Court dealing with the very Act we are dealing with is reported as Clariant International Ltd. v. SEBI - (2004) 8 SCC 524. In our view certain observations made in this judgment almost conclude the matters raised in this appeal. While discussing the effect of the Board being an expert body, this Court in paragraph 71 stated: (SCC p. 549)

> *"71.The Board is indisputably an expert body. But when it exercises its quasi-judicial functions, its decisions are subject to appeal. The Appellate Tribunal is also an expert Tribunal."*

(emphasis supplied)

In para 77 this Court further went on to state: (SCC p. 550)

"The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise of such wide-ranging powers is that it must comply with the Constitution and the Act. In

that view of the matter, where an expert Tribunal has been constituted, the scrutiny at its end must be held to be of wide import. The Tribunal, another expert body, must, thus, be allowed to exercise its own jurisdiction conferred on it by the statute without any limitation."

92. The Learned Counsel for the `Appellant' refers to the decision of the Hon'ble Supreme Court in Clariant International V Securities and Exchange Board of India, reported in (2004) 8 SCC at page 524, Spl. pg: 549, wherein at paragraph 71, it is observed as under:

71." The Board is indisputably an expert body. But when it exercises its quasi-judicial functions; its decisions are subject to appeal. The Appellate Tribunal is also an expert Tribunal. Only such persons who have the requisite qualifications are to be appointed as members thereof as would appear from sub-section (2) of Section 15-M of the said Act which reads thus:-

"15-M Qualification for appointment as Presiding Officer or Member of the Securities Appellate Tribunal.__(1)

(2) A person shall not be qualified for appointment as Member of a Securities Appellate Tribunal unless he is a person of ability, integrity and standing who has shown capacity in dealing with problems relating to securities market and has qualification and experience of corporate law, securities laws, finance, economics or accountancy:

Provided that a member of the Board or any person holding a post at senior management level equivalent to Executive Director in the Board shall not be appointed as Presiding Officer or Member of a Securities Appellate Tribunal during

his service or tenure as such with the Board or within two years from the date on which he ceases to hold office as such in the Board."

Appellant's Citations (under `The Competition Act, 2002') :

93. The Learned Counsel for the Appellant cites a decision of Hon'ble Supreme Court in SCM Solifert Ltd. and Anr. V Competition Commission of India, (2018) 6 SCC, at Spl. page 637, wherein at paragraph 20, it is observed as under:

> *20.``When the transaction has been completed and acquisition has been made and the latter transaction has exceeded holding more than 25% by the second purchase, obviously prior permission was required, as discussed hereinabove, as its total shareholding increased to 25.3%. Thus, we have no hesitation to hold that the notification under Section 6 (2) of the Act has to be ex ante."*

94. The Learned Counsel for the Appellant points out the order dated 24.06.2021 passed by the `1st Respondent/CCI' under Section 31 (1) of the Competition Act, 2002 (vide Combination, Registration No. C-2020/06/747), in the matter of Jaadhu Holdings LLC (Acquirer) / Jio Platforms Limited (Target), wherein at paragraphs, 4, 5 and 9, it is observed as under:

> *4.``Jaadhu was incorporated in March 2020 under the laws of the State of Delaware, USA, and is currently stated to be not engaged in any business in India. As stated earlier, it is an wholly owned subsidiary of Facebook, which is a publicly traded company listed*

on NASDAQ, with its headquarters in California, USA. The Facebook group offers various products and services in the market for social networking and advertisement. Globally, Facebook's main products / services include Facebook, Messenger, Instagram, WhatsApp, Oculus, Workplace and Portal. Facebook generates virtually all its revenue from selling advertising placements to marketers on its products/ services.

5. Jio Platforms is a company incorporated in India and a subsidiary of RIL. Jio Platforms owns and operates digital applications and holds controlling investments in certain technology related entities. Jio Platforms also holds 100% of the issued and outstanding share capital of Reliance Jio Infocomm Limited (RJIO), a public limited company incorporated in India. RJIO is a licensed telecommunication operator, providing mobile telephony services to users across India.

9. Based on the submissions of Jaadhu, the Commission observes that the activities of the Facebook group and Jio Platforms are similar in consumer communication applications and advertisement services. Further, the social interaction applications of Facebook group, particularly WhatsApp chat/ instant messaging application, and the telecommunication services offered by RJIO, a wholly owned subsidiary of Jio Platforms, are complementary to each other."

and submits that the `1st Respondent/CCI' necessarily had considered the `Business' of the group `Entities' in the `Competitive Assessment'.

95. The Learned Counsel for the Appellant cites the `Order' dated 02.09.2014, passed by the `1st Respondent/CCI' (u/n Section 31 (1) of the Competition Act, 2002) vide Combination Registration No.

C-2014/06/184 in Dunearn Investments (Mauritius) Pte. (``Dunearn" or ``Acquirer") / Intas Pharmaceuticals Limited (Target), wherein at paragraphs 2, 4 and 8, it is observed as under:

> *2." The proposed combination relates to acquisition of 10.16 percent of the issued, subscribed and paid-up share capital of Intas Pharmaceuticals Limited. ("Intas") by Dunearn from Mozart Limited ("Mozart"), a wholly owned subsidiary of ChrysCapital III LLC. (hereinafter "Dunearn", "Mozart" and "Intas" are together referred to as "**parties**")*
>
> *4. Dunearn, incorporated in Mauritius is an investment holding company. It is an indirect subsidiary of Temasek Holding (Private) Limited ("**Temasek**"). Temasek is an investment company owned by the Government of Singapore. As stated in the notice as of date, Dunearn does not own any interests in the Indian pharmaceutical sector.*
>
> *8. As stated earlier, the Acquirer is an investment holding company and an indirect subsidiary of Temasek. As per the information provided in the notice, there are no horizontal overlaps between the products and services of Intas and the rest of the Temasek group. As stated in the notice, Temasek has some minority investment in the companies engaged in the pharmaceutical and health sector in India including Medreich Limited, a pharmaceutical company in India. However, Temasek has entered into an agreement of divestment of its shareholding in Medreich Ltd. Moreover, as per the available records and information given by the Acquirer, even in respect of the overlapping products of Intas and Medreich Ltd., the combined market share is of minimal nature. Further, as stated in the notice neither Temasek nor any of its subsidiaries, associates or joint ventures has any significant vertical linkage with any of the business activities of Intas or its subsidiaries in India."*

96. The Learned Counsel for the `Appellant' adverts to the order dated 22.02.2021, passed by the `1st Respondent / CCI' (u/n Section 31 (1) of the Competition Act, 2002) vide (Combination Registration No.C-2021/01/805) in CDPQ Private Equity Asia Pte. Ltd. (Acquirer) / API Holdings Pte. Ltd. (Target), wherein at paragraphs 2, 4, 5, 7 and 8, it is observed as under:

> *2. "The Proposed Combination envisages an increase of shareholding of the Acquirer by approximately 2% in the Target by way of both a secondary acquisition of shares and a Combination Registration No. C-2021/01/805 Page 2 of 4 primary issuance of shares and compulsorily convertible preference shares by the Target. The increase of shareholding is accompanied by acquisition of certain additional rights as well. [Hereinafter, CDPQ Asia and API Holdings are collectively referred to as '**Parties**'.]*
>
> *4. CDPQ Asia is a wholly-owned subsidiary of Caisse de Depot et Placement du Quebec ('CDPQ') and is located in Singapore. CDPQ is a Canadian institutional fund, which manages and serves depositors which comprises public and private pension and insurance funds in Quebec. In India, the Acquirer is present through its subsidiaries, viz. CDPQ India Private Limited, Ivanhoe Cambridge Investment Advisory (India) Private Limited and SITQ India Private Limited.*
>
> *5. CDPQ is also present in India through its investments in various portfolio companies including, inter alia, Piramal Enterprises Limited (which is present in the pharmaceutical segment) ('**PEL**')*

*and TVS Supply Chain Solutions Limited (which is engaged in the business of providing logistics services) (‘**TVS**’).*

7. Based on the submissions, the Commission noted that Target exhibits horizontal overlaps with CDPQ’s portfolio companies, namely PEL and TVS in the segment of manufacture of pharmaceuticals and provision of logistics services, respectively. The Commission decided to leave the delineation of the relevant markets open as it was observed that the Proposed Combination is not likely to cause an appreciable adverse effect on competition in any of the relevant markets. As per the information submitted, the presence of the Target is minimal in these segments.

8. Similarly, based on the submission of the Acquirer, the Commission noted that there are various vertical relationships, existing and potential, between the portfolio companies of CDPQ and the Target. However, the presence of the Target in these segments is minimal and accordingly, it appears that the Parties do not have any ability or incentive to foreclose competition.”

97. The Learned Counsel for the `Appellant’ adverts to the `Order’ dated 22.03.2019, passed by the `1st Respondent/CCI’ (u/n Section 31(1) of the Competition Act, 2002) in Deli CMF Pte. Limited (Acquirer) / Delhivery Private Limited (Target) (vide Combination Registration No.C-2019/02/640), wherein at paragraphs 4, 6, 7 and 9, it is observed as under:

*4. ``The proposed combination is notified in relation to subscription by the Acquirer of preference shares in the Target (**Proposed Combination**). The Acquirer is an existing shareholder of the Target and currently holds 4.76% of the share capital, on a fully diluted basis. Post the Proposed Combination, the*

*shareholding of Acquirer in Target will be 4.51%, on fully diluted basis (Deli and Delhivery are collectively referred to as the **Parties**).*

*6. The Acquirer, incorporated in Singapore, is a wholly owned subsidiary of China Momentum Fund, L.P. [**CMF**]. Acquirer has been incorporated solely for the purpose of making investments in the Target. CMF, established in accordance with the laws of Cayman Islands, is a private equity fund. Fosun China Momentum Fund GP, Ltd. [**General Partner/FCM**], a wholly owned subsidiary of Fosun International Ltd. [**Fosun International**], is the general partner of CMF.*

*7. In the notice, it has been submitted that the Proposed Combination is not notifiable in terms of the Section 5 of the Act, as it does not meet the financial thresholds prescribed thereunder. It has been further submitted that the Acquirer is filing the notice by way of abundant caution only. However, as per the submissions of the Acquirer, the management, control and operation of CMF including the authority to determine its policy, investment and other activities, are vested exclusively with FCM, which is a subsidiary of Fosun International Ltd. (**FIL**). Thus, FCM has the ability to control the affairs of CMF. Accordingly, the assets and liabilities of FIL are also required to be considered for the purpose of financial thresholds prescribed under Section 5 of the Act. Taking into account said financials of FIL, the proposed acquisition by the Acquirer qualifies as a combination under Section 5 of the Act.*

9. It has been submitted that the Parties to the Proposed Combination do not produce/provide similar or identical or substitutable products or services either directly or indirectly. It has been further submitted that the Parties to the Proposed Combination are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in products or provision of services, which is at different stages or

level of the production chain. However, one of the companies beneficially owned by FIL is seen to have investments in an entity that is engaged in leasing of trucks in Karnataka, Tamil Nadu and Mumbai. This is suggestive of a limited vertical overlap between the activities of the Parties and they are not engaged in similar line of business."

98. The Learned Counsel for the `Appellant' refers to the `Order' dated 30.04.2020, passed by the `1st Respondent/CCI' (u/n Section 31(1) of the Competition Act, 2002) in Canary Investments Limited and Link Investment Trust II (Acquirers) Intas Pharmaceuticals Limited (Target (vide Combination Registration No.C-2020/04/741), wherein at paragraphs 2, 3, 9, 10 and 13, it is observed as under:

2. "The Proposed Combination envisages acquisition of ~ 3% of the shareholding in Intas by the Acquirers, along with certain contractual rights under SHA.

3. Canary is an investment company registered in Mauritius. It is wholly owned by ChrysCapital VIII LLC, which in-turn has been set up by ChrysCapital. ChrysCapital is engaged in the business of making investments in different sectors including consumer goods and services, financial services, healthcare and pharmaceuticals.

9. In the instant matter, it is observed that the activities of Intas are similar to a few of the other pharmaceutical companies in which ChrysCapital has shareholding and contractual rights to participate in some of their strategic corporate actions. ChrysCapital currently holds less than or equal to 10 percent of

*the share capital in each of Mankind Pharma Limited (**Mankind**) and Eris Lifesciences Limited (**Eris**); and less than 20 percent of the share capital in each of GVK Biosciences Private Limited (**GVK**) and Curatio Healthcare Private Limited (**Curatio**).*

*10. The interest of ChrysCapital in Eris is limited to its shareholding. Therefore, Eris has not been considered for identification of overlaps between the portfolio of ChrysCapital and Intas. However, its interest in GVK, Curatio and Mankind include board representation, right to seek information as well as the right to veto certain corporate actions including the change in capital structure, mergers and acquisitions, commencing new line of business and amendment to charter documents (GVK, Curatio and Mankind shall be together referred to as **Portfolio Entities**). A holistic appreciation of these rights suggest that ChrysCapital enjoys the ability to influence the strategic focus and operations of GVK, Mankind and Curatio. By way of the Proposed Combination, the Acquirers now propose to acquire minority shareholding in Intas along with rights to participate in some of its strategic corporate actions.*

13. The business of Intas and the Portfolio Entities are similar in respect of more than 150 pharmaceutical products. The combined market share of the parties is greater than 30% in more than 20 pharmaceutical products. These products are used to treat ailments falling under the categories of (a) alimentary tract and metabolism; (b) cardiovascular system; (c) dermatologicals; (d) genito-urinary system and sex hormones; (e) musculo-skeletal system; (f) nervous system; (g) respiratory system; and (h) various."

99. The Learned Counsel for the `Appellant' cites to the `Order' dated 01.09.2017, passed by the `1st Respondent/CCI' (u/n Section 31(1) of the Competition Act, 2002) in Copper Technology Pte. Ltd. (Acquirer) ANI

Technologies Private Limited (Target) (vide Combination Registration No.C-2017/08/525), wherein at paragraphs 2, 4 and 6, it is observed as under:

> *2. ``The proposed combination relates to subscription by CTPL of 9.57% fully diluted paidup share capital of ANI. In addition, CTPL is entitled to nominate a non- executive director on the board of ANI.*
>
> *4. CTPL, a newly incorporated private company in Singapore, is an investment holding company. Currently, it does not carry out any business activities in India and is a wholly owned subsidiary of Aceville Pte. Ltd. ("**Aceville**"), an entity incorporated in Singapore. Tencent Holdings Limited ("**Tencent**"), a company incorporated in the Cayman Island, is the ultimate parent company of Aceville. Tencent is inter-alia, engaged in provision of value-added services and online advertising services to users in China.*
>
> *6. The Commission observed that neither Tencent nor its subsidiaries are engaged in production, distribution or trading of similar or identical or substitutable products as of the main activities of ANI in India. However, Tencent group has investment in Flipkart through one of its portfolio company, which is inter-alia, engaged in the business of issuance of semi-closed prepaid instruments (i.e. Mobile Wallets) under the brand name of "PhonePe". The Commission noted that PhonePe may be substitutable to Ola Money. In this regard, the Commission observed that these entities have insignificant presence in the activity of mobile wallet in India and accordingly there seems to be no competition concerns."*

100. The Learned Counsel for the `Appellant' points out to the `Order' dated 13.06.2016, passed by the `1st Respondent/CCI' (u/n Section 31(1) of the Competition Act, 2002) in Marble II Pte. Limited (Acquirer) / Mphasis Limited (Target) (vide Combination Registration No.C-2016/04/391), wherein at paragraphs 2, 5, 9, 10 and 11, it is observed as under:

> *2. "The notice was given pursuant to execution of a Share Purchase Agreement ("**SPA**") between EDS Asia Pacific Holdings ("**EDS Asia**"), EDS World Corporation (Far East) LLC ("**EDS Far East**"), EDS World Corporation (Netherlands) LLC ("**EDS Netherlands**") and the Acquirer on 4th April 2016 for acquisition of up to 60.17% equity share capital of Mphasis. (Hereinafter, EDS Asia, EDS Far East and EDS Netherlands are collectively referred to as "**Sellers**")*
>
> *5. Marble II, a private limited company incorporated in Singapore, is a special purpose vehicle incorporated for the purpose of the Proposed Combination. It is a wholly owned subsidiary of Marble I Pte. Ltd. ("**Marble I**") and an indirect subsidiary of Blackstone Capital Partners (Cayman II) VI L.P. ("**BCP VI**"), a private equity fund managed / advised by affiliates of The Blackstone Group L.P. ("**Blackstone**"). Blackstone listed on the New York Stock Exchange ("**NYSE**") and headquartered in the United States, is a global alternative asset manager and provider of financial advisory services.*
>
> *9. The Commission noted that at broader level, activities of the parties' overlap in the business of IT and ITeS in India. While, the Acquirer, being a special purpose vehicle, is not engaged in any business activity, the portfolio companies of Blackstone and the Target are engaged in the overlapping activities i.e. IT and ITeS*

business in India. The Commission further noted that the provision of services relating to IT and ITeS can be sub-segmented into the provision of Consulting, Implementation Services and ITO services in India. However, in the instant case as the market shares of the parties are insignificant and there is presence of several other players, the market definition may be left open.

10. On the basis of the submissions of the Acquirer, the Commission noted that there is insignificant vertical relationship between the Target and portfolio companies of Blackstone in India.

11. It is observed that the competition assessment of the proposed combination for overlapping businesses of namely, (i) Mpahsis and the Acquirer, and (ii) Mpahsis and the relevant portfolio companies of Blackstone, would relate to the business of IT and ITeS in India. It is observed that the combined market share of the Target and portfolio companies of Blackstone, post-combination, are insignificant regardless of how the market is delineated. Further, other players, with a sizeable market share, are present in each of the sub-segment of the IT and ITeS business in India."

101. The Learned Counsel for the `Appellant' adverts to the `Order' dated 21.05.2014 in Thomas Cook Vs Sterling Holiday Resorts India Limited (u/n Section 43A of the Competition Act, 2002) (vide Combination Registration No.C-2014/02/153), wherein at paragraphs 8 to 11, it is observed as under:

8. "The Parties have also contended that even assuming for the sake of argument that the concept of 'composite combination' is regulated and controlled under the Act,

based on the previous decisions of the Commission, the Market Purchases do not meet the requirements of a composite combination. Citing reference to the earlier decisions of the Commission (Case bearing Reg. Nos. C-2012/03/45, C-2012/03/48 and C-2013/05/122), it has been argued that mutual interdependence is the relevant test to see whether two transactions are part of one composite combination. However, the Commission has never held that mutual interdependence is the only test to determine a composite combination. It is relevant to note sub-regulation (4) of Regulation 9 which states that a business transaction could be achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other. Even in the case bearing Reg. No. C-2013/05/122, the Commission regarded different steps/transactions as one combination as they were related to each other and there was no conclusion that mutual interdependence is the only test to determine a composite combination. It is observed that considering two different transactions as one combination depends on the facts and circumstances of each case with due regard to the subject matter of the transactions; the business and entities involved; simultaneity in negotiation, execution and consummation of the transactions; and also, whether it is practical and reasonable to isolate and view the transactions separately. In the instant case, though different, the Market Purchases are inherently related to the other transactions (Scheme and other acquisitions) and would not have been pursued in the absence of Parties envisaging the Scheme and other acquisitions.

9. In terms of sub-section (2) of Section 6 of the Act, any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission disclosing the details of the proposed combination within the time prescribed therein. Whereas, at the time of giving notice to

the Commission, TCISIL had already consummated the Market Purchases. Therefore, the Parties have failed to give notice under sub-section (2) of Section 6 of the Act.

10. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, the Commission shall impose on such person or enterprise, a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.

11. Though the penalty under section 43A of the Act may extent up to one percent of the total turnover or the assets of such a combination whichever is higher, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at an appropriate amount of penalty. In the instant case, the Parties consummated the Market Purchases between 10th and 12th February 2014 and same was disclosed in the notice filed on 14th February 2014. Though the parties have made full disclosure of all the transactions and there was no effort on their part to conceal information, the Commission discovered the violation of the provisions of the Act only from the notice given by the Parties. These facts go to suggest that the conduct of the Parties was not such that attracts severe penalty. Considering the facts and circumstances of the case, the Commission considers it appropriate to impose a relatively nominal penalty on the Parties. Therefore, in exercise of the powers under Section 43A of the Act, a penalty of INR 1,00,00,000 (Rupees one crore) is imposed on the Parties. The parties to the combination shall pay the penalty within 60 days from the date of receipt of this order."

Appellant's Decisions (on `Decisional Practice' under Competition Act, 2002):

102. The Learned Counsel for the `Appellant' refers to the `Order' dated 24.06.2020, passed by the `1st Respondent/CCI' (u/n Section 31(1) of the Competition Act, 2002) in Jaadhu Holdings LLC (Acquirer) / Jio Platforms Limited (Target) (vide Combination Registration No.C-2020/06/747), wherein at paragraphs 12, 13, 14, 16, 24, 25 and 28, it is observed as under:

> *12. "Jaadhu has submitted that there is no need to specifically define a relevant market in respect of consumer communication applications as the Proposed Combination is only a minority acquisition. The parties would continue to operate independently and therefore, the Proposed Combination would not alter the competitive landscape in any potential relevant market in any manner. Without prejudice to such submission, it has also submitted that Jaadhu firmly believes that it competes in the overall broader 'market for user attention'. Facebook group (and Jio Platforms) compete broadly with all digital products and services that seek to capture user attention, which can be through a number of different services such as social networking, messaging, gaming, content viewing and sharing, music, amongst many others. Without prejudice to the above submissions, Jaadhu has further submitted that the Commission, in Vinod Gupta v. WhatsApp Inc. (Order dated 01.06.2016 in Case No. 99 of 2016), had adopted a narrower market definition by covering consumer communication applications only. For such narrower market, Jaadhu has given submissions to suggest that the Proposed Combination is not likely to raise any competition concern. It has further submitted that it would be unrealistic to segregate*

consumer communication applications based on functionality or platform.

13. The Commission observes that JioChat, Messenger and WhatsApp are all consumer communication applications that primarily enable users to interact with each other. The purpose and features of these applications serve the particular purpose of interaction between individuals or groups and thus, it may not be appropriate to consider the relevant market as all user attention products/ services. Further, consumer communication applications can be segmented based on functionality – messaging, voice call and video call; platforms – applications meant for desktop, smartphones, tablets, mobile devices, etc.; and operating systems (OS) - proprietary applications and those that run over different mobile operating systems.

14. In Vinod Gupta case (supra), the Commission dealt with alleged abuse of dominant position by WhatsApp. While defining the relevant market, the Commission noted that "'WhatsApp', an instant communication app for smartphones using standard cellular mobile numbers, is a platform for communication through texting, group chats and voice and video calls. It is noted that instant communication apps cannot be compared with the traditional electronic communication services such as text messaging, voice calls etc. as provided by various telecommunication operators. It is so because unlike traditional modes of communication, instant messaging using communication apps are internet based and provide additional functionalities to the users. For example, users of communication apps can see when their contacts are online, when they are typing or when they last accessed the application. Further, instant communication apps can be used through smartphones only whereas traditional electronic communication services can be used through any mobile phone. There are also differences in the pricing conditions in both the abovesaid modes of communication. 'WhatsApp' is a free to download communication application which does not

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

(emphasis added)

16. The Commission observes that all the three consumer communication applications of the parties viz. WhatsApp, Messenger and Jio Chat offer similar functionalities and are available free of cost. It has been stated that applications like Duo and Hangout of Google, Snapchat, Wechat, imessage and FaceTime of Apple, Telegram and Viber also offer similar combination of functionalities and are available free of cost. These are seemingly the result of convergence in the consumer communication applications market. Thus, for the purpose of assessment of the Proposed Combination, it may not be relevant to further segment consumer communication applications based on functionalities.

24. Jaadhu has submitted that there is no need to specifically define a relevant market in respect of advertisement services as the Proposed Combination is only a minority acquisition. The parties would continue to operate independently and therefore, the Proposed Combination would not alter the competitive landscape in any potential relevant market in any manner. Without prejudice to such submission, Jaadhu has submitted that advertising is a

large, diverse segment made up of many forms and mediums such as billboards, radio and television spots, print advertising, online advertising, etc. It has been further submitted that the purchasers of advertising services (i.e, advertisers) procure advertising space, often across mediums, to promote a product, service, or cause. It has been submitted that the mediums for conveying advertisements have expanded in the recent years and now include a wide range of platforms including print, television, radio, billboards, cinemas, etc. (commonly referred to as offline mediums of advertising) and also apps, websites, emails, etc. (commonly referred to as online mediums of advertising).

25. Jaadhu has however submitted that there is no need to segregate online and offline advertisements as the purpose and end-use of advertisements across all mediums is the same and these different segments are substitutable from both demand and supply side perspectives. Creating awareness of brands, products, services and ideas amongst customers / potential customers; persuading target customers to buy products or avail services and/or reinforcing/ maintaining the demand for products and services, all are indicated as intended uses of any advertisement. Further submissions have been made regarding fluidity between different mediums of advertising, including from a supply side perspective. Without prejudice to the above submissions on relevant market for advertising services, Jaadhu has also given submissions and details for a narrower market like online advertisement services and a further narrower market for online display advertisement services. The estimates given by Jaadhu for these three different alternative markets viz. advertisement services, online advertisement and online display advertisement are as under:

Table 1 Advertising Services in India for FY 2019

Name of Enterprise	***Sales (INR Cr.)***	***Market Share (%)***
Facebook	****	****
Jio	****	****
Star India	****	****
Google	****	****
Bennett Coleman	****	****
Zee Entertainment	****	****
Sony Pictures	****	****
Viacom 18	****	****
Others	****	****
Total	****	****

Table 2 Online Advertising in India for FY 2019

Enterprise	***Sales (INR Cr.)***	***Market Share (%)***
Facebook	****	****
Jio	****	****
Google	****	****
Hotstar	****	****
Amazon Ads	****	****
Flipkart	****	****
InMobi	****	****

Others	****	****
Total	****	****

Table 3 Online Display Advertising in India for FY 2019

Enterprise	***Sales (INR Cr.)***	***Market Share (%)***
Facebook	****	****
Jio	****	****
Google	****	****
Hotstar	****	****
Amazon Ads	****	****
Flipkart	****	****
InMobi	****	****
Others	****	****
Total	****	****

*28. The Commission is of the view that the market definition for advertisement services may be left open as the Proposed Combination is not likely to increase concentration in any of the plausible relevant markets for advertisement services. The revenue of Jio Platforms from advertising services is only *** ** crore and *** ** crore in the preceding two financial years. Even in the narrowest possible market viz. market for online display advertisement services, the revenue of Jio Platforms for FY 2018-19 translates into only ***** of the total market. While earnings from advertisement is the main stream of revenue for Facebook, revenue of Jio Platforms from advertisement services is insignificant and constitutes less than 1% of its total revenue. The Commission also observes that online advertisement space*

features the presence of Google, which as per the data provided by Jaadhu, has a significant market position."

103. The Learned Counsel for the Appellant points out the `Order' dated 02.09.2014, passed by the `1st Respondent/CCI' (u/n Section 31 (1) of the Competition Act, 2002) vide Combination Registration No. C 2014/06/184 in Dunearn Investments (Mauritius) Pte. (``Dunearn" or ``Acquirer") / Intas Pharmaceuticals Limited (Target), wherein at paragraphs 3 and 7, it is observed as under:

> *3. "The notice was given pursuant to an application/communication dated 22nd May 2014, filed by Intas with the Foreign Investment Promotion Board ("FIPB"). As stated in the notice and other documents available on records, no definitive agreement for the proposed transaction had been executed by the parties till the date of application with the FIPB. In the notice, the Acquirer had stated that it might seek certain affirmative voting rights in its favour in the definitive agreements to be entered between the parties and accordingly, the notice was being given by them in abundant caution under subsection (2) of Section 6 of the Act, keeping in view the proviso to sub-regulation (8) of Regulations 5 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations ("Combination Regulations").*
>
> *7. The Acquirer has submitted, vide its reply dated 25th August, 2014 that the Share Purchase Agreement and the Shareholders' Agreement in relation to the proposed combination have been executed between the parties on 22nd August 2014. It is observed that pursuant to the proposed combination, Dunearn would secure all the affirmative voting rights which were earlier available to*

Mozart. Further, as stated by the Acquirer, such rights are for the purpose of protecting the minority stake of the Acquirer in the target and would not be intended, nor likely, to result in operational control of Intas by the Acquirer, as promoters will continue to remain in its control and management."

104. The Learned Counsel for the Appellant relies on the `Order' dated 07.03.2018, passed by the `1st Respondent/CCI' (u/n Section 31 (1) of the Competition Act, 2002) vide Combination Registration No. C 2018/01/550-553 in Reliance Jio Infcomm Limited (Acquirer) / Reliance Communications Limited, Reliance Telecom Limited and Reliance Infratel Limited (Targets) wherein at paragraphs 24 and 26, it is observed as under:

> *24. "With regards to the proposed combination relating to acquisition of the MCN assets from RCOM Entities by RJIO, it has been stated that the notice has been given by Acquirer in abundant caution as the turnover attributable to the MCN Assets is below INR 1000 Crore and as such transaction qualifies for de minimis exemption, in terms of Ministry of Corporate Affairs notification dated 27th March, 2017.*
>
> *26. MCN assets are required by the telecom operators for provision of telephony services but no specific turnover can be assigned to it. The MCN Assets on a standalone basis do not perform any revenue generation activities and are merely used to support the provision of telecom business. In light of the above, the Commission is of the view that entire turnover of the mobile telephony business ought to be attributed to these assets."*

105. The Learned Counsel for the Appellant cites the `Order' dated 25.06.2015, passed by the `1st Respondent/CCI' (u/n Section 31 (1) of the Competition Act, 2002) vide Combination Registration No. C 2015/05/276 in Cairnhill CIPEF Limited (CCL) and Cairnhill CGPE Limited (CGL) (Acquirers / Mankind Pharma Limited (Target), wherein at paragraphs 5 and 6, it is observed as under:

> *5. "In relation to applicability of Item 1 to the proposed combination, it is noted that the SHA entitles the Investors to appoint 1 (one) director on the board of directors of Mankind. Further, the SHA confers certain affirmative rights to the Investors inter alia including commencement of a new business. Moreover, an acquisition could be considered to be made solely as an investment if the acquirer has no intention to directly or indirectly participate in the formulation and determination of the business decisions of the target. In view of the above, the acquisition of 11 per cent of equity share capital of Mankind would not be treated as solely as an investment and thus, the Commission is of the view that the proposed combination is not covered under Item 1 of Schedule 1 of the Combination Regulations and is notifiable under sub-section (2) of Section 6 of the Act.*
>
> *6. It is also observed that the trigger for notification under sub-section (2) of Section 6 of the Act, in respect of the proposed combination, arose from the acquisition of shares in terms of the provisions of the SPAs. Further, as per the SPAs, the execution of SHA was a condition precedent for the closing of the proposed combination. Therefore, in terms of regulation 9(4) of Combination Regulations, the execution of SPAs and SHA are interconnected and interdependent on each other. Accordingly, it appears that the notice in the instant case ought to have been filed within 30 days of the execution of the SPA 1."*

Appellant's Case Laws:

106. The Learned Counsel for the `Appellant' refers to the decision in Amazon Seller Services Private Limited V Amway India Enterprises Pvt. Ltd. and Ors., reported in 2020 SCC Online Delhi 454, wherein at paragraphs 150 to 152, it is observed as under:

> *"The tort of inducement to breach of contract necessitates that there should be a contract in the first place between the online platforms and the Direct Selling Entities (DSEs. The mere fact that the online platforms may know the Code of Ethics of the DSEs, and the contractual stipulation imposed by such DSEs on their distributors, is insufficient to lay a claim of tortious interference. It was incumbent on plaintiffs to demonstrate active efforts on the part of or contracts entered into by the appellants/defendants to make a viable case for the tort of inducement to breach of contract. In this case, contentious issues have been raised which can be decided through trial. The single Judge could not, at the interlocutory stage, have ignored the rival contentions. Whether the online platforms induced a breach of contract between the DSEs and its ABOs/sellers is at best a matter of evidence, and not of inference."*

107. The Learned Counsel for the `Appellant' relies on the decision of the Hon'ble Supreme Court in Ram Parshotam Mittal and Ors. V Hotel Queen Road Private Limited and Ors reported in 2019, 20 SCC 326 at Spl. pg: 351, wherein at paragraph 63, it is observed as under:

> *63. "In view of the observations made by this Court, the order in Ram Purshottam Mittal V Hillcrest Realty Sdn. Bhd. (2009) 8 SCC*

79, is not final and is only a prima facie view in the matter of injunction. We find force in the submission of learned counsel appearing for the appellants that the observations in interim order cannot be taken as binding even for the purpose of deciding this matter as held in the State of Assam v. Barak Upatyaka D.U. Karamchari Sanstha (2009) 5 SCC 694, SCC 702 Para 21)

"21. A precedent is a judicial decision containing a principle, which forms an authoritative element termed as ratio decidendi. An interim order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned in support of such nonfinal interim order containing prima facie findings, are only tentative. Any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a fait accompli, before the final hearing."

108. The Learned Counsel for the `Appellant' falls back upon the decision of the Hon'ble High Court of Delhi in Spread Info Tech Consultants Private Limited V ZTE Kangxun Telecom Co. India Private Limited and another, reported in (2014) SCC Online Del 4137, wherein at paragraph 14, it is observed as under:

14.``It is settled law that observations made at interim stage are not binding. The defendants are seeking to rely on the observations on merit made by this Court in order dated 29th September, 2011 while dismissing its application under Order VII Rule 11 CPC. It is settled by the Supreme Court in a catena of judgments wherein it has been held that the observations made at interim stage are not binding at subsequent stages of the same proceeding either

before the learned Single Judge or W.S.G. Cricket PTE. Ltd., AIR 2003 SC 1177, has held as under:

31. In the instant case, though the learned single judge proceeded on the prima facie finding that the proceedings in the English Courts would be oppressive and vexatious, in our view, those finding, recorded at the stage of passing an ad-interim order, would not bind the same learned judge much less they would bind the appellate court or the parties thereto at subsequent stage of the same proceeding because it cannot operate as issue estoppel….."

109. The Learned Counsel for the `Appellant' refers to the judgment of the Hon'ble Supreme Court Premlata @ Sunita V Naseeb Bee Ors., dated 23.03.2022 vide Civil Appeal Nos. 2055 – 2056 of 2022, wherein at paragraph 4, it is observed as under:

4.``At the outset, it is required to be noted and it is not in dispute that the plaintiff instituted the proceedings before the Revenue Authority under Section 250 of the MPLRC. These very defendants raised an objection before the Revenue Authority that the Revenue Authority has no jurisdiction to deal with the matter. The Tehsildar accepted the said objection and dismissed the application under Section 250 of the MPLRC by holding that as the dispute is with respect to title the Revenue Authority would not have any jurisdiction under MPLRC. The said order passed by the Tehsildar has been affirmed by the Appellate Authority (of course during the pendency of the revision application before the High Court). That after the Tehsildar passed an order rejecting the application under Section 250 MPLRC on the ground that the Revenue Authority would have no jurisdiction, which was on the objection raised by the respondents herein – original defendants, the plaintiff instituted a suit before the Civil Court. Before the Civil Court the respondents – original defendants just took a contrary stand than

which was taken by them before the Revenue Authority and before the Civil Court the 5 respondents took the objection that the Civil Court would have no jurisdiction to entertain the suit. The respondents – original defendants cannot be permitted to take two contradictory stands before two different authorities/courts. They cannot not be permitted to approbate and reprobate once the objection raised on behalf of the original defendants that the Revenue Authority would have no jurisdiction came to be accepted by the Revenue Authority / Tehsildar and the proceedings under Section 250 of the MPLRC came to be dismissed and thereafter when the plaintiff instituted a suit before the Civil Court it was not open for the respondents – original defendants thereafter to take an objection that the suit before the Civil Court would also be barred in view of the Section 257 of the MPLRC. If the submission on behalf of the respondents – defendants is accepted in that case the original plaintiff would be remediless. The High Court has not at all appreciated the fact that when the appellant – original plaintiff approached the Revenue Authority / Tehsildar he was nonsuited on the ground that Revenue Authority / Tehsildar had no jurisdiction to decide the dispute with respect to title to the suit property. Thereafter when the suit was filed and the respondents - defendants took a contrary stand that even the civil suit would be barred. In that case the original plaintiff would be remediless. In any case the respondents – original defendants cannot be permitted to approbate and reprobate and to take just a contrary stand than taken before the Revenue Authority."

110. The Learned Counsel for the `Appellant' cites the decision in Antaios Compania S.A. v Salen Rederierna A.B. (1985) AC 191, 192 (H.L. (E.), wherein it is observed that if conclusions of words in a `Commercial Contract' flout business sense, it must be made to yield business common sense.

111. The Learned Counsel for the Appellant cites the decision of Hon'ble Supreme Court in Md. Serajuddin and Ors. V The State of Orissa, reported in (1975) 2 SCC, page 47 at Spl. pg: 73 and 74, wherein at paragraphs at 61, 62 and 63, it is observed as under:

> *61.``One important criterion in order to determine as to whether the contract of sale between the appellant and STC occasioned the export is to find whether STC could divert the goods supplied by the appellant for a purpose other than the export to the foreign buyer. If the answer be in the negative, it would necessarily follow that the contract between the appellant and STC resulted in the export of chrome concentrates. The above criterion was applied in a number of cases. In the case of Ben Gorm Nilgiri Plantations Co. (supra) Shah speaking for the majority observed :*
>
> *There is no statutory obligation upon the purchaser to export the chests of tea purchased by him with the export rights. The export quota merely enables the purchaser to obtain export licence, which he may or may not obtain. There is nothing in law or in the contract between the parties, or even in the nature of the transaction which prohibits diversion of the goods for internal consumption."*
>
> *In the case of K. G. Khosla & Co. (supra) Sikri J. speaking. for this Court observed :*
>
> *"Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within section 5 (2) of the Act, and are, therefore, exempt from taxation.*

In the case of Coffee Board (supra) Hidayatullah CJ observed The compulsion to export here is of a different character. It only compels persons who buy on their own to export in their own turn by entering into another sale. It is a sale for export. Even with the compulsion the sale may not result for clauses 26, 30 and 31 visualize such happenings."

62. Coming to the facts of the present case, I find that it was an f.o.b. sale and there was absolutely no chance of diversion of the goods by STC for a purpose other than the export to the foreign buyer.

63. It may also be mentioned that the position of STC under the contract between the appellant and STC was not of a purchaser in the ordinary sense of the term. Unlike such a purchaser, STC was not entitled to get profits and was not liable to bear losses resulting from fluctuations in the market rate of the goods specified in the contract. It was not open to STC to charge any price for the goods exported to the foreign buyer. The price to be charged from the foreign buyer was already fixed in the contract between the appellant and STC. An ordinary purchaser of goods is entitled to resell the goods or retain them with himself for any length of time. There is no obligation upon him to export the goods, much less to export them to a specified foreign buyer. As against that, in the present case is a result of the agreement between the appellant and STC, the latter was not entitled to retain the goods but was bound to export them immediately to the specified foreign buyer at a price which was already mentioned in the agreement between the appellant and STC. In fact, the arrangement for export of the goods was also made by the appellant because the contract of sale between the appellant and STC was f.o.b. contract. STC came into the picture as a statutory intermediary because of the legal requirements under the Exports Control Order. All that STC was entitled in the bargain was a commission of one 'dollar per ton. Indeed, STC in one of its letters described its remuneration as commission. In the case of M/s Daruka & Co. V. The Union of

India & Ors.(1) this Court observed in para 23 of the judgment that the Corporation like STC is in the nature of a commercial undertaking to which a licence has been granted for the export of certain commodities and the service charges are nothing but quid pro quo for the services rendered by the Corporation. The introduction of a statutory intermediary Eke STC with only entitlement of commission of one dollar per ton would not, in my opinion, affect the real nature of the transaction that it was the appellant who was to export the chrome concentrates to the foreign buyer."

112. The Learned Counsel for the Appellant points out the decision of the Hon'ble Supreme Court in Shyam Telelink Limited V Union of India, reported in (2010) 10 SCC at page 165 at Spl. pg:174, wherein at paragraph 27, it is observed as under:

27. "In America Estoppel by acceptance of benefits is one of the recognized situations that would prevent a party from taking up inconsistent positions qua a contract or transaction under which it has benefited. American Jurisprudence, 2nd Edition, Volume 28, pages 677-680 discusses `Estoppel by acceptance of benefits' in the following passage:

"Estoppel by the acceptance of benefits: Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience."

113. The Learned Counsel for the Appellant adverts to the decision of the Hon'ble Supreme Court in Hari Shankar and Ors. V The Deputy Excise and Taxation Commissioner and Ors., reported in (1975) 1 SCC at page 737 at Spl. pgs: 745 and 746, wherein at paragraphs 16, it is among other things observed as under:

16.``……… The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to, sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of the trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licenses by auction and to collect licence fees through the medium of auctions cannot by writ petitions be, questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it

prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

114. The Learned Counsel for the `Appellant' refers to the judgment of the Hon'ble Supreme Court in Vijay Karia and Ors. V Prysmian Cavi E Sistemi SRL and Ors. (2020) 11 SCC 1, at Spl. pg: 5, wherein it is observed and held as under:

> *"Enforcement of a foreign award may under Section 48 be refused only if the party resisting enforcement furnishes to the Court proof that any of the grounds stated in Section 48 has been made out to resist enforcement __ The said grounds are watertight, and no ground outside Section 48 can be looked at __ Given the "pro-enforcement bias" of the New York Convention, which has been adopted in Section 48, burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around ___ The challenge procedure in the primary jurisdiction gives more leeway to courts to interfere with a foreign award than the narrow restrictive grounds contained the New York Convention when a foreign award's enforcement is resisted __ Further, the expression used in Section 48 is "may __ Thus, even if grounds for refusal of recognition and enforcement of an award are proved to exist, in one class of cases, the enforcing Court is not obliged to refuse enforcement."*

115. The Learned Counsel for the `Appellant' refers to the judgment of the Hon'ble Supreme Court in Pradeep V Goa State Co-operative Bank, reported in (2017) (3) Maharashtra Law Journal, at page 274, Spl. pgs: 281 and 282, wherein at paragraphs 26 and 27, it is observed as under:

26. ``....mere allegation of fraud in the background, is of no assistance to disturb such transactions and / or proceedings which are initiated by the Financial Institution / Bank by following the due procedure of law'

27. ……the amount/payment deposited in the Court pursuant to the order passed by this Court, that itself, cannot be read and/or for the entire amount due to the respondent Bank has been duly paid. The respondent bank has taken action based upon the then existing facts of no payment on demand and the provision. Admittedly, there was no challenge raised or objection filed that itself concluded the situation. The actions so initiated by the bank in no way can be stated to be contrary to law. Therefore, SJS Business Enterprises (2004) 7 SCS 166 on fact itself distinct and distinguishable. Ludovico Sagrado Goveia (2017) (1) MH.L.J.(S.C. 608) is also of no assistance as petitioner in case in hand never raised appropriate application within time before conclusion of first sale. Therefore, there was no question of holding that sale in question was in violation of provisions of Rule 22 of the Rules as no case was made out by the petitioner to set aside even the second sale and consequent action arising out of the same."

116. The Learned Counsel for the `Appellant' relies on the decision of the Hon'ble Supreme Court in Electrosteel Castings Limited V U V Asset Reconstruction (2021) SCC Online SC 1132, at page 385, wherein at paragraph 29, it is observed as under:

29."However it is required to be noted that except the words used `fraud'/`fraudulent' there are no specific particulars pleaded with respect to the `fraud'. It appears that by a clever drafting and using the words `fraud'/`fraudulent' without any specific particulars with respect to the `fraud', the plaintiff-appellant

herein intends to get out of the bar under Section 34 of the SARFAESI Act and wants the suit to be maintainable. As per the settled preposition of law mere mentioning and using the word `fraud'/`fraudulent' is not sufficient to test of `fraud'. As per the settled preposition of law such a pleading/using the word `fraud'/`fradulent' without any material particulars would not tantamount to pleading of `fraud'. In case of Bishundeo Narain and Anr. 1951 SCR 548) in para 28, it is observed and held as under:

> *"….. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6, Rule 4, Civil Procedure Code."*

117. The Learned Counsel for the `Appellant' cites the Judgment of this Tribunal dated 08.09.2021 in Devas Multimedia Private Limited V Antrix Corporation Limited, reported in (2021) SCC Online NCLAT 448, wherein at paragraphs 192 to 208, it is observed as under:

192. "Fraud vitiates every solemn proceeding and no right can be claimed by a fraudster the ground of technicalities. On behalf of the appellants, reliance has been placed on the definition of "fraud" as defined in Black's Law Dictionary, which is as under:

> *"Fraud: (1) A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (esp. when the conduct is willful) it may be a crime.*

… (2) A misrepresentation made recklessly without belief in its truth to induce another person to act. (3) A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. (4) dealing; esp., in contract law, the unconscientious use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."

193. Halsbury's Laws of England has defined "fraud" as follows: Whenever a person makes a false statement which he does not actually and honestly believe to be true, for purpose of civil liability, the statement is as fraudulent as if he had stated that which he did know to be true, or know or believed be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirement of the law, whether the representation has been made recklessly or deliberately, indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief.

194. In Kerr on the Law of Fraud and Mistake, "fraud" has been defined thus:

"It is not easy to give a definition of what constitutes fraud in the extensive significance in which that term is understood by Civil Courts of Justice. The courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety… Courts have always declined to define it, … reserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud ... may be said to include property properly) all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue

or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a wilful act on the part of anyone, whereby another is sought to be deprived, by legal or Inequitable means, of what he is entitled to."

195. In Ram Chandra Singh v. Savitri Devi ((2007) 10 SCC 674 Sunil Pannalal Banthia v City & Industrial Development Corpn. Of Maharashtra Ltd.), it was observed that fraud vitiates every Solemn act. Fraud and justice never dwell together and it cannot be perpetuated or saved by the application of any equitable doctrine Including res judicata. This Court observed as under: (SCC pp. 327-29, paras 15-18, 23 & 25)

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud, as is well known, vitiates every solemn act. Fraud and justice never dwell together.

16. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfuly or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata.

(emphasis supplied)

196. In Madhukar Sadbha Shivarkar v. State of Maharashtra ((2006) 13 SCC 382, Nagar Nigam v Alfaheem Meat Exports (P) Ltd.), this Court observed that fraud had been played by showing the records and the orders obtained unlawfully by the declarant, would be a nullity in the eye of the law though such orders have attained finality. Following observations were made: (SCC pp. 569-70, para 27)

27. The said order is passed by the State Government only to enquire into the landholding records with a view to find out as to whether original land revenue records have been destroyed and fabricated to substantiate their unjustifiable claim by playing fraud upon the Tahsildar and appellate authorities to obtain the orders unlawfully in their favour by showing that there is no surplus land with the Company and its shareholders as the valid sub-leases are made and they are accepted by them in the proceedings under Section 21 of the Act, on the basis of the alleged false declarations filed by the shareholders and sub-lessees under Section 6 of the Act. The plea urged on behalf of the State Government and the de facto complainant owners, at whose instance the orders are passed by the State Government on the alleged

ground of fraud played by the declarants upon the Tahsildar and appellate authorities to get the illegal orders obtained by them to come out from the clutches of the land ceiling provisions of the Act by creating the revenue records, which is the fraudulent act on their part which unravels everything and therefore, the question of limitation under the provisions to exercise power by the state Government does not arise at all. For this purpose, the Deputy Commissioner of Pune Division was appointed as the enquiry officer to hold Such an enquiry to enquire into the matter and submit his report for consideration of the Government to take further action in the matter. The legal contentions urged by Mr. Naphade, in justification of the impugned judgment and order prima facie at this stage, we are satisfied that the allegation of fraud in relation to getting the landholdings of the Villages referred to supra by the declarants on the alleged ground of destroying original records and fabricating revenue records to show that there are 384 sub-leases of the land involved in the proceedings to retain the surplus land illegally as alleged, to the extent of more than 3000 acres of land and the orders are obtained unlawfully by the declarants in the land ceiling limits will be nullity in the eye of the law though such they are tainted with fraud, the same can be interfered with by the State Government and officers to pass appropriate orders. The landowners are also aggrieved parties to agitate their rights to get the orders which are obtained by the declarants as they are vitiated in on account of nullity is the tenable submission and the same is well founded and therefore, we accept the submission to justify the impugned judgment and order Babu Maruti Dukare v. State of Maharashtra ((2006) 3 SCC

549, Intellectuals Forum v State of A. P) of the Division Bench of the High Court."

(emphasis supplied)

197. In Jai Narain Parasrampuria v. Pushpa Devi Saraf ((2006) 3 SCC 434 Bombay Dyeing & MFG. Co. Ltd., (3) v Bombay Environmental Action Group), this Court observed that fraud Vitiates every solemn act. Any order or decree obtained by practicing fraud is a nullity. his Court held as under:

"55. It is now well settled that fraud vitiates all solemn act. Any order or decree obtained by practising fraud is a nullity. [See (1) Ram Chandra Singh v. Savitri Devi ((2007) 10 SCC 674, Sunil Paannalal Banthia v City & Industrial Development Corpn. Of Maharashtra Ltd.,) followed in (2) Kendriya Vidyalaya Sangathan v. Girdharilal Yadav ((2005) 13 SCC 495: (2006) SCC (L & S) 1225, State of Orissa v Gopinath Dash; (3) State of A.P. v. T. Suryachandra Rao ((2004) 4 SCC 489, Special Response No. 1 of 2001, In Re. (4) Ishwar Dutt v. LAO ((2004) 3 SCC 214, Jamshed Hormusji wadia v Port of Mum bai (5) Lillykutty v. Scrutiny Committee, SC & ST; (6) Maharashtra SEB v. Suresh ((2002) 2 SCC 333, BALCO Employees' Union v Union of India (6) Suresh Raghunath Bhokare ((2001) 3 SCC 635, Ugar Sugar Works Ltd. v Delhi Admn.; (7) Satya v. Teja Singh ((2000) 5 SCC 287, Monarch Infrastructure P. Ltd.,v Ulhasnagar Municipal Corpn.; (8) Mahboob Sahab v. Syed Ismai ((1997) 1 SCC 388, M. C. Mehta v Kamal Nath ; and (9) Asharfi Lal v. Koili ((1996) 6 SCC 558, Shivsagar Tiwari v Union Of India.]

(emphasis supplied)

198. In State of A.P. v. T. Suryachandra Rao ((2004) 4 SCC 489, Special Reference No. 1 of 2001, In Re, it was observed that where the land which was offered for surrender had already been acquired by the State and the same had vested in it. It was held that merely because an enquiry was made, the Tribunal was not divested of the power to correct the

error when the respondent had clearly committed a fraud. Following observations were made: (SCC pp. 152-53 & 155, paras 7-10 & 13-16)

"7. The order of the High Court is clearly erroneous. There is no dispute that the land which was offered for surrender by the respondent had already been acquired by the State and the same had vested in it. This was clearly a case of fraud. Merely because an enquiry was made, the Tribunal was not divested of the power to correct the error when the respondent had clearly committed a fraud.

8. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the Second condition is satisfied. [See Vimla v. Delhi Admn. ((1996) 6 SCC 530, Common Cause v Union of India and Indian Bank v. Satyam Fibres (India) (P) Ltd.((1996) 5 SCC 510, New India Public School v HUDA]

9. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's OSs. It is a cheating intended to get an advantage. (See S.P, Chengalvaraya Naldu V. Jagannath ((1996) 2 SCC 405 Delhi Science Forum v Union of India.)

10. "Fraud" as Is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes or the other person authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation amounts itself relief against to fraud. Indeed, Innocent misrepresentation may also give reason to claim fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in taw if a party makes representations, which he knows to be false, and injury ensures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although In a given case a deception may not amount to fraud, fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi ((2007) 10 SCC 674, Sunil Pannalal Banthia V City Industrial Development Corpn. Of Maharashtra Ltd..)

13. This aspect of the matter has been considered recently by this Court in Roshan Deen v. Preeti Lal ((1995) 5 SCC 482, LIC v Consumer Education & Research Centre, Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education ((1995) 2 SCC 161, Ministry of Information & Broadcasting Govt. of India v Cricket Assn. of Bengal, Ram Chandra Singh v. Savitri Devi ((20007) 1o SCC 674 Sunil Pannalal Banthia V City Industrial Development Corpn. Of Maharashtra Ltd..) and Ashok Leyland Ltd. v. State of T.N

((1993) 52 DLT 168, Home communication Ltd. v Union of India)

14. Suppression of a material document would also amount to a fraud on the court. (See Gowrishankar v. Joshi Amba Shankar Family Trust((1991) 2 SCC 48, Premchand Somchand Shah v Union of India and S.P. Chengalvaraya Naidu v. Jagannath ((1996) 2 SCC 405 Delhi Science Forum v Union of India.)

15. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence of fraud; as observed in Ram Preeti Yadav ((1995) 2 SCC 161 Ministry of Information & Broadcasting, Govt. of India v Cricket Assn. of Bengal).

16. In Lazarus Estates Ltd. v. Beasley2, Lord Denning observed at QB pp. 712 and 713: (All ER p. 345 C)

'No judgment of a court, no order of a minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.'

In the same judgment, Lord Parker, L.J. observed that fraud 'vitiates all transactions known to the law of however high a degree of solemnity' (All ER p. 351 E-F)."

(emphasis supplied)

199. In A.V. Papayya Sastry v. State of A.P, ((1987) 2 SCC 295 Sachidanand Pandey v State of W.B.) , this Court as to the effect of fraud on the Judgment or order observed thus: (SCC pp. 231 & 236-37, paras 21-22 & 38-39)

"21. Now, it is well-settled principle of law that If any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

'Fraud avoids all judicial acts, ecclesiastical or temporal."

22. It is thus settled proposition of law that a judgment, decree or order obtained Dy playing fraud on the court, tribunal or authority Is a nullity and non est in the eye of the law. Such a judgment, decree or order-by the first court or by the final court-has to Decree treated as nullity by every court, superior or Inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where this Court does not dismiss special eave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and

cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior."

Supervisory jurisdiction of the court can be exercised in case of error apparent on the face of the record, abuse of process and if the issue goes to the root of the matter.

200. In S.P. Chengalvaraya Naidu v. Jagannath ((1996) 2 SCC 405, Delhi Science Forum v Union of India), this Court noted that the issue of fraud goes to the root of the matter and it exercised powers under Article 136 to cure the defect. The Court observed: (SCC p. 5, paras 5-6)

"5. The High Court ((1986) 2 SCC 594 Chaitanya Kumar v State Bank of Karnataka), in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that 'there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence'. The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that It becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, the process of the court is being abused. Property-grabbers, tax evaders, bank loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We

have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud Is an act of deliberate deception with the design of securing something by taking unfair advantage of another It is a deception in order to gain by another's loss. It Is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ext. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellant defendants could have easily produced the certified registered copy of Ext. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If the withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

In addition, the Learned Counsel for the 1st Respondent refers to the decision of Hon'ble Supreme Court in Bhaurao Dagdu Paralkar V State of Maharashtra and Ors reported

in (2005) 7 SCC 605 wherein at para 9-16 it is observed as under:

*9. **By** "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or*

from ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. [See Vimla (Dr.) v. Delhi Admn. ((2003) 8 SCC 319 Ram Chandra Singh V Savitri Devi) and Indian Bank v. Satyam Fibres (India) (P) Ltd. ((2003) 8 SCC 311 Ram Preeti Yadav V U.P Board of High School & Intermediate Education]

10 . A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S.P. Chengalvaraya Naidu v. Jagannath ((2002) 1 SCC 100: (2002) SCC (L & S) (1997, Roshan Deen v Preeti Lal)

11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letters or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letters, It is a well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and

injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would Ender the transaction void ab initio. Fraud and deception are synonymous. Although a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi ((2001) 8 SCC 8: (2001) AIR SCW 3843, Gurdial Singh v Union of India).

12. In Shrisht Dhawan v. Shaw Bros. ((1996) 5 SCC 550, Indian Bank v Sathyam Fibres (India) (P) Ltd.,), it was observed as follows: (SCC p. 553, para 20) "Fraud" and collusion vitiate even the most solemn proceedings in any civilized System of jurisprudence. It is a concept descriptive of human conduct. Michael Levi kens a fraudster to Milton's sorcerer, Camus, who exulted in his ability to, "wing me into the easy-hearted man and trap him into snares". It has been defined as an act or trickery or deceit. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Law Dictionary "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or Surender a legal right a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and if intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as Criminal Deception, use

of false representation to gain unjust advantage; dishonest artifice or trick.

Accordingly to Halsbury's Law of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act, 1872 defines "Fraud" as an act committed by a party to a contract with intend to deceive another. From the dictionary meaning or even otherwise fraud arises out of a deliberate active role of the representator about the fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English Case that is Derry v Peek ((1996) 3 SCC 310, Gowrisankar v Joshi Amba Sankar Family Trust what constitutes "Fraud" was described thus: (All ER P 22 B-C)

"Fraud' is proved when it is shown that your false representation has been made (I) knowingly , or (II) without belief in its truth, or (III) recklessly, careless whether if be true or false.:

But "fraud" in public law is not the same as 'fraud" in private law. Nor can the ingredients, which establishes "fraud" in commercial transactions, be of assistance in determining fraud in administrative law. It has been aptly observed by Lord Bridge in Khawaja V Secy. Of State for Home Dept.,((2004) 3 SCC 1 Ashok Leyland Ltd., v State of T. N) that it is dangerous to introduce maxims of common law as to the effect of fraud while determining the fraud in relation to statutory law. "Fraud" in relation to the statute must be a colorable transaction to evade the provisions of a statute.

"If statute has been passed for someone particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or malafide exercise of power. It may arise due to overstepping the limits of power or defeating the provisions of statute by adopting subterfuge or the power may be exercise for extraneous or irrelevant consideration. The colour of fraud in public law or administrative law, as it is developing, is assuming differentiates. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or Tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non existence of which power can be exercised. But non disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non disclosure of every fact does not vitiate the agreement. ' In a contract every person must look for himself and ensure he acquires the information necessary to avoid bad bargain'. In public law the duty is not to deceive." (see Shrisht Dhawan v Shaw Bros) ((1996) 5 SCC 550, Indian Bank v Satyam Fibres (India) (P) Ltd., SCC P. 554, Para 20)

13. This aspect of the matter has been considered recently by this court in Roshan Deen V Preeti Lal ((1993) Supp (3) SCC 2 ; AIR 1993 SC 2127, Mukund Lal Bhandari v Union of India), Ram Preeti Yadav v U.P Board of High School and Intermediate Education0 ((1992) 1 SCC 534, Shrisht Dawan v Shaw Bros.), Ram Chandra Singh ((2001) 8 SCC 8 ; (2001) AIR SCW 3843, Gurudial Singh V Union of India) and Ashok Leyland Ltd. v State of T.N ((1983) 1 All ER 765;

1984 AC 74; (1982) 1 WLR 948 (HL) Khawaja v Secy. Of State of Home Deptt.)

14. Suppression of a material document would also amount to a fraud on the court. See Gowrishankar v. Joshi Amba Shankar Family Trust ((1963) Supp (2) SCR 585; AIR 1963 SC 1572, Vimla (Dr) v Delhi Admn. and S.P. Chengalvaraya Naidu cases. ((2002) 1 SCC 100; (2022) SCC (L & S) 97, Roshan Deen v Preeti Lal)

15. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav case ((1992) 1 SCC 534, Shrisht Dawan v Shaw Bros).

16. In Lazarus Estates Ltd. V. Beasley ((1956) 1 QB 702; (1956) 1 All ER 341; (1956) 2 WLR 502 (CA), Lazarus Estates Ltd., v Beasley , Lord Denning observed at QB pp. 712 and713: (All ER p. 345 C)

> *"No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." Tn the same judgment Lord Parker, L.J. observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (pn722 These aspects were recently highlighted in State of A.P. v. T. Suryachandra Rao ((1886-90) All ER Rep 1 ; (1889) 14 AC 337; 61 LT 265 (HL) Derry V Peek.)*
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> *The Learned Counsel for the 1st Respondent seeks in aid of the Hon'ble Supreme Court in Shrisht Dhawan (SMT) V M/s. Shaw Brothers reported in (1992) 1 SCC 534 at para 534 wherein it is observed as under:*

20. Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of a fact

with knowledge that it was false. In a leading English case (Derry V Peek (1886-90) All ER 1: 1889 14 SC 337: 5TLR 625) what constitutes fraud was described thus: (All ER p. 22 B-C)

"[F]raud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false."

But fraud in public law is not the same as fraud in private law. Nor can the ingredients which establish fraud in commercial transaction be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in Khawaja (Khawaja v Secy of State for Home Deptt., (1983) 1 All ER 765) that it is dangerous to introduce maxims of common law as to effect of fraud fraud while determining fraud in relation to statutory law. In Pankaj Bhargav v Mohinder Nath, (1991) 1 SCC 556; AIR 1991 SC 1233) it was observed that fraud in relation to statute must be a colourable transaction to evade the provisions of a statute. A statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope." (Craies on Statue Law, 7th Edn., P.79). Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The administrative law, as it is developing, is assuming different shades. It arises from a deception committed

by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which power can be exercised. But fraud. Even in fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions nondisclosure of every fact does not vitiate the agreement. In a contract every person must look for himself and ensures that he acquire deceive. Information necessary to avoid bad bargain." (Anson's Law of Contract) In public law the duty is not to deceive. For instance non-disclosure of any reason in the application under e remises Act about its need after expiry of period or failure to give reason that the premises shall be required by son, daughter or any other family member does not result in misrepresentation or fraud. It is not misrepresentation under section 21 to state that the premises shall be needed by the landlord after expiry of the lease even though the premises in occupation of the landlord on the date of application or, after expiry or period were or may be sufficient. a non-disclosure of fact which is not required by law to be disclosed does not amount to misrepresentation. section 21 does not place any positive or comprehensive duty on the landlord to disclose any fact except that he did not need the premises for the specified period. even the controller is not obliged with a pro-active duty to investigate. silence or non-disclosure of facts not required by law to be disclosed does not amount to misrepresentation. even in contracts it is excluded as is clear from explanation to section 17 unless it relates to fact which is likely to

affect willingness of a person to enter into a contract. fraud or misrepresentation resulting in vitiation of permission in context of section 21 therefore could mean disclosure of false facts but for which the Controller would not have exercised jurisdiction. The Learned Counsel for the 1st Respondent adverts to the Judgment of the Hon'ble Supreme Court in Venture Global Engineering V Tech Mahindra Limited reported in (2018) 1 SCC 656 wherein at para 76-83 it is observed as under:

201. The expression "fraud", what it means and once proved to have been committed by the party to the lis against his adversary then its effect on the judicial proceedings was succinctly explained by this Court in Ram Chandra Singh v. Savitri Devi ((2010) 8 SCC 660; (2010) 3 SCC (CIV) 523, Venture Global Engg. V Satyam computer Services Ltd.) in the following words: (SCC p. 322b-d)

"Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent m is representation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a

> *given case a deception may not amount to fraud, fraud is anathema principles and any affair tainted with fraud cannot be judicata." perpetuated or saved by the application of any equitable doctrine including res judicata."*

202. Similarly, how the leading authors have dealt with the expressions "fraud", misrepresentation", suppression of material facts" with reference to various English cases also need to be taken note of. This is what the learned author Kerr in his book Fraud and Mistake has said on these expressions.

203. While dealing with the question as to what constitutes fraud, the learned author said, "What amounts to fraud has been settled by the decision of House of Lords in Derry Peek ((2010) 7 SCC 1, Reliance Natural Resources Ltd., v Reliance Industries Ltd., where Lord Herschell said: (AC p. 374)

> *'... fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." (See Kerr on Fraud and Mistake, 7th Edn., pp. 10-11.)*

204. The author has said that, Courts of Equity have from a very early period had jurisdiction to set aside awards on the ground of fraud, except where it is excluded by the statute. So also, if the award was obtained by fraud or concealment of material circumstances on the part of one of the parties so as to mislead the arbitrator or if either party be guilty of fraudulent concealment of matters which he ought to have declared, or if he wilfuly mislead or deceive the arbitrator, such award may be set aside. (See Kerr on Fraud and Mistake, 7th Edn., pp. 424-25.)

205. The author said that, if a man makes a representation in point of fact, whether by suppressing the truth or suggesting what is false, however innocent his motive may have been, he is equally responsible in a civil proceeding as if he had while committing

these acts done so with a view to injure others or to benefit himself. It matters not that there was no intention to cheat or injure the person to whom the statement was made. (See Kerr on Fraud and Mistake, 7th Edn., p. 7.)

206. This rule of law is applicable not only between the two individuals entering into any contract but is also applicable between an individual and a company and also between the two companies. (See Kerr on Fraud and Mistake, 7th Edn., p. 99.)

207. The author said that this principle is also not limited to cases where an express and distinct representation by words has been made, but it applies equally to cases where a man by his silence causes another to believe in the existence of a certain state of things, or so conducts himself as to Induce a reasonable man to take the representation to be true, and to believe that it was meant that he should act upon it, and the other accordingly acts upon it and so alters his previous position. (See Kerr on Fraud and Mistake, 7th Edn., p. 110.)

208. The author said that where there is a duty or obligation to speak, and a man in reach of that duty or obligation holds his tongue and does not speak and does not say the thing which he was bound to say, if that be done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, there is a fraud. (See Kerr on Fraud and Mistake, 7th Edn., p. 110).

> *Para 7. The Learned counsel of the 1st Respondent cites two decision of Hon'ble Supreme Court in Panther Fincap and Management Services Ltd V Central Government through the Department of Company Affairs reported in (2005) SCC Online Bom 386 wherein at para 33 it is observed as under:*
> *33. I have considered these rival submissions of the parties and I am of the opinion that the jurisdiction and the power of the various investigating authorities derived from the*

jurisdiction vested in them by the various legislations or statutes, the authority which is doing the inquiry and or conducting the investigation is required to carry out investigation keeping in mind the legal provisions and legal limitations which are stipulated under the respective statute. Undoubtedly it can be that there may be an overlapping investigation but in my opinion such an eventuality cannot prevent any investigating authority from carrying out investigation in respect of their jurisdiction conferred on them under the statute. I am also of the further opinion that the investigation in respect of the corporate fraud can be initiated and considered by the central government under section 237 (b)(i) of the companies Act. I have not been able to come across any provisions under the SEBI act in which any corporate fraud can be investigated by the SEBI. Undoubtedly it can be investigated under normal criminal law by the CBI. I am further of the opinion that merely because the material on the basis of which investigation is being undertaken is identical to the material which is subject matter of investigation by the other authority it cannot be stated that both the authorities cannot simultaneously investigate pursuant to power conferred on them under their respective statutes. I am of the opinion that every authority is entitled to investigate even may be in respect of the same material as well as from the angle and facet in which they have been asked to carry out investigation. It is possible that the SEBI may be investigating the same material on the ground of breach of the various provisions of the SEBI act and other security related legislations whereas the central government, department of company affairs can consider and/or investigate the fraud and/or breach of various provisions of law in the light and context of the provisions of the companies act may be in respect of the same material. However, I am of the opinion that the contentions advanced by the learned counsel for the appellant cannot be accepted

particularly in view of the fact that every authority has been conferred various powers in their respective legislation. A similar issue aroused before the English Court under the identical provisions of investigation under the Companies Law and the Court of Appeal in the case of Re London United Investments plc reported in 1992 BCLC 285 equivalent to 1971 All England Law Reports page 849 it is held as under:

The power of the secretary of state to appoint inspectors to investigate the affairs of a company and to report is an important regulatory mechanism for ensuring probity in the management of companies' affairs. That of course is in the public interest. Since the Secretary of State's powers under s 432(2) are exercisable where there are circumstances suggesting fraud, it is likely that in many cases where inspectors are appointed an investigation by the police or the Serious Fraud Office could also be appropriate. But the code under the 1985 Act is a separate code even though it may overlap the field of criminal investigation."

Para 8. The Learned Counsel for 1st Respondent points out the decision of Hon'ble Supreme Court in Dharampal Satyapal Ltd V Deputy Commissioner of Central Excise, Gauhati & Ors reported ion (2015) 8 SCC 519 where in para 39 & 40, it is observed as under:

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for

some reason perhaps because the evidence against the individual is thought to be utterly compelling it is felt that a fair hearing "would make no difference"-meaning that a hearing would not change the ultimate conclusion reached by the decision-maker-then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corpn.((1971) 1 WLR 1578; (1971) 2 All ER 1278 (HL), who said that: (WLR p. 1595: All ER p. 1294)

"... A breach of procedure. cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.3 opined in Cinnamond v. British Airports Authority ((1980) 1 WLR 582; (1980) 2 ALL ER 368 (CA) that: (WLR p. 593: All ER p. 377)

"... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing. "In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual."

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is

taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "prejudice". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing."

118. In the decision of the Hon'ble Supreme Court in Vidya Drolia V Durga Trading Corporation, reported in (2021) 2 SCC at page 146, wherein at paragraph 146 to 153, it is observed and held as under:

146. ``We now proceed to examine the question, whether the word 'existence' in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence'. However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of 'existence' requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A

void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147. We would proceed to elaborate and give further reasons:

147.1. In Garware Wall Ropes Ltd., this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to 'existence' and 'validity' of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing paragraph 29 thereof: (SCC p. 238)

> *"29. This judgment in Hyundai Engg. case is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub- contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case, as followed by us.";*

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

147.2. The court at the reference stage exercises judicial powers. 'Examination', as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam- Webster Dictionary). It would be rather odd for the court to hold and say that the arbitration agreement exists, though ex facie and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a Will.

147.3. Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same. Even Starvos Brekoulakis accepts that validity, in terms of substantive and formal validity, are questions of contract and hence for the court to examine.

147.4. Most jurisdictions accept and require prima facie review by the court on non-arbitrability aspects at the referral stage.

147.5. Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in Patel Engineering Ltd.. The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is prima facie and not final. Prima facie standard

equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, 'existence of an arbitration agreement'.

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence– competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In Subrata Roy Sahara v. Union of India,75 this Court has observed:

> *"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending 75 (2014) 8 SCC 470 without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him*

> *into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs".*

147.9. Even in Duro Felguera, Kurian Joseph, J., in paragraph 52, had referred to Section 7(5) and thereafter in paragraph 53 referred to a judgment of this Court in M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited to observe that the analysis in the said case supports the final conclusion that the Memorandum of Understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to Patel Engineering Ltd. and Boghara Polyfab Private Limited to observe that the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Paragraph 48 in Duro Felguera 76 (2009) 7 SCC 696 specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Paragraph 59 is more restrictive and requires the court to see whether an arbitration agreement exists – nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties - nothing more, nothing less. Reference to decisions in Patel Engineering Ltd. and Boghara Polyfab Private Limited was

to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to Garware Wall Ropes Limited case, this Court in Narbheram Power and Steel Private Limited and Hyundai Engg. & Construction Co. Ltd., both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by the arbitration agreement. The court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in Vulcan Insurance Co. Ltd. Similarly, in M/s. PSA Mumbai Investments PTE. Limited, this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the arbitral tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knockdown ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage.

148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section. 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time barred

and dead, or there is no subsisting dispute. All other cases should be referred to the arbitral tribunal for decision on merits. Similar would be the position in case of disputed 'no claim certificate' or defence on the plea of novation and 'accord and satisfaction'. As observed in Premium Nafta Products Ltd., it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

149. We would also resolve the question of principles applicable to interpretation of an arbitration clause. This is important and directly relates to scope of the arbitration agreement. In Premium Nafta Products Ltd., on the question of interpretation and construction of an arbitration clause, it is observed: (Bus LR p. 1723, para 6)

> *6.``In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction."*

150. In Narbheram Power and Steel Private Ltd., this Court while dealing with the arbitration clause in the insurance agreement, has

held that the arbitration clause should be strictly construed, relying on the principles of strict interpretation that apply to insurance contracts. These observations have been repeated in other cases.

151. What is true and applicable for men of commerce and business may not be equally true and apply in case of laymen and to those who are not fully aware of the effect of an arbitration clause or had little option but to sign on the standard form contract. Broad or narrow interpretations of an arbitration agreement can, to a great extent, effect coverage of a retroactive arbitration agreement. Pro-arbitration broad interpretation, normally applied to international instruments, and commercial transactions is based upon the approach that the arbitration clause should be considered as per the true contractual language and what it says, but in case of doubt as to whether related or close disputes in the course of parties' business relationship is covered by the clause, the assumption is that such disputes are encompassed by the agreement. The restrictive interpretation approach on the other hand states that in case of doubt the disputes shall not be treated as covered by the clause. Narrow approach is based on the reason that the arbitration should be viewed as an exception to the court or judicial system. The third approach is to avoid either broad or restrictive interpretation and instead the intention of the parties as to scope of the clause is understood by considering the strict language and circumstance of the case in hand. Terms like 'all', 'any', 'in respect of', 'arising out of' etc. can expand the scope and ambit of the arbitration clause. Connected and incidental matters, unless the arbitration clause suggests to the contrary, would normally be covered.

152. Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes,

more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.

153. Accordingly, we hold that the expression 'existence of an arbitration agreement' in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability."

1st Respondent's Contentions (Competition Commission of India) (In Competition Appeal (AT) Nos. 1, 2 and 3 of 2022):

119. The Learned Additional Solicitor General for the 1st Respondent/Competition Commission of India' submits that the `Appellant' (a direct Subsidiary of Amazon.com Inc (ACI), was issued with a `Show Cause Notice' dated 04.06.2021, by the 1st Respondent/Commission and that the `impugned order dated 17.12.2021 was passed against the `Appellant'/`Amazon' under Sections 43A, 44 and 45 of the Competition Act, 2002.

120. According to the 1st Respondent/CCI, the `Appellant' wanted to notify a `Combination' (Bearing Combination Registration No. C-

2019/09/688 to it (1st Respondent/CCI), through `Notification' dated 23.09.2019 (`Notice') as per Section 6 (2) of the Competition Act, 2002, in Form I of Schedule II to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**).

121. It is represented on behalf of the 1st Respondent/CCI that the `Proposed Combination', as sought to be notified by the `Appellant' to the `1st Respondent/CCI' caused acquisition of 49% shares of the `FCL' by the `Acquirer' (Transaction III), constituent steps among other things concerning Intra-promoter group transactions between 1) `Future Coupons Private Limited' 2) `Future Corporate Resources Private Limited' (`FCRPL') and 3) `Future Retail Limited' (`FRL').

122. It is the stand of the 1st Respondent/CCI that the `Appellant' / `Amazon.com NV Investment Holdings LLC', during the time of `notifying the Combination', had stated that the intended ambit and purpose of the `Combination' Viz., its investment in `FCPL' (2nd Respondent) was in view of the `FCPL's potential' for `Long Term Value Creation' and providing `Returns' on its `Investment'; and also with a view to strengthen and augment the `Business of `FCPL'/2nd Respondent.

123. On behalf of the 1st Respondent/CCI, it is submitted that the `Appellant' / `Amazon.com NV Investment Holdings LLC', had mentioned that `it does not have any direct or indirect Shareholding' in `FRL' and further that it would not acquire directly any rights in `FRL' and was only acquiring `Limited Investor Protection Rights' via `FCPL' (2nd Respondent) with a view to protect the value of its investment in `FCPL'. That apart, it was also mentioned that rights were derived from the rights granted to `FCPL' (2nd Respondent) in terms of the `FRL SHA', which was negotiated by the `Promoters', `FRL' and `FCPL', independent of the investment by `Appellant' in `FCPL' (2nd Respondent) and with a view to unlock value for `FCPL' (2nd Respondent). Therefore, a plea is taken on behalf of the `1st Respondent/CCI' that the whole attention, as represented, during the time of notifying the `Combination' was `FCPL'/`2nd Respondent' and its `Business' with `rights' in `FRL' being reflected as mere `Investor Protection Rights'.

124. The stand of the 1st Respondent/CCI is that as per terms of `Part V', description of the `Combination' of the abovementioned `Notice', the `Combination' notified by the `Appellant' encompassed the undermentioned three transactions:

<u>i)</u> <u>Transaction I</u>: The issue of 9,183,754 Class A voting equity shares of Future Coupons Private Limited (**FCPL**) to Future Coupons Resources Private Limited (**FCRPL**). Prior to, and immediately post issuance of such equity shares, FCPL will be a wholly owned subsidiary of FCRPL (This was presented as being nothing but an internal re-organization within the Future Group); and

<u>ii)</u> <u>Transaction II:</u> Transfer of 13,666,287 shares of FRL held by FCRPL (representing Two decimal Five Two Percent (2.52%) of the issued, subscribed and paid-up equity share capital of Future Retail Limited (**FRL**), on a Fully Diluted Basis) to FCPL (This was also presented as being nothing but an internal re-organization within the Future Group); and

<u>iii)</u> <u>Transaction III:</u> The acquisition of the Subscription Shares representing Forty Nine percent (49%) of the total issued, subscribed and paid-up equity share capital of FCPL (on a Fully Diluted Basis) by the Appellant, by way of a preferential allotment and coupon business with a view to unlock value for FCPL as it showed potential for long terms value creation and return on investment).

125. On behalf of the 1st Respondent/CCI it is brought to the notice of this `Tribunal' that the Appellant's `Notice' among other things had mentioned the following:

i) The Appellant and the relevant entities and persons, belonging to the Future Group had entered into: (a) a share subscription agreement dated 22.08.2019 (**FCPL SSA**); and (b) a shareholders agreement dated

22.08.2019 to determine respective rights and obligations as shareholders of FCPL (**FCPL SHA**).

ii) The parties had only executed FCPL SSA and FCPL SHA in relation to the Combination. (As aforementioned, it was represented that FCPL's potential for long term value creation and providing returns on its investment, with a view to strengthen and augment the business of FCPL).

iii) The Appellant would acquire certain rights in terms of FCPL SHA to protect its investment in FCPL.

iv) Before the `Combination', `FCPL' had acquired equity warrants of `FRL', Convertible into `Equity Shares' representing 7.30% of the share capital of `FRL', within 18 months of the date of allotment (**Warrants Transaction**). FCPL and FRL had entered into FRL SHA, which sets forth inter se mutual rights and obligations of the parties as shareholders.

v) The Appellant had submitted a presentation captioned `Taj Coupons – Business Plan for Five Years' in response to Item 8.8 of Form I, which require the `notifying party' to disclose documents, material (including reports, studies, plan, latest version of other documents, etc.) considered by and/or presented to the board of directors and/or key managerial person, in relation to the `proposed combination'.

vi) Existing and contemplated business arrangement/agreements between FRL and Amazon Seller Services Private Limited (**ASSPL**) (Business Solutions Agreement, Prime Now Program Terms, Prime Now FRL Amendment Agreement and Softlines FRL Agreement, referred to

in paras 62 to 66, pages 46 to 48 of the Notice at pages 54 to 56, Convenience Compilation-II); agreement between Amazon Retail India Private Limited (**ARIPL**) and Future Consumer Limited (**Future Consumer**); Memorandum of Understanding among Amazon Pay (India) Private Limited (**APIPL**) and FRL; collectively referred to as **Commercial Arrangements** or **Business Commercial Agreements**.

But it was mentioned that all these `Business Commercial Agreements' were neither inter connected with, nor part of the `Combination'; or not related to the `Combination' whatsoever.

126. The categorical version of the `1st Respondent/CCI' is that the `Retail Business' of `FRL' and the `Appellant's interest in the same were not represented to the 1st Respondent/CCI as being the `focus', `purpose' and the `ambit' of the `Combination'. In this connection, it is projected on the side of the 1st Respondent/CCI that pertaining to the rationale of the `Combination', the `Appellant' had stated that it believed that `FCPL' held potential for `Long Term Value Creation' and providing `Returns' on its `Investment'. Moreover, it was mentioned that the `Appellant' had determined to invest in `FCPL' with a view to strengthen and augment the business of `FCPL' (including the Marketing and Distribution of `Loyalty Cards', `Corporate Gift Cards' and `Reward Cards' to Corporate Customers) and `unlock the value' in the Company.

127. The Learned Additional Solicitor General, appearing for the 1st Respondent/CCI brings it to the notice of this `Tribunal' that the 1st Respondent/CCI in regard to the considerations for the `Appellant's Investment' in `FCPL', the nature and rationale of the rights, in respect of the `Appellant' under `FRL SHA', raised some queries and that the `Appellant' through letter dated 15.11.2019, again emphasized `FCPL' to be the `attention of the Combination' and mentioned the following:

(i) The Appellant's decision to invest in `FCPL' is, among other things rested on the following considerations;

(a) the unique business model of FCPL addresses an existing gap in the payments landscape in India, thereby making it a strong and sound investment opportunity for Appellant (which holds similar existing investments in entities engaged in business activities within the payments market in India);

(b) while FCPL has a strong growth potential, in the short term, to add credibility to its financial position, it has invested in and proposes to invest in FRL, which is a publicly traded company with strong financials and futuristic outlook (vide Response to query No.2.5 of the letter dated 24th October, 2019 available at para 35 at page 35 of the submissions dated 15th November, 2019 of Appellant at page 104, Convenience Compilation-I) (Para 8.2 of the Impugned Order).

(ii) It does not have any direct or indirect shareholding in FRL. It would not acquire directly any rights in FRL. Appellant has only limited

`Investor Protection Rights' in FCPL with a view to protect the value of its investment in FCPL. These rights can be exercised only through FCPL and not directly by Appellant. The said rights have been derived from the rights granted to FCPL in terms of `FRL SHA' which was negotiated by the Promoters, FRL and FCPL, independent of the investment by Appellant in FCPL and with a view to unlock value for FCPL. (vide Response to query No.2.5 of the letter dated 24th October, 2019 and Para 8.3 of the Impugned Order).

(iii) The Commercial Arrangements have not been entered into pursuant to the Combination and are not part of, or connected with, the Combination in any manner whatsoever. (Para 72 at page 45 of the submissions dated 15th November, 2019 of Appellant submitted in response to query 2.21 of the letter dated 9th October, 2019 at Page 100, Convenience Compilation-I. It was further asserted that though being executed contemporaneously with FCPL SHA and FCPL SSA, these are in no way connected with the Combination and each such commercial agreement has been negotiated between its respective parties, in isolation, and independent of the Combination. (vide para 45 at page 32 of the Appellant's submission dated 15.11.2019 in response to query 2.12 of the Letter dated 9th October, 2019 at page 97 of Convenience Compilation-I). Furthermore, the Commercial Arrangements need not be examined under the framework for the regulation of combinations in terms of the Act and the Combination Regulations. (vide Para 4 of the Appellant's submission dated 15.11.2019 furnished in response to query 2.5 of the Letter dated 24.10.2019 (Para 8.4 of the Impugned Order at page 8 of Convenience Compilation-I).

128. The crystalline stand of the 1st Respondent/CCI is that the `Combination Approval Process' requires the `notifying person' to submit the true, correct and complete information as regards the actual `Combination' pursued by the `parties' and to meet the requirements of the `Competition Act, 2002 and Regulations prescribed thereunder. Only then, the 1st Respondent/CCI will evaluate the effects of a `Combination' in a proper perspective.

129. For the aforesaid reason, according to the 1st Respondent/CCI, it assessed the `Combination' in the context of `Appellant's Assertions' in the `Notice' and later representations whereunder the disclosures pertaining to the overlapping activities of Amazon's group and `FRL' were stated to be merely by way of abundant caution as `FCPL' held warrants issued by `FRL'.

130. Apart from that, in as much as `FRL SHA' and `BCAs' were not notified as inter connected parts of the `Combination', the 1st Respondent/Commission had no possibility in directing the `Appellant' to file form II in the subject.

131. Yet another contention of the 1st Respondent/CCI is that there was no possibility for it to conduct `Combination Assessment' from the `point

of Strategic Alignments' between `FRL' and `Amazon group'. Continuing further, it is pointed out on behalf of the 1st Respondent/CCI that the effect of Commercial Contracts entered into between `FRL' and `Amazon group' entities in their normal course of `Business' would be considerably different from `parties' envisaging `Strategic Alignments' between their `Business' though `Strategic Investments'. Therefore, it is the plea of the 1st Respondent/CCI that the `Regulatory Process' of `Notification' and the nature of `Economic' and `Legal' enquiry would differ in the two situations.

132. It is projected on the side of the 1st Respondent/CCI that resting upon the Appellant's `Notice' and `Representations/Amplifications' placed before the 1st Respondent/CCI, the `Combination' was approved on 28.11.2019 and further that the `Competition Assessment' in the said `Approval Order' dated 28.11.2019 was limited to the overlapping `Business Activities' of the `Appellant', `FCPL' and the `Group Entities' and was adjudged unlikely to cause any `Appreciable Adverse Effect' on `Competition' in India, as per Para 9 of the `Impugned Order'.

133. At this juncture, it is pointed out by the 1st Respondent/CCI that in the `Approval Order' dated 28.11.2019 given by the 1st Respondent/CCI at paragraph 16, it was mentioned that the `Approval' was `contingent'

and shall stand `revoked' if at any time, the information provided by the `Appellant' was found to be incorrect. In this connection, it is the stand of the 1st Respondent/CCI the `Approval' ought not to be construed as showering immunity in any manner from later proceedings before it for the `Breach of other Sections of the Act'.

134. According to the 1st Respondent/CCI, the `Appellant' had presented a complete false portrayal of the `Combination' which runs as under:

Intended scope and purpose of the Combination as presented to Respondent No.1	***Intended scope and purpose of the Combination concealed from Respondent No.1***
Proposed Transaction: *The Combination that was presented by the Appellant for approval to the Respondent No.1 was confined to investment in FCPL's coupons and payments business.* *The Appellant stated in its Notice that the Proposed Combination would include 3 proposed transactions. The first two being internal reorganisations whereby:*	***Business Transaction:*** *The Combination was intended to be an investment in FRL and its retail business, whereby the Appellant would gain a `foot-in-the-door' in the Indian offline retail market.*  *The Actual Combination can be identified from internal communications between the Appellant's key managerial personnel (which were never disclosed to Respondent No. 1 by the Appellant). The internal communications discuss the `modus operandi' for indirectly investing FRL wherein Mr. Jeff Bezos's*

*- Future Coupons Pvt. Ltd. (**FCPL**) would issue voting equity shares to Future Coupons Resources Pvt. Ltd. (**FCRPL**)* *- Shares of Future Retail Ltd. (**FRL**) held by FCRPL would be transferred to FCPL.* *The third proposed transaction envisaged the Appellant acquiring 49% of the FCPL's total share capital.* *[Notice at Pages 9 & 10 of Convenience Compilation-II (Vol. 1)].*	*approval for a `twin-entity' structure in this regard was sought [Internal email dt.19.07.2019 at Page 244 of Convenience Compilation – II (Vol. 1)].* *The aforementioned internal communications further identify FRL as a key player in the offline retail space to partner with, while also noting FRL's founder's belief that a `close alignment via a strategic investment' is important [Internal email dt. 24.05.2018 at Page 228 of Convenience Compilation-II (Vol.1)].* *Further, in these internal communications, the Appellant identifies its strategic objectives for the proposed Combination as the ability to become the single largest shareholder in FRL when FDI Policy allows the same, blocking competitive interest in FRL, ultra-fast delivery and finally to gain a `foot-in-the-door' of Indian offline retail (qualified as a `Strategic Value Option') [Internal email dt. 10.07.2018 at Page 230 of Convenience Compilation-II (Vol.1)].* *Significantly, the internal communications expressly discuss how the proposed Combination would be structured to achieve the aforementioned strategic objectives whereby it is stated that:* *- The number of FRL shares to be held by FCPL was calculated so that the Appellant can indirectly hold the same number of shares in FRL.*

	- A premium of 25% was paid on account of the strategic rights and a call option in FRL being provided to the Appellant *[Internal email dt. 19.07.2019 at Page 244 of Convenience Compilation-II (Vol. 1)]*

Rationale and nature of rights over FRL, as disclosed to Respondent No.1 in furtherance of "Proposed Transaction" ***[Investor Protection Rights]***	***True nature and rationale of rights over FRL concealed from Respondent No.1 in furtherance of the `Business Transaction"*** ***[Strategic Rights]***
*Vide Item 5.1.3 of Form I, [Schedule II, Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2022 (**Regulations**) the Appellant was asked to clarify the rights it would acquire out of or in connection with the transactions comprising the proposed Combination [Notice at Page 30 of Convenience Compilation-II (Vol.1)]. The Appellant stated that the rights it will acquire qua FRL pursuant to Transaction III are `mere*	*The rights the Appellant sought to acquire qua FRL have to be understood in the context of the Business Transaction i.e., the strategic integration of the Appellant's online retail business and FRL's offline retail business highlighted above.* *The rights that the Appellant sought to acquire qua FRL (as mentioned in the preceding column) would clearly enable the Appellant to achieve the strategic objectives stated by its key managerial personnel in their internal communications.* *The true rationale behind the Appellant acquiring these rights qua FRL is further evidenced by a bare perusal of*

*investor protection rights' that do not confer control over FRL [Para 22 of the Notice at Page 30 of Convenience Compilation-II (Vol. 1)]. Even in response to subsequent pointed queries by Respondent No.1, on the same issue, the Appellant repeatedly stated that the rights it will acquire qua FRL are merely investor protection rights as opposed to strategic rights acquired with the ultimate objective of entering the Indian Retail Market [Para 44, Response to Query 2.12, Response-I at Page 285 of Convenience Compilation-II (Vol. 1)] [Part A, Annexure E of Response-I available at Page 703 of Appellant's Convenience Compilation (Vol.3)], [Para 37, Response to Query 2.5, Response-II at Page 344 of Convenience Compilation-II (Vol.2)], Table in Para 38, Response to Query 2.5, Response-II at Pages 344-352 of Convenience Compilation-II (Vol. 2) (**Relevant Table)].***	*internal email dt. 04.04.2019, in sofar as the rights mentioned therein (i.e., the rights the Appellant sought to acquire FRL) which accrue to the Appellant vide FCPL SSA have been mirrored in the FRL SHA.*
Importantly, the Appellant's submission before this Hon'ble Tribunal – that the Appellant's aforementioned use of the term `investor	*Importantly, the internal email dt. 04.04.2019 specifically states in regard to these rights that unless the same are `captured by way of a specific agreement between the FCPL, the Promoter, and FRL' the Appellant*

protection' to describe rights it acquired in FRL amount to sufficient disclosure of the Appellant's intended purpose of investing in FRL's retail business – are contradicted by a bare perusal of the Relevant Table supplied by the Appellant itself. Therein, the Appellant justified: *i. Its right to request appointment of observer to FRL's board of directors by stating that FRL represents a significant investment by FCPL and will therefore have a direct impact on FCPL's financial position (Sr. No.1 of the Relevant Table);* *ii. The requirement for its prior written consent in relation to inter alia certain `Reserved Matters' by stating that any investor in FCPL will have an interest in preserving FCPL's shareholding in FRL which derives its value from FRL's asset base as FCPL's shareholding, warrants in FRL are pertinent to FCPL's market valuation (Sr No.2 of the Relevant Table);* *iii. The requirement for its prior written consent before*	*would have no recourse to give effect to the provisions in the FCPL SSA and the rights would not be enforceable against FRL (Email dt. 04.04.2019 at Page 240 of Convenience Compilation – II (Vol. 1)].* *Therefore, the actual rationale for the Appellant acquiring rights qua FRL pursuant to the Proposed Combination was to protect Combination was to protect the Appellant's investment in FRL and its retail business. Accordingly, it is clear that the actual rationale aligns with the Business Transaction; and has not connection to the Proposed Transaction.*

FRL's retail assets can be transferred by stating that any negative effect on FRL's retail assets will indirectly affect the Appellant's investment in FCPL as FRL's retail assets are an integral part of the valuation of FRL's share (Sr. No.3 of the Relevant Table; and *iv. Its right to purchase FRL securities when it exits FCPL on the happening of certain `Mandatory Exit Events' by stating that FRL, a public listed company will provide more liquidity / ease of selling (`more `liquid' security') than a private company like FCPL (Sr. No. 4 of the Relevant Table).* *The Appellant pointedly portrayed the purpose of each right acquired in FRL via the FCPL SSA and FRL SHA as intended to protect its primary investment in FCPL's coupons and payments business in a myriad of ways. The Appellant therefore presented the combination as the Proposed Combination even with regard to the rights it sought to acquire qua FRL and its retail business.*	

135. It is the plea of the 1st Respondent/CCI that the 1st Respondent/CCI was presented with only the `Proposed Transaction' by the `Appellant' and not the `Business Transaction'. As such, the `Approval' for the `Combination' was granted, as per `1st Respondent/CCI's order dated 28.11.2019 (under Section 31 (1) of the Competition Act, 2002).

136. It is represented on behalf of the 1st Respondent/CCI that the `Appellant' filed its `Notice' in Form I and in terms of Item 8.8 of Form I, the `Appellant' was required to disclose documents considered by and / or presented to the `Key Managerial Personnel' in relation to the `Proposed Combination' (vide Notice at Page 108 of the Convenience Compilation – II, Vol – 1). In fact, the `Appellant' furnished a presentation captioned `Taj Coupons Presentation – Business Plan for five years', which mentioned that the `Appellant's objective has entering Future Coupons Private Limited (FCPL) gift voucher business and made no reference to `FRL' and its `Retail Business', being the subject matter / intended purpose of the `Proposed Combination', contrary to the `Appellant's submissions' (vide `Notice' at Page 219 of `Convenience Compilation – II, Vol. (I), Annexure – 32). As a matter of fact, the 1st Respondent/CCI had not furnished the (a) internal email dated 24.05.2018 (b) internal email dated 10.07.2018 (c) internal email dated

19.07.2019 which were exchanged between the Key Managerial Personnel of the `Appellant', which emails mentioned the true intended scope and purpose of the `Proposed Combination'.

137. The contention of the `1st Respondent/CCI' is that inspite of further opportunities, the `Appellant' had failed to submit the aforesaid Key Internal Documents as per Item 8.8 and instead, provided the documents relating to the Coupons and Payments Business of `FCPL' (vide Query 2.1; RFI – II at Page 306 of Convenience Compilation-II (Vol. 2) r/w. Response of the Appellant at Table below Para 3, Response to Query 2.1, Response-II at Page 310 of Convenience Compilation-II (Vol. 2)].

138. The Learned Counsel for the `1st Respondent/CCI' submits that the `Appellant' as per Item 5.3 of Form I was required to clarify the `Economic' and `Strategic Purpose' (Rationale) of the `Proposed Combination' and that the `Appellant', in response had stated that its rationale as FCPL's potential for long term value creation, returns on investment and to strengthen FCPL's business of loyalty, gift and reward cards (Para 30 and Statutory Summary under Regulation 13 (1A) of the Regulations, Notice at Page 38 and 217 of Convenience Compilation-II (Vol.1).

139. On behalf of the `1st Respondent/CCI', it is brought to the notice of this `Tribunal' that the `Appellant' had accentuated that its decision to invest was based on `FCPL's unique business model and the proposed investment' in `FRL' was to add credibility to its Financial position (vide paragraph 35 – 36, Response to Query 2.10, Response-I at Page 281 of Convenience Compilation-II (Vol. 1)], (para 35, Response to Query 2.5, Response to at Page 343 of Convenience Compilation-II (Vol.2).

140. The Learned Counsel for the `1st Respondent/CCI', points out that in response to the `1st Respondent/CCI's query, based on `Media Articles' and statements of Mr. Kishore Biyani, in regard to the `Appellant's investment being strategic, the `Appellant' reiterated the business model in `FCPL', interest in payment landscape in India (vide Query 2.13 (c), RFI-I at Page 252 of Convenience Compilation-II (Vol. 1 read with) Para 51 and 53, Response to Query 2.13 (c); Response-I at Page 287 and 288 of Convenience Compilation-II (Vol.1.)].

141. Besides the above, according to the `1st Respondent/CCI', the `Appellant' had stated that its investment in `FCPL' to be a financial investment aligned with its investment focussed in India (vide paragraphs 39-41, Response to Query 2.6, Response-II at Pages 353-354 of Convenience Compilation-II (Vol. 2)], and that the `FCPL' Group's

objective to invite investment was to partner with an investor with experience in the payments market and a desire to `invest in the Business for marketing and distribution of `Gift Cards' [vide Para 43, Response to Query 2.6, Response-II at Page 354 of Convenience Compilation-II (Vol.2)].

142. According to the `1st Respondent/CCI', the `Appellant' had misrepresented the scope and purpose of the `Proposed Combination' in two additional manner (a) the Appellant was asked (vide Item 2.16 of RFI – I) to state `FRL's business linkage with `FCPL' (vide page 252 of convenience compilation (II) – Vol. (1) and that the `Appellant' had responded by stating that `FRL' was related to `FCPL' merely as a `Coupon Issuer' (vide Sr. No. 1, Table 3, Para 56, Response to Query 2.16, Response-I at Page 289 of Convenience Compilation-II (Vol.1)]. (b) the Appellant had identified certain over lapse between its affiliates and FRL in the retail market, but stated that the same was provided only as a `matter of abundant caution' [vide Para 80 of RFI-II at Page 379 of Convenience Compilation-II (Vol.2.)].

143. As a result, it is submitted on behalf of the `1st Respondent/CCI' that the `Appellant' repeatedly asserted that its decision to invest in `FCPL' was based on the `Long Term Potential' of `FCPL' and its

`Corporate Gift Cards', `Loyalty Cards' and `Reward Cards' business and there was no `Strategic Intent' vis-à-vis `FRL' and its `Retail Business'. For that reason, the `1st Respondent/CCI's `Approval Order' and the underlying `Competitive Assessment' of the `Proposed Combination' (vide paragraphs 13 and 14 of the `Approval Order') were focussed solely on the aforementioned Coupons and Payments landscape and not on `FRL' and its `Retail Business'.

144. It is the version of the `1st Respondent/CCI' that the `Appellant' had `misrepresented', the character of the `Approval' granted to it, as per the `Approval Order' before the numerous `Forums' like before the `Hon'ble High Court of Delhi' and the `Arbitral Tribunal'.

145. Indeed, according to the `1st Respondent/CCI', the `Appellant' in its `Appeal' dated 23.12.2021 (Before the `Hon'ble High Court of Delhi) had submitted that its `Notice' demonstrated that the `Appellant' was the ultimate Beneficiary of the Rights granted to `FCPL' under the `FRL SHA'. Moreover, the `Appellant' had submitted that the FCPL SHA, FCPL SSA and the FRL SHA were negotiated together with the Appellant; and constitute a single integrated transaction that demonstrate the Appellant's strategist interest in FRL's business (vide page 46 of the

Compilation of Relevant Extracts) and this was the misrepresentation made by the `Appellant'.

146. According to the `1st Respondent/CCI', the `Appellant' however before the `Arbitral Tribunal', in its statement of claim dated 04.07.2021 in the `Arbitration Proceedings' stated that the `1st Respondent/CCI' had approved the `Proposed Combination' after considering the `Appellant's consistent stand that `FRL', its Retails Assets were material inducement for the investment (vide page 41 of the Compilation of Relevant Extracts).

147. Thus, according to the `1st Respondent/CCI', contrary to the factual position of `Approval' of the `Proposed Transaction', the `Appellant' has misrepresented before various `Forums' that the `Business Transaction' was notified to and approved by the `1st Respondent/CCI'.

148. It is represented on behalf of the `1st Respondent/CCI' that a `Show Cause Notice' was issued to the `Appellant', highlighting the fundamental discrepancies in respect of the `Proposed Transaction' and `Business Transaction' (vide pages 402 to 405 of Convenience Compilation-II (Vol.2).

149. The Learned Counsel for the `1st Respondent/CCI' submits that because of the (a) Non Disclosure (b) Suppression (c) Misrepresentation and (d) Failure to notify the `Combination' by the `Appellant', in the `Impugned Order', the `1st Respondent/CCI' had found that the `Appellant' had found (i) Suppressed and misrepresented material particulars of the `Proposed Combination' (scope and purpose in respect of Item 5.3, Form I and the nature of rights acquired under Item5.1.3. (Form I) (vide Para 48 of the Impugned Order at page 66 of Compilation of Relevant Extracts) (ii) The Appellant had provided the `Taj Coupons Presentation', in response to Item 8.8, Form I and suppressed the internal communications (vide paragraphs 45, 47 of the Impugned Order - Page 65 of Compilation of Relevant Extracts) (iii) The Appellant had notified `FRL SHA' and `Commercial Agreements' as part of the Combination or in response to Items 5.1.1. and 5.1.2. of Form I (vide paragraphs57, 60, 69 and 75 of the Impugned Ord at Pages 68, 70, 74 of Compilation of Relevant Extracts) (iv) The Appellant had failed to issue a single notice covering all inter-connected steps of the `Combination' as is required by Regulations 9 (5) and 5 of the Regulations.

150. Because of the `Appellant's aforesaid acts, the `1st Respondent/CCI' had kept the `Approval Order' in abeyance, while

directing the `Appellant' to make a `Fresh Notification' under Section 6 (2) of the Competition Act, 2002, in Form II which is a permissible, based on the `1st Respondent/CCI's discretion, as per Regulation 5 (5) of the Regulations, since the `Regulations' do not levy a mandatory threshold.

151. The Learned Counsel for the `1st Respondent/CCI' vehemently puts forward a legal plea that the `Arbitral Tribunal' had committed an `error' in exercising `jurisdiction' and `rendering a finding' on the ambit and nature of the `1st Respondent/CCI's `Approval Order' of course, behind the back of`1st Respondent/CCI'. In this regard, it is the stand of the `1st Respondent/CCI' that `Disputes in rem' and the `Arbitral Tribunal' could not and should not have given the findings as regards the nature of `Approval' granted, as per decision of the `Hon'ble Supreme Court' in Vidya Drolia and Others V Durga Trading Corporation, reported in (2021) 2 SCC 1 (vide paragraphs 15, 46, 50, 54, 76, 77 and 78).

152. To lend support to the contention that merely furnishing the `1st Respondent/CCI' with certain documents or making a reference to a document in a foot note by the `Appellant' does not result in compliance with the `Appellant's duty to notify and does not amount to `full disclosure', the Learned Counsel for the `1st Respondent/CCI' refers to

the decisions in (a) Indian Hume Pipe Co. Lt. V Assistant Commissioner of Income Tax and Others, reported in (2011) SCC Online Bom 1863, vide paragraphs 6 and 9) (b) Sitara Diamonds Private Limited V ITO, 2013 SCC Online Bom 1221 (vide paragraphs 12 and 13) and (c) Garden Finance Ltd. V Additional Commissioner of Income Tax, 2001 SCC Online Guj 319, vide Paras 27 and 30).

153. On behalf of the `1st Respondent/CCI', an argument is advanced that because of Appellant's repeated `Wilful Misrepresentations and Omissions', it cannot be said that the ingredients of Section 6 (2) of the Competition Act, 2002, read with Regulations were satisfied by the `Appellant'.

154. Yet another argument, projected on the side of the `1st Respondent/CCI' is that the `Appellant' had committed (a) `Misrepresentation' (b) `Fraud' and (c) `Suppression' and in Law, a `Litigant' who has approached the Court with `uncleaned hands' is not entitled to any `Relief' as per decisions of Hon'ble Supreme Court in (a) Kishore Samrite V State of Uttar Pradesh, 2013 2 SCC 398, Para 37-38; (b) New Okhla Industrial Development Authority V Ravindra Kumar Singhvi, 2022 SCC Online SC 186, Para 19).

155. It is projected on the side of the `1st Respondent/CCI' that interpreting the profusion of `Residuary Powers' under Section 45 (2) of the Competition Act, 2002, an interpretation ought to be provided, which is in consonance with the objectives of aiming (a) to achieve highest sustainable levels of economic growth (b) entrepreneurship (c) protection of economic rights for just, equitable, inclusive, sustainable, economic and social development (d) promotion of economic democracy and supporting good governance. As per decision in Excel Crop Care Ltd. V Competition Commission of India, reported in (2017) 8 SCC, Page 47 Paragraph 108.

156. On behalf of the `1st Respondent/CCI', a plea is taken that the `1st Respondent/CCI' has the power to revoke an `Approval'/keep the same in abeyance as per decision of the Hon'ble Supreme Court in (i) Sahara India Real Estate Corporation Ltd. V SEBI & Another, at paragraphs 303.1, 304.1 and 304.2, reported in (2013) 1 SCC, Page 1 and (ii) in Shankar Sharma V SEBI, 2001, SCC Online Securities Appellate Tribunal.

157. It is the contention of the `1st Respondent/CCI' side that `1st Respondent/CCI' has an ancillary and implied power to either suspend or revoke an `Approval', as per Section 45 (2) of the Competition Act,

2002, and such powers are `inherent', permitting the `Statutory Regulator' to satisfy the purpose of its `Parent Statute'. Therefore, it is submitted on behalf of the `1st Respondent/CCI' that the `1st Respondent/CCI's power to grant an `Approval' includes the power to revoke the said `Approval' as per decisions (i) in State of Uttar Pradesh V Dharmander Prasad Singh and Others, reported in AIR 1989 Supreme Court Page 997 (ii) Ultratech Cement Limited, Combination Registration No. C-2015/02/246, Para 12.1 and (iii) Malik Medical Hall V Union of India, AIR 1975 Raj 108 and (iv) Tappers Co-operative Society, Maddur V Superintendent of Excise, Mahaboobnagar, 1984 (2) APLJ (HC) 1.

158. It is represented on behalf of the `1st Respondent/CCI' that as per Section 45 (2) of the Competition Act, 2002, in term of the general power, the 1st Respondent/CCI's power to undue an `Approval' granted cannot be precluded as per decisions, reported in (i) Sahiti and Others V Chancellor, Dr. N.T.R. University of Health Science and Others, reported in (2009) 1 SCC Page 599 (vide paragraphs 26, 28 and 32) (ii) Arabinda Das and Etc., V State of Assam & Ors., reported in 1980 SCC Online Gau 13, Para 22.

159. In this connection, the Learned Counsel for the `1st Respondent/CCI' by adverting to the words occurring in the language of

Section 45 (2) of the Competition Act, 2002, `pass such orders as it deems fit', points out that the same is to be interpreted widely, as per the purpose of the Statute and in the teeth of the Competition Act 2002, Preamble, i.e., (i) `to prevent' practices having adverse effect on Competition (ii) `to promote' and sustain Competition in Markets, the `1st Respondent/CCI' does have the `power to undue' an `Approval Order', as per Section 45 (2) of the Competition Act, 2002, and in this regard cites the decisions of the Hon'ble Supreme Court (i) in the matter of V.C. Rangadurai V D. Gopalan and Others, reported in AIR 1979 Supreme Court Page 281 (ii) Babulal Nagar V Shree Synthetics 1984 (Supp) SCC Page 128, paragraphs 16 and (iii) Nagin Das Kesharlal Mehta and Ors. V The Competent Authority, reported in AIR 1988 Guj Page 162.

160. In pith and substance, the contention of the `1st Respondent/CCI' is that the `1st Respondent/CCI' has the requisite power to annul an `Order' if the same was procured by means of `Fraud' or `Misrepresentation' and as such, the `impugned order' is a correct one, whereby and whereunder the `1st Respondent/CCI' has exercised its power in this regard and a reference is made to the decisions of the Hon'ble Supreme Court in (i) Meghmala and Ors. V G Narasimha Reddy and Ors, reported in (2010) 8 SCC Page 383 (vide paragraphs 28 to 33

and Para 36 (ii) Industrial Infrastructure Development Corporation (Gwalior) M.P. Ltd. V Commissioner of Income Tax, Gwalior, AIR 2018 Supreme Court (iii) United India Insurance Co. Ltd. V Rajendra Singh and Ors., reported in AIR 2000 SC 1165 (iv) Indian National Congress (I) V Institute of Social Welfare and Ors., reported in AIR 2002 SC 2158 (v) Rajendra Tripathi V Deputy Director of Education, 1976 (2) AIR 518 and (vi) Radhey Shyam Chaube and Ors. V District Inspector of Schools, Jaunpur and Ors. 1978 Labour & Industrial Cases 191.

161. The Learned Counsel for the `1st Respondent/CCI' comes out with a plea that Section 17 of the Indian Contract, Act, 1872 defines `Fraud' to mean and include among other things, the suggestion of an untrue fact as true by a person who does not believe it to be true, active concealment, any other act fitter to deceive as long as it is done with an intent to deceive. In this connection, the `1st Respondent/CCI' points out that the `Appellant's conduct is that it had deliberately strived to `Misrepresent' and `Suppress' material particulars and documents vis-à-vis the `Proposed Combination' and in short, the `Appellant' had repeated the same false statements in relation to ambit and purpose of the `Proposed Combination', etc., even after being asked with the pointed follow up questions as per RFI-I and RFI-II.

162. The Learned Counsel for the `1st Respondent/CCI' takes a pivotal stance that `Fraud' vitiates every solemn act and points out that irrespective of the 1st Respondent/CCI's eventual conclusion on the `Combinations' (`AAEC'), the `Fraud' played by the `Appellant' upon the `1st Respondent/CCI' (Statutory Regulator) wholly vitiates the `Approval' granted, as per the `Approval Order'. To fortify the 1st Respondent/CCI's stand, reliance is placed upon the Hon'ble Supreme Court decisions in (i) Satluj Jal Vidyut Nigam V Raj Kumar Rajinder Singh, 2019 14 SCC 449, Para 68-76; (ii) Bhaurao Dagdu Parlkar V State of Maharashtra , 2005 7 SCC 605, Para 9 – 16; (iii) Commissioner of Customs V Aafloat Textiles India Pvt. Ltd., 2009 11 SCC 18, Para 11; (iv) Shrisht Dhawan V M/s. Shaw Brothers, 1992 1 SCC 534, Para 20; and (v) Venture Global Engineering LLC V Tech Mahindra Ltd. & Anr., 2018 1 SCC 656, Paras 76-78.

163. The Learned for the `1st Respondent/CCI' submits that a cursory reading of the ingredients of Section 20 (1) of the Competition Act, 2002, makes it clear that the same and its proviso applied to the Commission/1st Respondent inquiring into a `Fresh Combination' `suo moto' or basis of an information being filed in this regard. But the `Notice' filed by the `Appellant' was a `Voluntary Notification', in the instant case, as per

Section 6 (2) of the Act, in fact, Section 6 (2) of the Competition Act, 2002, concerns with `voluntary reporting', mutually exclusive to Section 20 (1) of the Competition Act, 2002. Hence, it is the submission of the `1st Respondent/CCI' side that the limitation imposed by the proviso to Section 20 (1) of the Competition Act, 2002, will not apply.

164. The other contention advanced on behalf of the `1st Respondent/CCI' is that the Appellant's `Fraud' will vitiate the `Approval Order' together with the fact that it failed to notify the `Proposed Combination' in its whole, meaning that the one year limitation imposed by the proviso to Section 20 (1) of the Competition Act, 2002, is `inapplicable', because of the fact that there is `no Notification' and `no Approval'.

165. The Learned Counsel for the `1st Respondent/CCI' comes with an emphatic plea that the `impugned order' of the `1st Respondent/CCI' cannot contain any analysis of the `Combinations' (`AAEC') because the focus of `1st Respondent/CCI `inquiry' in the `impugned order' is not to substantively `revaluate' the correct `Combination' (`AAEC'). In fact, the `impugned order' rightly determines that the `Appellant' had not supplied the correct and sufficient particulars, information and documents.

166. The Learned Counsel for the `1st Respondent/CCI' submits that a `detailed analysis' of the `Combinations' (`AAEC') can only be made afterwards, when the `Appellant' files Form II with correct, true and complete/information/particulars/documents that disclose the `ambit' and intended purpose of the `Combination'.

167. The Learned Counsel for the `1st Respondent/CCI' contends that the `impugned order' in directing the `Approval' secured by the `Appellant' shall be kept in abeyance, while granting the `Appellant' an opportunity to file Form II afresh is `a correct and proper one' in the `eye of Law' and therefore, prays for dismissal of the (i) Competition Appeal (AT) No.1 of 2022; Competition Appeal (AT) No. 2 of 2022 and (iii) Competition Appeal (AT) No. 3 of 2022.

Contentions of 2nd Respondent (in Comptn. App (AT) No. 01 of 2022) and Pleas of 3rd Respondent (in Comptn. App (AT) No. 03 of 2022 (`Future Coupons Private Limited'):

168. The Learned Counsel for the 2nd Respondent/Future Coupons Private Limited (`FCPL') contends that as per Section 6 (2) of the Competition Act, 2002 ("**Act**"), read with `Regulations 9 (4) and 9 (5) of the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations Regulations, 2011)

(“**Combination Regulations**”) an `Acquirer’ is required to notify all the inter- connected steps and individual transactions, that form part of the `Combination’ to achieve the `ultimate intended effect’ of the `Combination’. In fact, the `Statutory Scheme’ visualizes that a full, true and fair disclosure must be made by the `Acquirer’ at the stage of seeking an `Approval’ for the contemplated transaction.

169. The Learned Counsel for the 2nd Respondent submits that the `1st Respondent/CCI’ and the `Appellate Tribunal’ dip into the numerous pages of the documents read, `between the lines’ of `Appellant/Amazon’s filings and form an independent assessment of the Appellant’s ultimate intent while ignoring the unequivocal and demonstrably the false statements in its real filings – is topsy-turvy to the plain language, `object and scheme of the Competition Act, 2002’, and its `Regulations’, made thereunder.

170. The Learned Counsel for the 2nd Respondent points out that in the present case, the `Combination’ notified was clearly investment in to `FCPL’ by `Amazon’ considering the growth potential of the `Corporate Gift Cards / Coupons Business of `FCPL’ and nothing more. In short, the assessment of `AAEC’ by the `1st Respondent/CCI’ on any relevant market is only for this `Combination’ and the `Assessment’ could not and

would not have been for a `Combination' which was in the mind of `Amazon' but was not notified in its filings. Moreover, the Appellant's assertion that the combination approved by the CCI is for its `single integrated transaction' Viz., an investment in `FRL' for `Amazon's strategic interest over assets' of `FRL' and `acquisition of strategic rights' over `FRL' and also for `Business Collaboration Agreements' defies any logic. To put it differently, the plea of the Learned Counsel for the 2nd Respondent/FCPL is that an `Approval' can be given in respect of the `Combination' for which an `Approval' is sought for and not otherwise.

171. The Learned Counsel for the 2nd Respondent submits that failure to give a `Notice' under Section 6 (2) of the Competition Act, 2002, is a breach of `Law' and the `Combination' is `non est' in `Law'.

172. The Learned Counsel for the 2nd Respondent takes a plea that the Appellant's filings in clear term mentions that `the (FCPL) SHA and the SSA are the only transactional documents executed pursuant to the Proposed Combination' and further that the paragraph 5.1.2 of the `Notice Format' specifically requires the `Acquirer' to `disclose' any other transactions that is/are inter-connected in the context of the `Combination' being notified. Indeed, a reference to the `FRL SHA' and

`BCFs' is visibly absent in Appellant's response to this requirement in its `Notice' dated 23.09.2019.

173. The Learned Counsel for the 2nd Respondent advances an argument that the `Appellant' made it clear that `BCAs' were not part of the `Proposed Combination' stating that these agreements were neither inter-connected with, nor part of the `Proposed Combination' (vide paragraph 5 of the Appellant's `Notice' dated 23.09.2019, page 47 of Vol. (1) of Amazon's Convenience Compilation), which was reiterated in its responses to the questions raised by the 1st Respondent/CCI (vide paragraph 44 of Response dated 15.11.2019 to RFI 2 dated 24.10.2019, Page 769 – Vol. (3) Appellant's Convenience Compilation).

174. The Learned Counsel for the 2nd Respondent brings it to the notice of this `Tribunal' that in regard to the `FRL SHA', the Appellant's filings before the 1st Respondent/CCI stated that this agreement was entered into in the course of `Intra-Promoter Group Transactions' (vide II of Appellant's Notice dated 23.09.2019, Page 2, Vol. (1) of Appellant's Convenience Compilation), to which, the parties were `FCPL' and `persons' belonging to the `Biyani Group'.

175. The Learned Counsel for the 2nd Respondent points out that in regard to a specific question posed by the 1st Respondent/CCI as to whether it was gaining any direct right over `FRL' (vide Query 2.5 of RFI 2 dt. 24.10.2019, Page 721, Vol (3) of Appellant's Convenience Compliance), the Appellant reiterated that its investment was in to `FCPL' and not `FRL' and that whatever rights were granted to it were with respect to FCL's investment in `FRL' and can be exercised only through `FCL' and not directly by it (`Amazon').

176. The Learned Counsel for the 2nd Respondent comes out with a plea that the `Appellant' further stated that `importantly, these rights have been derived from the rights granted to `FCL' in terms of the `FRL SHA, which was negotiated by the Promoters, FRL and FRL (sic., FCPL) independent of the investment by the Investor in FCL and with a view to unlock value for `FCL' (Para 37 of Response dt. 15.11.2019 to RFI 2 dt. 24.10.2019, Page 758, Vol. (3) of Appellant's Convenience Compilation).

177. The Learned Counsel for the 2nd Respondent contends that the `Appellant', with reference to the `Show Cause Notice' issued by the 1st Respondent/CCI endeavoured to overcome this statement by rewriting it, claiming that various words were in-advertently left out in its earlier

response, and what was `independently negotiated was the `Warrants Transaction' between the `Promoters', `FCPL' and `FRL' and not the `FRL SHA' (vide paragraph 39 of the `Appellant's response to the `Show Cause Notice', Page 1409 – 1410, Vol. (6) of Appellant's Convenience Compilation).

178. The Learned Counsel for the 2nd Respondent submits that in response to paragraph 8.8 of its Form I filing, the Appellant was required to disclose any and all documents considered by the `Board of Directors'/`Key Managerial Personnels' of its group entities in relation to the `Proposed Combination' and that the `Law' requires that the internal documents which were suppressed by the `Appellant' Viz., the documents which brought out the intention of the `Acquirer' in making the `Acquisition' be placed before the 1st Respondent/CCI, and further that the `Appellant' had failed to comply with the requirement of `Law' in Form or in substance.

179. According to the Learned Counsel for the 2nd Respondent the `Appellant' disclosed a single document (vide Appellant's Notice dt. 23.09.2019, Page 100, Vol. (1) of Appellant's Convenience Compilation), which was a `presentation' dealing with the Five Years' Business Plan of `FCPL' that is of the `coupons business', which

emphasized that its `investments' was in to `FCPL' alone and that its `intent' in entering in to the `Combination' was to further to the coupons business of `FCPL' and that the 1st Respondent/CCI sought a full disclosure (vide Query 2.1 of RFI 2 dt. 24.10.2019, Page 720, Vol. (3) of Appellant's Convenience Compilation), because the filing of the `Appellant' was found to be inadequate.

180. The contention of the Learned Counsel for the 2nd Respondent is that the `Appellant' later, disclosed three additional documents (vide paragraph 3 of Response dated 15.11.2019 to RFI-2 dated 24.10.2019 – page 724 Amazon's Convenience Compilation) and the two documents related exclusively to `FCPL' and the third one was a `Resolution' authorizing `Amazon Entities' to enter in to `FCPL SHA' and the `FCPL SSA' and these documents reiterated the Appellant's assertion throughout its filings it was making an investment into `FCPL' alone and was acquiring rights only in `FCPL' alone.

181. The Learned Counsel for the 2nd Respondent points out that by means of the Appellant's disclosures made pursuant to the `Orders' issued by the `Arbitral Tribunal', a reading of the internal documents (vide internal notes dt. 24.05.2018, page 1908, Vol. 9 of Appellant's Convenience Compilation; 10.07.2018 (vide page 1910, Vol. 9 of

Appellant's Convenience Compilation and internal email dated 19.07.2019 (vide page 1918 – Vol. 9 of Appellant's Convenience Compilation) indicates that the Appellant's actual intent in entering in to the `Combination' was completely irreconcilable with what it had mentioned in its filings, and that it was actively supressing the same.

182. According to the Learned Counsel for the 2nd Respondent these documents bring out that the Appellant was investing into `FCPL' with a view to acquire strategic rights in `FRL' and was treating `BCAs' as in integral part of the `Combination'. Moreover, these documents, reveal that `FCPL' was nothing more than an `SPV' and a `Conduit' and part of the `Twin Entity Structure' through which investment was made in to `FRL'. In fact, no value was attributed to `FCPL' by the `Appellant'.

183. The Learned Counsel for the 2nd Respondent adverts to the fact that in the internal documents the value of the investment of Rs.1431 Crore was arrived at only on the basis of the Regulatory Share Prices of `FRL' with a 25% premium (for the `Strategic Rights' acquired) multiplied by the indirect number of `FRL' shares which `Amazon' would be holding through `FCPL'. Apart from this, the `Appellant' had submitted before the `Tribunal' that the filing premised on active suppression,

misrepresentation and fraud ought not to be interfered with and the said plea, according to the 2nd Respondent is an absurd one.

184. The Learned Counsel for the 2nd Respondent proceeds to point out that the Regulation 14 clearly mentions that a `Notice' shall not be valid unless it is complete and inconformity with the `Regulations' and `Sub-Regulation 2A) empowers the 1st Respondent/CCI to invalidate a `Notice' when it comes to its knowledge that such `Notice' was not valid as per the `Sub-Regulation 1'. Besides this, in the `impugned order', the 1st Respondent/CCI had invalidated the `Notice' and directed the `Appellant' to file a fresh `Notice'.

185. The Learned Counsel for the 2nd Respondent contends that the Appellant's filing in its `Notice' made no reference to any direct enforceable rights acquired by it, in `FRL', in its response to this requirement. Per contra, the Appellant's filing reaffirmed that the rationale for the `Combination' was `with a view to strengthen and augment the `business of `FCL' (including the marketing and distribution of loyalty cards, corporate gift cards and reward cards corporate consumers)' and `unlock the value in `FCPL'. Therefore, it is the plea of the 2nd Respondent that the `Appellant' had not only suppressed but deliberately misrepresented the `ultimate intended effect'

of the `Combination' and committed a flagrant violation of Section 6 (2) read with Regulation 9 of the `Combination' Regulations.

186. The Learned Counsel for the 2nd Respondent submits that the Appellant's submissions in regard to the supposed breach of orders of the `Arbitral Tribunal' hearing a dispute initiated by the `Appellant' against `FCPL', `FRL' and others was an in-appropriate one, before the `Tribunal', because of the fact that they are irrelevant to the present `Appeal' and each of the contentions is `subjudice' before the Hon'ble High Court of Delhi in numerous pending proceedings in which the `Appellant' and `FCPL' are parties. In short, the Appellant's endeavour to advance a misconceived submissions in parallel proceedings before the different Judicial Authorities is an `abuse of process' and to be deprecated.

187. The Learned Counsel for the 2nd Respondent points out that the identity / even an existence of a Complainant does not control the exercise of 1st Respondent/CCI's jurisdiction, because the 1st Respondent/CCI is enjoined to act even `suo moto' or based on information in Public domain to prevent violation of the provisions of the Competition Act, 2002.

188. It is represented on behalf of the 2nd Respondent that the `Appellant' was provided with a full opportunity to respond to the documents and in fact, it took full advantage of the same in submitting a detailed oral and written submissions to the 1st Respondent/CCI on this aspect (vide Appellant's Rejoinder submissions dated 12.12.2021, pages 1882 – 1884, Vol. (9) of Appellant's Convenience Compilation).

189. The Learned Counsel for the 2nd Respondent refers to the judgment of the Hon'ble Supreme Court in the State of Uttar Pradesh V Sudhir Kumar Singh (vide Civil Appeal No. 3498 of 2020 with Civil Appeal Nos. 3499 and 3500 of 2020 dated 16.10.2020), wherein it is held that `natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the `audi alteram partem rule' cannot by itself, without more, lead to the conclusion that prejudice is thereby caused'.

190. The Learned Counsel for the 2nd Respondent contends that in the instant case the `Appellant' was given the full opportunity and which was availed by it and hence, the `Appellant' has not suffered any `prejudice'.

191. The Learned Counsel for the 2nd Respondent puts forward a plea that the `power to grant an Approval`, carries with it the power to revoke such

an `Approval' as per the decisions of the Hon'ble Supreme Court in the matter of Shree Sidhbali Steels Ltd. V State of U.P., (2011) 3 SCC 193; Indian National Congress (I) V Institute of Social Welfare, (2002) 5 SCC 685, particularly when it is evident that the `Approval' was obtained, based on material omissions, suppression of material particulars, misrepresentation and / or fraud.

192. According to the Learned Counsel for the 2nd Respondent Section 21 of the General Clauses, Act, 1897 expressly mentions that the `power to issue orders', includes the `power to amend', `vary' or `rescind' such orders, thereby obviating the requirement for a specific provision to such effect in the Act.

193. The Learned Counsel for the 2nd Respondent contends that Regulation 14 of the Combination Regulation which specifies that a `Notice' shall not be valid unless it is in conformity with the Regulations. In fact, Regulations 14 (2A), specifically envisages invalidation by the 1st Respondent/CCI of a `Notice' that it is not in conformity with the Regulations.

194. The Learned Counsel for the 2nd Respondent points out that Section 45 (1) of the Competition Act, 2002, is expressly clarified to be without

prejudice to the power under Section 44 of the Act and the power under Section 45 (2) of the Act is stated to be without prejudice to the power under Section 45 (1) of the Act. More importantly, it is the version of the 2nd Respondent that `no provision of the Statute' stands `breached' by the exercise of the jurisdiction as per Section 45 (2) of the Competition Act, 2002, by the 1st Respondent/CCI.

195. It is the stand of the 2nd Respondent that a failure to notify, the rights purportedly claimed by the Appellant/Amazon in `FRL', `FRL SHA' and `BCFs' undoubtedly, constitutes a failure to disclose material particulars as per Section 44 and 45 of the Competition Act, 2002, and in this connection, a reliance is placed on the decision of the Hon'ble Supreme Court in Harkirat Singh V Amrinder Singh, (2005) 13 SCC 511, wherein at paragraph 51 and 52, it is observed as under:

> *51.``A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise.*

52. All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

196. The Learned Counsel for the 2nd Respondent adverts to the `Order' dated 21.11.2019 passed by the 1st Respondent/CCI (under Section 43A and 44 of the Competition Act, 2002, wherein at paragraphs 35 to 37, it is observed and held as under:

35. "CPPIB has contended that it had mentioned in the Notice that "The proposed Transaction represents an opportunity for ReNew to enable smooth shareholder transition, and secure primary funding to leverage for growth and expansion plans.". This according to CPPIB amounts to full disclosure and thus, there was no suppression or omission on its part. The Commission notes that Form I under the Combination Regulations inter alia requires the notifying party to "Please explain the purpose (including business objective and/or economic rationale for each of the parties to the combination and how are they intended to be achieved) of the combination". In spite of this requirement, no detail regarding Transaction II was disclosed to the Commission in the Form I filed by CPPIB in Combination Registration No. C-2017/11/536. Mere statement that Transaction I would secure primary funding to leverage the growth and expansion plans of ReNew cannot be taken as a disclosure about Transaction II. Such vague statements cannot meet the requirement to disclose material particular to the Commission. Having seen the extent of knowledge and the linkage between Primary Acquisition in Transaction I and Transaction II,

CPPIB ought to have disclosed the details of Transaction II in the combination Notice filed for Transaction I. However, CPPIB having failed to do so, the Commission has no hesitation in concluding that CPPIB omitted to disclose a material particular, knowing it to be material.

36. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, the Commission shall impose on such person or enterprise, a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination. In case of contravention under Section 44, the person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

37. Though the penalty under sections 43A and 44 of the Act can be to the extent mentioned therein, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at an appropriate amount of penalty. In the instant case, CPPIB and ReNew have extended cooperation in the inquiry and supplied requisite material/ documents in response to the information requirement of the Commission. Such material/ documents formed the basis of above findings of contravention. Considering these, the Commission considers it appropriate to impose a penalty of INR 50,00,000 (Rupees fifty lakh) on CPPIB. CPPIB shall pay the penalty within 60 days from the date of receipt of this Order.”

197. The Learned Counsel for the 2nd Respondent takes a plea that the `Appellant’ had issued a `Notice’ to the 1st Respondent/CCI on 23.09.2019 notifying the `Combination’ and secured the `Approval’ of the CCI for the same, albeit based on material omissions, suppression of

material particulars, misrepresentation and fraud and in fact, Section 20(1) of the Competition Act, 2002, has no application in respect of a `matter' where a `Notice' was filed.

198. While rounding up, the Learned Counsel for the 2nd Respondent submits that the 1st Respondent/CCI had passed the `impugned order' and penalised the `Appellant' correctly.

Contentions of 3rd Respondent (in Comptn. App No. 01 of 2022) & Submissions of Appellant in Comptn. App No. 03 of 2022 (`Confederation of All India Traders'):

199. The Learned Counsel for the `3rd Respondent' / `Confederation of All India Traders' - submits that the Competition Appeal No. 3 of 2022 filed by the `Appellant' (`3rd Respondent' – (`Confederation of All India Traders'-in Competition Appeal No. 1 of 2022), is maintainable and that the `Appellant / 3rd Respondent' (`CAIT') has the locus to appear before the 1st Respondent/CCI.

200. It is contended on behalf of the `3rd Respondent / CAIT' that it is a necessary and proper party to the present proceedings and in fact, it has a substantial interest in the outcome of the proceedings.

201. In this connection, it is pointed out on behalf of the `3rd Respondent / CAIT' that in Writ Petition (C) 12889 / 2021 filed by the 3rd Respondent / CAIT (`Appellant' in Comptn. App AT No. 3 of 2022) that the Hon'ble High Court of Delhi by an `Order' dated 16.11.2021 had directed the `1st Respondent / CCI' to decide the issue raised in the `1st Respondent / CCI's `Show Cause Notice' dated 04.06.2021, `within a period of two weeks' from today' and that `such decision shall be taken by CCI, after giving an opportunity of hearing to the stakeholders'. Furthermore, the `Appellant / Amazon's' `Special Leave Petition' against the `Order' of the Hon'ble High Court of Delhi dated 16.11.2021 was dismissed by the Hon'ble Supreme Court of India.

202. The Learned Counsel for the `3rd Respondent / CAIT' comes out with a plea that the `Appellant / Amazon.com NV Investment Holdings LLC' had deceived the `1st Respondent / CCI' and secured an `Approval Order' and illegally entered the `MBRT Sector' in India, in violation of the `Foreign Direct Investment Laws of India'.

203. According to the Learned Counsel for the `3rd Respondent / CAIT, the relevant `Regulatory regime', governing `Amazon's investment through the `Proposed Combination' as notified to the `1st Respondent / CCI' is:

(a) Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (“**FEMA Regulations**”), (vide Annexure R-1 of CAIT Reply in `Amazon’s Appeal’ (Pgs. 23 – 68), which was thereafter replaced with by the `Foreign Exchange Management’ (Non-debt Instruments) Rules, 2019 (`**FEMA Rules**’) (vide Annexure R-2 of CAIT’s Reply in `Amazon’s Comptn. App (AT) No. 1 of 2022 (Pgs: 69 – 116). In fact, the provisions relating to investment in `MBRT’ are identical in both the abovesaid Rules and Regulations.

(b) Regulations 5 of the FEMA Regulations, Foreign Direct Investment (“FDI”) by a person resident outside (like Amazon in the present case) is subject to the entry routes, sectoral caps and investment limits as laid down in Schedule 1 of the Regulations (**Regulation 5 at Page 26 of Annexure R-1 of CAIT Reply in Amazon Appeal**). Under item 15.4 of Schedule 1 of the FEMA Regulations, any investment in MBRT is allowed only with prior approval of the Government of India (Item 15.4, Schedule 1 @ Pg.: 46 of Annexure R-1 of CAIT’s Reply in Amazon’s Comptn. Appeal No. 1 of 2022).

(c) `Foreign investment in e-commerce is regulated by FEMA Rules and Regulations and Press Note No.2 of 2018 (“**PN2**”). Under PN2, effective from 01.02.2019, a retailer selling on the platform cannot be a `group company’ of the e-commerce platform entity (vide Annexure R-3 of CAIT’s Reply in `Amazon’s Comptn. Appeal (AT) No. 1 of 2022 .(Pgs: 117–120).

204. The Learned Counsel for the `3rd Respondent / CAIT' contends that the three Agreements, Viz., `FRL SHA', `FCPL SSA' and `FCPL SHA' purportedly consisting of a `single integrated transaction' for an investment of Rs.1431 Crores by Amazon `indirectly' in `FRL' are in substance and in reality. an investment in MBRT and directly contrary to the `FEMA Regulations';

205. The Learned Counsel for the `3rd Respondent / CAIT' points out that the Amazon's contentions that `FRL' was the object of attention and purpose of Amazon's investment would make the investment directly contrary to the `FEMA Regulations' and `PN2' as it effectively would have entered the MBRT sector.

206. The Learned Counsel for the `3rd Respondent / CAIT' submits that the `Amazon's (and its Affiliates) by way of its investment (directly or indirectly) in `FRL' cannot list any `Retail Products' on the Amazon e-commerce market place in India in view of the FEMA Regulations and PN2. As such, Amazon (and its Affiliates) could not enter into the `BCAs'.

207. The Learned Counsel for the `3rd Respondent / CAIT' contends that the Amazon's internal emails now exhibit that it adopted a convoluted

structure to enter MBRT and deceive statutory authorities in order to skirt PN2 and the FEMA Regulations. Furthermore, the `Amazon' had not invested in `FCPL' (or `FRL' as it now claims) as a `Foreign Portfolio Investor' (`FPI). Even otherwise, an `FPI' cannot invest in and exercise any form of control over an `Indian Entity' – which is exactly the situation in the present case `as Amazon is seeking to exercise and control the management decisions of `FRL'.

208. The Learned Counsel for the `3rd Respondent / CAIT' proceeds to point out that the Amazon's pleas before the 1st Respondent/CCI directly contradict the representation made by it to the `Court's' and the `Arbitral Tribunal' and its own internal documents, among other things that the `FRL SHA', `FCPL SHA' and `FCPL SSA' constituted a `single integrated transaction' that `Amazon' was really investing in `FRL' and not `FCPL' and that the `BCAs' were an integral part of the `Proposed Combination'.

209. The Learned Counsel for the `3rd Respondent / CAIT' submits that the 1st Respondent/CCI being the `Statutory Authority' cannot approve a transaction that is an `illegality'. The 1st Respondent/CCI is to safeguard that all `Combinations' for which an `Approval' is sought from the `Commission' are legal and not in `violation of any law'.

210. On behalf of the `3rd Respondent / CAIT', it is represented that the `Amazon' had knowingly made a `False Statement' and withheld the true nature of the `transaction' and stated that `apart from the approval of the Hon'ble Commission, no other regulatory approvals will be required from any other government department / authority for consummating the `Proposed Combination' since it was investing in `FCPL' and not `FRL' [**Amazon's Response dated 15.11.2019 @ Pgs. 254-305 of CCI Convenience Compilation**].

211. The other contention of the 3rd Respondent / CAIT is that had the `Appellant' disclosed the exact/true nature of `transaction' notified all the `relevant Agreements' as part of the `Proposed Combination' and claimed approval thereof from the 1st Respondent / CCI, then CCI might have obtained an `Opinion' from the `Enforcement Directorate' or `such Authority' `in relation to the `Combination', as per Regulation 34 of the `Combination Regulations'.

212. According to the Learned Counsel for the `3rd Respondent / CAIT', Regulations 9 (4) and (5) of the `Combination Regulations' require the `Acquirer' to notify each of the `transactions' that are part of the `Proposed Combination' and further that the mere disclosure of the `Agreements' does not amount to the fulfilment of the requirements of

the Regulations and in this regard, the relevant decisions relied on by the 3rd Respondent/CAIT are:

(i) Competition Commission of India v Thomas Cook (India) Ltd. & Anr. (2018) 6 SCC 549,

(ii) Sterlite Industries (Combination Registration No.: C-2012/03/45; order dated 12.04.2012,

(iii) Tech Mahindra (Combination Registration No.: C-2012/03-48, order dated 26.04.2012.

213. The Learned Counsel for the `3rd Respondent / CAIT' brings it to the notice of this `Tribunal' that the `Regulation 9 (4) of the Combination Regulation was amended on 01.07.2015 to introduce the `words', shall be filed by the `Parties' to the `Combination' – thereby imposing a `Mandatory Obligation' to notify `all Series or Small Individual Transactions which are inter-connected'.

214. The Learned Counsel for the `3rd Respondent / CAIT' points out that from the representations made by `Amazon' in its notice and later responses at several places where it made `False Statements' (vide paragraphs 9, 35, 37, Internal Pgs : 40, 43, 71, Paragraphs 36 and 21 of the Response dated 15.11.2019 to the 1st Respondent/CCI at Pages 254 – 305 and Pages 309 – 383 of Part II of 1st Respondent/CCI's Convenience Compilation.

215. The Learned Counsel for the `3rd Respondent / CAIT' contends that in the `Approval Order' the 1st Respondent/CCI had notified the `Proposed Combination' (which had not included `FRL SHA' and examined the `Proposed Combination' in regard to the coupons / gift cards activities of `FCPL'. Moreover, the 1st Respondent/CCI vide Paragraphs 11 to 13 had not defined the `relevant market' in regard to `FRL' because `Amazon' is not investing in `FRL' (vide `Approval Order' Annexure A-19 of 3rd Respondent / CAIT's Appeal, Page 769).

216. The Learned Counsel for the `3rd Respondent / CAIT' submits that `Amazon' had suppressed its `strategic rights' deliberately over `FRL' so that it can start `deep discounting' products (similar to its illegal practices on its website Amazon.com) at FRL's brick and mortar stores which will have a direct anti-competitive impact on `small traders' and `kirana store owners', including the members of CAIT. Apart from that, it is submitted by the 3rd Respondent / CAIT that the Amazon's control over `FRL' will negatively impact `small traders' who supply `FRL' as `Amazon' through its `BCAs' will ensure that those `small traders' will be replaced by `manufacturing units' owned by it.

217. The Learned Counsel for the `3rd Respondent / CAIT' points out that the `BCAs' between Amazon's Affiliates and `FRL' would also

ensure that only `Future Retail' will sell its products on Amazon's website which would not only negatively impact `small traders' who also sell their products on `Amazon's website', but would also be contrary to `Indian Foreign Exchange Regulations'. In this connection, the Learned Counsel for the `3rd Respondent / CAIT' adverts to the decision of the Hon'ble Supreme Court in State of Rajasthan V Gotan Lime Stone Khanij Udyog (P) Ltd., (2016) 4 SCC, Page 469, wherein at paragraph 36, it is held that such `arrangements' or `devices' cannot be used by `unscrupulous parties' to `circumvent the law'.

218. The Learned Counsel for the `3rd Respondent / CAIT' contends that Section 21 of the General Clauses Act, 1897, enjoins that;

> *``the Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws. Where, by any [Central Act] or Regulations a power to [issue notifications,] orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any [notifications,] orders, rules or bye-laws so [issued]."*

219. The Learned Counsel for the `3rd Respondent / CAIT' submits that `if a person' misrepresents and obtain any `Approval' or `Permission' on the basis of the such misrepresentation, the `Authority' granting such `Approval' or `Permission' has the implicit `Power' to `revoke' the `Approval' or `Permission'.

220. In this regard, the Learned Counsel for the `3rd Respondent / CAIT' adverts to the decision of the Hon'ble Supreme Court in Sardar Govindrao V State of Madhya Pradesh in AIR 1965, SC 1222, wherein at paragraphs 9 and 10, it is observed as under:

> *9. "In all cases an enquiry has to be made which generally follows a pattern disclosed by rule 4, sub-rules (a) to (e). But in cases of maufi or inam held by religious, charitable or public institutions or service or in case of a maufi or inam for the maintenance of a descendant of a former ruling chief additional enquiries have to be made. The rules highlight the distinction between revocation of exemption in the case of persons belonging to two special categories and the revocation of exemption in the case of others. It will be noticed presently that Section 5 of the Act also follows the same scheme and the rules do no more than emphasise the special character of sub-section (3) of Section 5. Power has been conferred on Government to make some other lands free from land revenue so that sometimes a grant of money or pension and sometimes exemption from land revenue may be resorted. It could hardly have been intended that sub-section (3) of Section (5) was to be rendered nugatory in its purpose by the operation of the discretion conferred by sub-section (2). The two sub-sections have to be read separately because though the word "may" appears in both of them that word in sub-section (3) takes its meaning from an obligation which is laid upon Government in respect of certain institutions and persons if the stated conditions are fulfilled. It is impossible to think that in the case of a religious, charitable or public institution which must be continued or in the case of descendants of former ruling Chiefs Government possessed an absolute discretion to refuse to make a grant of money or pension for their maintenance or upkeep even though they satisfied all the conditions for such a grant and were deserving of a grant of money or pension. The word "may" in Section 5(3) must be interpreted as*

mandatory when the conditions precedent, namely, the existence of a religious, charitable or public institutions which ought to be continued or of the descendants of a ruling Chief, is established. The words "may pass such orders as it deems fit" in sub-section (2) mean no more than that Government must make its orders to fit the occasion, the kind of order to be made being determined by the necessity of the occasion. As stated in Maxwell on the Interpretation of Statutes:

> *"Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they `may': or `shall, if they think fit,' or, `shall have power,' or that "it shall be lawful" for them to do such acts a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have__to say the least__ a compulsory force, and so would seem to be modified by judicial exposition."*

This is an instance where, on the existence of the condition precedent, the grant of money or pension becomes obligatory on the Government notwithstanding that in Section 5 (2) the Government has been given the power to pass such orders as it deems fit and in sub-section (3) the word "may" is used. The word "may" is often read as "shall" or "must" when there is something in the nature of the thing to be done which makes it the duty of the person on whom the power is conferred to exercise the power. Section 5 (2) is discretionary because it takes into account all cases which may be brought before the Government of persons claiming to be adversely affected by the provisions of Section 3 of the Act. Many such persons may have no claims at all though they may in a general way be said to have been adversely affected by Section 3. If the power was to be discretionary in every case there

was no need to enact further than sub-section (2). The reason why two sub-sections were enacted is not far to seek. That Government may have to select some for consideration under sub-section (3) and some under Section 7 and may have to dismiss the claims of some others requires the contenment of a discretion and sub-section (2) does no more than to give that discretion to Government and the word "may" in that subsection bears its ordinary meaning. The word "may" in sub-section (3) has, however, a different purport. Under that sub-section Government must, if it is satisfied that an institution or service must be continued or that there is a descendant of a former ruling Chief, grant money or pension to the institution or service or to the descendant of the former ruling Chief, as the case may be. Of course, it need not make a grant if the person claiming is not a descendant of a former ruling Chief or there is other reasonable ground not to grant money or pension. But, except in those cases where there are good grounds for not granting the pension, Government is bound to make a grant to those who fulfil the required condition and the word "may" in the third sub-section though apparently discretionary has to be read as "must". The High Court was in error in thinking that the third sub- section also like the second conferred an absolute discretion.

10. The next question is whether Government was justified in making the order of April 26, 1955? That order gives no reasons at all. The Act lays upon the Government a duty which obviously must be performed in a judicial manner. The appellants do not seem to have been heard at all. The Act bars a suit and there is all the more reason that Government must deal with such cases in a quasi-judicial manner giving an opportunity to the claimants to state their case in the light of the report of the Deputy Commissioner. The appellants were also entitled to know the reason why their claim for the grant of money or a pension was rejected by Government and how they were considered as not falling within the class of persons who it was clearly intended by the Act to be compensated in this manner. Even in those cases

where the order of the Government is based upon confidential material this Court has insisted that reasons should appear when Government performs curial or quasi-judicial functions (see Hari Nagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala – 06.10.1964). The High Court did not go into any other question at all because it rejected the petition at the threshold on its interpretation of Section 5 (3). That interpretation has been found by us to be erroneous and the order of the High Court must be set aside. As the order of Government does not fulfil the elementary requirements of a quasi-judicial process we do not consider it necessary to order a remit to the High Court. The order of the State Government must be set aside and the Government directed to dispose of the case in the light of our remarks and we order accordingly. The respondents shall pay the costs of the appellants in this Court and the High Court. Appeal allowed."

221. The Learned Counsel for the `3rd Respondent / CAIT' takes a stand a `Party' cannot to be allowed to get away from the consequences of the `Suppression', `False Statements' and `Misrepresentations' and further that it makes a no difference whether an `Order' of is a `Court' or `an `Administrative' or `Statutory Authority', and refers to the Judgement of the Hon'ble Supreme Court in A.V. Papayya Sastry V Govt. of A.P., (2007) 4 SCC Page 221 at Spl. Page 231, wherein at paragraphs 22 and 23, it is observed as under:

22. " It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of law. Such a judgment, decree or order__by the first court or by the final court__has to be

treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of Lazarus Estates Ltd. v. Beasley (1956) 1 All ER 341; Lord Denning observed: (All ER p. 345 C).

> *"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud."*

222. The Learned Counsel for the `3rd Respondent / CAIT' relies on the decision of the Hon'ble Supreme Court in Hamza Haji v. State of Kerala, reported in 2006 7 SCC at Page 416; Spl Pages 427 and 428, wherein at Paragraph 25, it is observed as under:

25. "Thus, it appears to be clear that if the earlier order from the Forest Tribunal has been obtained by the appellant on perjured evidence, that by itself would not enable the Court in exercise of its power of certiorari or of review or under Article 215 of the Constitution of India, to set at naught the earlier order. But if the Court finds that the appellant had founded his case before the Forest Tribunal on a false plea or on a claim which he knew to be false and suppressed documents or transactions which had relevance in deciding his claim, the same would amount to fraud. In this case, the appellant had purchased an extent of about 55 acres in the year 1968 under Document No. 2685 of 1968 dated 2-6-1968. He had, even according to his evidence before the Forest Tribunal, gifted 5 acres of land to his brother under a deed dated 30-1-1969. In addition, according to the State, he had sold, out of the extent of 55.25 acres, an extent of 49.93 acres by various sale deeds during the years 1971 and 1972. Though, the details of the sale deeds like the numbers of the registered documents, the dates of sale, the names of the transferees, the extents involved and the

considerations received were set out by the State in its application for review before the High Court, except for a general denial, the appellant could not and did not specifically deny the transactions. Same is the case in this Court, where in the counter affidavit, the details of these transactions have been set out by the State and in the rejoinder filed by the appellant, there is no specific denial of these transactions or of the extents involved in those transactions. Therefore, it stands established without an iota of doubt as found by the High Court, that the appellant suppressed the fact that he had parted with almost the entire property purchased by him under the registered document through which he claimed title to the petition schedule property before the Forest Tribunal. In other words, when he claimed that he had title to 20 acres of land and the same had not vested in the State and in the alternative, he bona fide intended to cultivate the land and was cultivating that land, as a matter of fact, he did not have either title or possession over that land. The Tribunal had found that the land was a private forest and hence has vested under the Act. The Tribunal had granted relief to the appellant only based on Section 3(3) of the Act, which provided that so much extent of private forest held by an owner under a valid registered document of title executed before the appointed day and intended for cultivation by him and that does not exceed the extent of the ceiling area applicable to him under Section 82 of the Kerala Land Reforms Act, could be exempted. Therefore, unless, the appellant had title to the application schedule land and proved that he intended to cultivate that land himself, he would not have been entitled to an order under Section 3(3) of the Act. It is obvious that when he made the claim, the appellant neither had title nor possession over the land. There could not have been any intention on his part to cultivate the land with which he had already parted and of which he had no right to possession. Therefore, the appellant played a fraud on the Court by holding out that he was the title-holder of the application schedule property and he intended to cultivate the same, while procuring the order for exclusion of the application schedule lands. It was not a case of mere perjured evidence. It was

suppression of the most vital fact and the founding of a claim on a non-existent fact. It was done knowingly and deliberately, with the intention to deceive. Therefore, the finding of the High Court in the judgment under appeal that the appellant had procured the earlier order from the Forest Tribunal by playing a fraud on it, stands clearly established. It was not a case of the appellant merely putting forward a false claim or obtaining a judgment based on perjured evidence. This was a case where on a fundamental fact of entitlement to relief, he had deliberately misled the Court by suppressing vital information and putting forward a false claim, false to his knowledge, and a claim which he knew had no basis either in fact or on law. It is therefore clear that the order of the Forest Tribunal was procured by the appellant by playing a fraud and the said order is vitiated by fraud. The fact that the High Court on the earlier occasion declined to interfere either on the ground of delay in approaching it or on the ground that a Second Review was not maintainable, cannot deter a Court moved in that behalf from declaring the earlier order as vitiated by fraud."

223. The Learned Counsel for the `3rd Respondent / CAIT' cites the decision of the Hon'ble Supreme Court in United Insurance Company v. Rajendra Singh, reported in (2000) 3 SCC 581 at Spl. Page: 587, wherein at Paragraph 16, it is observed as under:

16. ``Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled

through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

224. The Learned Counsel for the `3rd Respondent / CAIT' falls back upon the decision of the Hon'ble Supreme Court in Indian Bank v. Satyam Fibres (India) Pvt. Ltd., reported in (1996) 5 SCC 550 at Spl. Page: 563, wherein at Paragraph 23, it is observed as under:

> *23.``Since fraud affects the solemnity, regularity, and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order (See: Benoy Krishna Mukerjee v. Mohanlal Goenka (AIR 1950 Cal 287), Gajanand Sha v. Dayanand Thakur (AIR 1943 Pat 127), Krishnakumar v. Jawand Singh (AIR 1947 Nag 236), Devendra Nath Sarkar v. Ram Rachpal Singh (AIR 1926 Oudh 315), Saiyed Mohd. Raza v. Ram Saroop (AIR 1929 Oudh 385 (FB), Bankey Behari Lal v. Abdul Rahman (AIR 1932 Oudh 63), Lekshmi Amma Chacki Amma v. Mammen Mammen (1955 Ker LT 459). The court has also the inherent power to set aside a sale brought about by fraud practised upon the court (Ishwar Mahton v. Sitaram Kumar (AIR 1954 Pat 450), or to set aside the order recording compromise obtained by fraud (Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh (AIR 1958 Pat 618), Tara Bai v. V.S. Krishnaswamy Rao (AIR 1985 Kant 270)."*

225. The Learned Counsel for the `3rd Respondent / CAIT' points out that in the `impugned order', findings on `Fault Statements',

`Suppression', and `Misrepresentations' were rendered by the 1st Respondent / CCI and that the `Commission' had no other option but to revoke the `Approval Order', but the `Commission' had directed the keeping in `abeyance' of the `Approval Order'.

The Competition Act, 2002:

226. The Competition Act, 2002, does not specify any qualification for a person who desires to file an information under Section 19 (1) (a) of the Act. A mere glance of the simpliciter language of Sections 18 and 19 read with 26 (1) of the Competition Act, 2002, shows that it cannot be inferred by an Homo-sapien that the 1st Respondent/CCI has the power to refuse a relief claimed from investigation into the allegations concerning the breach of Section 3 and 4 of the Act. Further, the Scheme of the Competition Act is an inquisitorial one and the 1st Respondent/CCI in appropriate case.

Agreement:

227. Section 2 (b) of the Competition Act, 2002, defines `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"*

Enterprise:

228. Section 2 (h) of the Competition Act, 2002, defines `Enterprise', meaning

> *"a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.*
>
> *Explanation.—For the purposes of this clause,—*
>
> *(a) "activity" includes profession or occupation;*
>
> *(b) "article" includes a new article and "service" includes a new service;*
>
> *(c) "unit" or "division", in relation to an enterprise, includes—*
>
> *(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;*
>
> *(ii) any branch or office established for the provision of any service;*

(i) "goods" means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—

(A) products manufactured, processed or mined;

(B) debentures, stocks and shares after allotment;

(C) in relation to goods supplied, distributed or controlled in India, goods imported into India;"

Relevant Market:

229. Section 2 (r) of the Competition Act, 2002, defines `relevant market', meaning,

> *"the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets."*

Indeed, for determining whether a market constitutes `a relevant market' for the purpose of the Competition Act, 2002, the `Competition Commission' shall have due regard to the `relevant geographic market' and `relevant product market' as per Section 19 (5) of the Competition Act. Really speaking, the `relevant market' comprises a `product' or `group of products and geographic area', which these products are produced or traded. As a matter of fact, the `term' `relevant market' is used with a view to identify the `products' and `enterprises' which are

directly competing in business. `Relevant Market' is a `market', where a `competition' takes place.

Relevant Geographic Market:

230. The `relevant geographic market' is defined in Section 2 (s) of the Competition Act, 2002, in terms of area, in which, the conditions of the Competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. In this connection, this `Tribunal' points out that it can be understood as the geographical region within which `substitutable product' can be made available at a similar price.

231. As per Section 19 (6) of the Competition Act, 2002, the factors to be taken into consideration while deciding the `relevant geographic market' include; (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services.

Relevant Product Market:

232. Section 2 (t) of the Competition Act, 2002, defines `relevant product market', meaning,

> *"a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use"*

233. In fact, the factors which may be taken in to account while deciding the `relevant product market' include (a) physical characteristics or end use of `Goods'; (b) price of `Goods' of services; (c) consumer preferences; (d) Exclusion of in-house production; (e) Existence of specialised producers.

Turnover:

234. Section 2 (y) of the Competition Act, 2002, defines `turnover', includes, *"value of sale of goods or services"*.

235. The `term' `turnover' occurring in Section 27 (b) and its proviso of the Competition Act, 2002, pertain to the `Goods', `Produces' and `Qua' which `finding of violation of Section 3 and / or Section 4 was recorded' and while imposing `penalty', the `Commission' cannot take

average turnover of last three preceding financial years' products in respect of other Goods or Services of an `Enterprise' or `Association of Enterprise' or a `Person' or `Association of Persons'.

Combination:

236. To be noted, that Section 5 of the Competition Act, 2002, sees at acquisition of control, shares, voting rights or Assets while determining if a transaction is to be notified to the Commission under Section 6 of the Act. As a matter of fact, if a particular transaction or a series of transactions falls within the purview of `Combination', it is obligatory to report the same to the Competition Commission of India, as per Section 6 of the Competition Act, 2002. In fact, the definition of `Group', relies on the understanding of `control'.

237. In terms of the `Scheme of the Act', `Enterprises' proposed to enter into `Combination' will have to notify the `Commission' before making an entry into such `Combination'.

238. In Competition Law practice, `Control' is considered as a matter of `degree'. However, all `degrees' and forms of control nevertheless constitute `control' as per decision in Telenor ASA (India) Communications Pvt Ltd and Telenor South Asia Investments Pte Ltd

(decided on 03.07.2018). Further, it is pointed out that the definition of `control' is not `indicative of any right', which if present, may `confer' `control'.

239. It is to be pointed out that the `Combination Regulations', 2011, have clarified that any `reference' to `combination' shall mean a `Proposed Combination' shall mean `combination' or `combined entity', if the `combination' has come in to effect, as the case may be. Further, `parties to the combination', mean `persons' or `enterprises' entering in to a `combination' and shall include the `combined entity' if the `combination' come in to effect.

240. The `term' `Merger' or `Amalgamation' is not defined under the Competition Act, 2002. The word `Amalgamation' has no definite meaning. In Halsbury's Law of England, `Amalgamation' is defined as `blending of two or more existing `Undertakings' into `one Undertaking' the `Shareholders' of each blending company become substantially the `Shareholders' in the company, which is to carry on the blended undertaking.

241. That apart, `Amalgamation' contemplates a `state of things' under which two companies are so joined as to form a `third entity' or `one

company' is absorbed into and blended with `another company', vide Re Walker's Settlement (1935) 1 Ch 567.

242. The task of `Merger' bringing under unified control over the `enterprises' that was previously independent and this is accomplished either through `Acquisition' of `stock' or through `purchase of physical Assets'.

Regulation of Combination (Section 6 of The Competition Act, 2002):

243. It is pointed out that the `Competition Assessment' of a `Combination' in words of two `counter factual market scenarios', Viz. with or without `Combination'. In fact, the `Commission' considers the relevant factors mentioned in Section 20 (4) of the Competition Act, 2002, which among other things includes `market share of the parties to the Combination', `entry barriers', `extent of vertical integration' and `economic strength of parties' and `determines the effect of `Proposed Combination' on `Competition' in `relevant market'.

244. It is significantly pointed out that `Regulation 9 of the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011', pertains to an `obligation'

to file the `Notice'. In fact, Regulation 9 (1) of the Combination Regulations proceeds as under:

> ``***9. Obligation to file the notice.*** –
>
> *(1) In case of an acquisition or acquiring of control of enterprise(s), the acquirer shall file the notice in Form I or Form II, as the case may be, which shall be duly signed by the person(s) as specified under regulation 11 of the Competition Commission of India (General) Regulations, 2009.*
>
> *Provided that in case of a company, apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009, Form I or Form II may also be signed by [any person duly authorised by the (Company)].*
>
> *(2) In case the enterprise is being acquired without its consent, the acquirer shall furnish such information as is available to him, in Form I or Form II, as the case may be, relating to the enterprise being acquired:*
>
> *Provided that all information required to be filed, relating to the enterprise being acquired shall be filed with the Commission within fifteen days from filing of the notice and in case the acquirer is not in a position to furnish all the required information in Form I or Form II, as the case may be, relating to the enterprise being acquired, the Commission may direct the enterprise being acquired to furnish such information as it deems fit and the time taken by the parties to the combination or the acquired enterprise, as the case may be, in furnishing the required information including document(s) shall be excluded from the period provided in [sub-section (2A) of section 6 of the Act,] sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.*
>
> *(3) In case of a merger or an amalgamation, parties to the combination shall jointly file the notice in Form I or Form II, as*

the case may be, duly signed by the person(s) as specified under regulation 11 of the Competition Commission of India (General) Regulations, 2009.

Provided that in case of a company, apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009, Form I or Form II may also be signed by [any person duly authorised by the Company].

(4) Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination, a single notice, covering all these transactions, [shall be filed by the parties] to the combination.

(5) The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded."

245. If the parties to a `Combination' failed to file `Notice' under sub-section (2) of Section 6 of the Competition Act, 2002, the `Commission' may under sub-section (1) of Section 20 of the Act, upon its own knowledge or information relating to such `Combination' inquire into which such a `Combination' has caused or is likely to cause an `Appreciable', `Adverse' effect on `Competition' in India.

246. Furthermore, the `Notice' of `Proposed Combination' under Section 6 (2) of the Competition Act, 2002, is to be given prior to

`consummation of Combination'. As a matter of fact, Ex Post Facto `Notice' is not envisaged as per Section 6 (2) of the Competition Act, 2002. It is important that the Competition Commission of India receives prior Ex ante Notification of `Proposed Combination' in order for it, to effectively prevent ante-competitive `Acquisitions' and `Mergers'.

Inserted Regulation:

247. The newly inserted Regulation 16A (1) enjoins the parties to the `Combination' to withdraw and refile the `Notice' (either filed voluntarily or under CCI's directions) with permission of the `Commission' before the issuance of `Show Cause Notice' under Section 29 (1) of the Competition Act, 2002. By virtue of this amendment, the parties can address the material defects / deficiencies in `Notice' without facing an invalidation by the `Commission'.

248. Dealing with `Notice' to the `Combination' as per Section 6 (3) of the Competition Act, 2002, once mandatory `Notice' is given under Section 6 (2) of the Competition Act, 2002, the Competition Commission of India is to deal with the same as per provisions of Section 29, 30 & 31 of the Competition Act, 2002.

249. Added further, the `prepayment of consideration in part' or `full amounts' to `consummation of a part of a Combination' and `amounts to violation of an obligation' contained in `Section 6 (2) read with Section 6 (2-A) of the Competition Act, 2002. Indeed, the Competition Commission of India may `suo moto' issued a `Show Cause Notice' to the `Parties' to its `Combination' under Section 29 of the Act for an `investigation of Combination'. In this connection, it is not out of place for this `Tribunal' to make a pertinent mention that if the `Commission' deems it necessary to provide an `opportunity of being heard to the Parties' to the `Combination' before deciding to deal with the case in accordance with the provisions contained in Section 31 of the Competition Act, 2002, the `Secretary' shall convey its `directions' to the said `Parties' to `appear' before it by giving a `Notice' of such period as directed by the `Commission' [vide Competition Commission of India (procedure in regard to the transaction of business relating to Combinations) Regulations, 2011)]. After the enquiry, the `Competition Commission' may `approve' the `pro-combination' or may `propose modification' to the `Combination' (known as `Remedies') or may `opine' that the `Proposed Combination' be not given effect to.

250. It is to be remembered that the `Competition Commission of India' may pass an `Order' for `Approval', where the Commission is of the opinion that the `Combination' does not or is not likely to have an `AAEC'. Besides this, the Competition Commission of India is likely to approve `Combination' where there is no horizontal or vertical overlap or even there is an overlap, there is either an insignificant overlap or the market is fragmented to contain `multiple prominent players' and the `combined market share' of the `Proposed Combination' is insignificant.

Duties of 1st Respondent/Competition Commission:

251. The aim of 1st Respondent/CCI is the Institution of a system of undistorted competition which is commensurate to the promotion of the interest of the Consumers. Further the exercise of power as per Section 18 of the Competition Act, 2002, is subject to the other provisions of the Competition Act, 2002. In fact, the preamble of the Competition Act, 2002 and Section 18 of the Competition Act, 2002, mandates the `Commission' to `protect the Consumers interest and to ensure that the Consumers surplus is not adversely impacted'.

Purview of Section 19 of the Competition Act, 2002:

252. It must be borne in mind that as per the Scheme of the Competition Act, 2002, it is not obligatory that there must be an `Informant' to initiate an `inquiry' for an `investigation' the `Commission' can proceed even `suo moto' on any reference being made by the Central Government or State Government or any Statutory Authority. Suffice it for this `Tribunal' to point out that the facts and allegations mentioned / highlighted in the `Information' the `Competition Commission of India' is more concerned with the fair functioning of the `market' and the motive with which the `Informant' has approached the `Commission' is subservient to that purpose.

253. The 1st Respondent/CCI can take `suo moto cognisance' of the case based on an anonymous complaint. But the Commission must be satisfied that there exists a prima facie case for ordering into the allegation of violation of Section 3 (1) or Section 4 (1) of the Act. Also that, the 1st Respondent/CCI may take cognisance of the Reports appearing in `Print' or `Electronic Media' or `Anonymous Complaint' / `Representation' suggesting a Breach of Section 3 and 4 of the Act, and issue direction for an investigation under Section 26 (1) of the Act, 2002.

254. In a given case, the Commission may not act upon information filed under Section 19 (1) (a) of the Competition Act, 2002, but may `suo moto' take cognisance of facts constituting violation of Section 3 (1) or Section 3 (4) of the Act, 2002 and direct an investigation.

255. It is to be pointed out that Section 19 of the Competition Act, 2002, originally stated that `receipt of complaint' from any person, consumer or their association or trade association. In fact, the expression `receipt of a complaint' (with effect from 20.05.2009 was substituted by Act 39 of the 2007) with an expression `receipt of any information' in such manner, by virtue of amendment brought in 2007. In fact, Regulation 10 of Competition Commission of India (General) Regulations, 2009, does not require an informant to state how he is personally aggrieved by violation of the Competition Act. As per Regulation 25 of the Competition Commission of India (General) Regulations, 2009. The public interest must be foremost in the consideration of the `Commission' when an `Application' is made in writing. A reading of Section 35 of the Competition Act, 2002, in which an earlier term `complainant' or `defendant' was substituted by the expression `person' or `an Enterprise'.

Inquiry into `Combination':

256. Section 20 (4) of the Competition Act, 2002, prescribes factors that 1st Respondent/CCI will take into account to decide whether a `Combination' will have or is likely to have `AAEC' in relevant market.

Procedure for Investigation of `Combinations':

257. Section 29 of the Competition Act, 2002, lays down a detailed procedure for an investigation of `Combination' if the `Commission' is of the opinion that any `Combination' is likely to cause, or has caused an Appreciable Adverse Effect on Competition within the relevant market in India. Also that, Section 29 of the Competition Act, 2002, prescribes a time bound procedure for an `Investigation' of `Combinations'. Further, the 137 days does not cover the time taken by the `Director General' in submitting his report or the `Competition Commission' for hearing the matter orally, if necessary, and passing `appropriate orders'.

258. It is up to the `Competition Commission of India' after considering the facts on records, details provided in `Notice' and `Responses' filed by the `Parties' may form a prima facie opinion that the `Proposed Combination' is likely to cause an Appreciable Adverse Effect within `relevant market' in India.

Procedure in case of `Notice' under Section 6 (2):

259. Section 30 of the Competition Act, 2002, envisages that `where any `Person' or `Enterprise' has given a `Notice' under `Section 6 (2) of the Act', the `Commission' shall examine such `Notice' and form its prima facie opinion as mentioned in sub-section 1 of Section 29 and proceed as per provisions contained in that Section.

Orders of `Commission' on certain `Combinations':

260. Section 31 (2) of the Competition Act, 2002, enjoins that where the `Commission' is of the opinion that the `Combination' has, or is likely to have, an Appreciable Adverse Effect on Competition, it shall direct that the `Combination' shall not take effect.

261. Section 31 (3) of the Competition Act, 2002, points out that, if the `Commission' approves the `Combination' with modification, the Commission's order approving the `Combination' shall specify that terms and conditions and the time for all `Constituent activities' giving effect to the `Proposed Combination' and shall call for a `Compliance Report'.

Imposition of `Penalty:

262. Section 43A of the Competition Act, 2002, speaks of the power of the `Commission' to levy penalty for non-furnishing of information and the `penalty' shall be imposed by the `Competition Commission' upon any `Person' or `Enterprise' who had failed to issue `Notice' to the `Commission' as per Section 6 (2) of the Act, extending to 1% of the total turnover or the assets, whichever is higher of such `Combination'.

Penalty for making false statement, etc.:

263. Section 44 of the Competition Act, 2002, deals with the aspect of penalty being imposed upon any `Person' being a party to a `Combination' for making `false statements' or `omission' to furnish `material information' and such penalty shall not be less than rupees fifty lakh, but it may extend to rupees one crore, as may be determined by the `Commission'.

Penalty for offences in relation to furnishing of information:

264. Section 45 of the Competition Act, 2002, relates to the `penalty when a person furnishes or is required to furnish any particulars, documents or information makes any statement or furnishes any

document which he knows or has reason to believe to be false in any material particular or omits to state any material fact knowing it to be material, etc., and such person shall be punishable with fine which may extend to rupees one crore as may be determined by the `Commission'.

265. This `Appellate Tribunal' has heard the Learned Senior Counsels, the Learned Counsels and the Learned Additional Solicitor General, appearing for the respective `Parties' and noticed their contentions.

<u>Appraisal in Competition Appeal (AT) No. 1 of 2022:</u>

266. At the outset this `Tribunal', points out that the `1st Respondent/Competition Commission of India' had received a `Notice', on 23.09.2019 in terms of Section 6 (2) of the Competition Act, 2002, filed by the `Appellant'/`Amazon.com NV Investment Holdings LLC' (`Amazon/Acquirer') and this `Notice' was filed in carrying out the execution of `Share Subscription Agreement' (`SSA') and `Shareholders Agreement' (`SHA') both dated 22.08.2019. Furthermore, these `Agreements' were entered into `Entities', the `Appellant' (`Amazon.com NV Investment Holdings LLC'), `Future Coupons Private Limited' (`FCL / Target') and the Promoters of `FCL').

267. It comes to be known that under `Part V' `Description of the `Combination' of the `Notice' dated 23.09.2019, the `Combination' informed by the `Appellant'/`Amazon' encompassed the three following transactions', which are to the undermentioned effect:

> *"Transaction I: The issue of Nine Million one Hundred and Eighty Three Thousand Seven Hundred and Fifty-Four (9,183,754) Class A voting equity shares of FCPL to Future Coupons Resources Private Limited (**FCRPL**). Prior to, and immediately post issuance of such equity shares, FCPL will be a wholly owned subsidiary of FCRPL; and*
>
> *Transaction II: The transfer of Thirteen Million Six Hundred and Sixty Six Thousand Two Hundred and Eighty Seven (13,666,287) shares of FRL held by FCRPL (representing Two decimal Five Two Percent (2.52%) of the issued, subscribed and paid-up equity share capital of Future Retail Limited (**FRL**), on a Fully Diluted Basis) to FCPL; and*
>
> *Transaction III: The acquisition of the Subscription Shares representing Forty Nine percent (49%) of the total issued, subscribed and paid-up equity share capital of FCPL (on a Fully Diluted Basis) by Amazon, by way of a preferential allotment."*

268. At this juncture, this `Tribunal' relevantly points out that in the `Notice' of `Amazon' dated 23.09.2019, it was mentioned that the obligation of `Appellant' / `Amazon.com NV Investment Holdings LLC' was depending upon the accomplishment of Transaction I and II. Continuing further, it was made mention of that neither the Transaction I

nor Transaction II was to be notified to the `1st Respondent / CCI' on a standalone basis being visualised concerning a parent and its subsidiary. In respect of Transaction III, it was mentioned that (on a standalone basis) benefits from `target exemption' was below the verge specified for such commitment, in view of the fact that the `Value of Assets' and `Turnover' of `FCPL / 2nd Respondent' as on 31.03.2019. Besides these, the `Appellant' had mentioned that in the event of the `1st Respondent/CCI' pondering that the `Combination' to be notifiable, the `Appellant' will notify the `Combination' as per Section 6 (2) of the Competition Act, 2002, read with Regulation 9 (4) of the Competition Commission of India (procedure in regard to the transaction of business relating to Combination) Regulations, 2011.

269. It cannot be gainsaid that in the `Notice' of the `Appellant' dated 23.09.2019 as per Section 6 (2) of the Act in Form I of Schedule II of the Competition Commission of India (Procedure in regard to the transaction of business relating to Combination) Regulations, 2011. The `Appellant' had mentioned that the parties had entered into `FCPL SSA' and `FCPL SHA' as regards the `Combination'.

270. According to the `Appellant'/`Amazon' the `rights' proposed to be acquired by the `Investor' in terms of `SHA' to protect its investment in `FCL' is mentioned in Table 3 in brief, which runs as under:

Sr.No.	***Reference to the SHA***	***Subject matter of the right acquired***	***Brief Description of the required right***
i.	*Section 6.2.1 read with Section 6.2.2 and Section 6.2.3; Section 6.8(vii); Section 6.9(i); Section 6.11 and Section 6.12*	*Appointments to the board of directors of FCL ("Board") quorum and other associated rights.*	*The Board will comprise of five(5) directors, out of which two (2) will be nominated and appointed by the Investor (each such director, an "Investor Director"), as long as the Investor holds Forty Nine percent (49%) of the equity share capital of FCL. In case of a change in the shareholding of FCL, if the Investor holds less than forty nine percent (49%) of the equity share capital, but at least twenty five percent (25%) of the equity share capital of FCL, it will have the right to nominate one (1) Investor Director to the Board. A meeting of the Board can be called on a shorter notice only if the same has been consented to by at least one (1) Investor Director and at least one (1) director nominated by the Promoters. If a meeting of the Board involves an Investor Protective Matter (as defined in the SHA), no business in respect of such Investor Protective Matter may be conducted without the presence and participation of at least one (1) Investor Director.*
ii.	*Section 6.22*	*Right to request appointment of an observer to the board of directors of any Material Entity (as defined in the SHA).*	*The Investor may request FCL to appoint an Investor Director as an observer on the board of the Material Entities who may attend (but not vote in) board proceedings, receive all information that is provided to the members of the*

			board of all Material Entities (as defined in the SHA).
iii.	*Section 8 read with Schedule IX and X*	*Consideration of Investor Protective matters (as defined in the SHA) and Investor Protective Notice Matters (as defined in the SHA)*	*Items identified in Schedule IX and Schedule X have a direct bearing on Investor's investment in as FCL. Accordingly, items identified in the Schedule IX can only be considered and by FCL's Board or a committee thereof:* *(a) after procuring a prior written consent from the Investor; or* *(b) if at least one (1) Investor Director is present and has voted in favour of such an item.* *Items Identified in Schedule X can only be considered by FCL's Board or shareholders if a prior notice of at least fifteen (15) business days has been served to the Investor and the Investor Directors.*
iv.	*Section 9*	*Reporting Information and Access Rights*	*The Investor has the right to seek and examine financial reports and other books and records maintained by FCL, and its subsidiaries.*
v.	*Section 13*	*Consent and compliance in relation to Material Entity matters.*	<u>*Prior written consent from the Investor would be required before:*</u> *(a) FCL decides implements any on or matter under the FRL SHA which requires FCL's consent;* *(b) FCL decides to decline, recuse itself, or not subscribe to its pro-rata entitlement in relation to issuance of securities by a Material Entity;* *(c) Any updates to the list of "Restricted Persons" and its communication to FRL under the FRL SHA; and* *(d) Assignment of the rights and obligations of FCL and the Promoters (as defined in the SHA) under the FRL SHA.*
vi.	*Section 14*	*Transfer of Retail Assets (as defined in the SHA)*	*FCL and the Promoters have agreed not to undertake any sale, divestment, transfer, disposal, etc. of retail outlets across various formats operated by FRL (which is*

			an integral part of the business conducted by FRL) except as mutually agreed (in writing) between the Promoters and the Investor, or contained in the FRL SHA or any commercial agreement between a Material Entity (as defined in the SHA) and an affiliate of the Investor. FCL and the Promoters have also agreed not to transfer, encumber, divest or dispose of these retail Assets (as defined in the SHA), directly or indirectly, in favour of a mutually agreed list of Restricted Persons (as defined in the SHA)

271. Further, the `Appellant'/`Amazon' in the `Notification' dated 23.09.2019 (Form I) in Table 4, under the caption `Milestones to the Proposed Combination' had mentioned as under:

Milestone	***Date***
Execution of the SSA amongst the Investor, Promoters and FCL in relation to the acquisition of the Subscription Shares	*August 22, 2019*
Execution of SHA amongst the Investor, Promoters and FCL	*August 22, 2019*

272. Moreover, the `Appellant'/`Amazon' had stated that the Proposed Transaction I and Proposed Transaction II are conditions precedent to Proposed Transaction III. Therefore, after receipt of the approval of the Hon'ble Commission, in order to effectuate Proposed Transaction III, the Promoter Group will carry out Proposed Transaction I and Proposed

Transaction II. Under the SSA, the Long Stop Date is 180 days from the date of execution, i.e., 18 February 2020 (or such date as may be mutually agreed between the parties (Section 5.1 of the SSA).

273. Indeed, the `Appellant' / `Amazon' in the `Notification' dated 23.09.2019 (Form I) under the subject `Economic and strategic purpose (including business objectives and rationale for each of the parties to the combination and the manner in which they are intended to be achieved) of the combination, had described the following:

> *"**Rationale for FCRPL:***
>
> *FCRPL, being the parent entity of FCL and a part of the Promoter Group, has invited the Investor to invest in FCL with a view to strengthen and augment the business of FCL.*
>
> ***Rationale for FCL:***
>
> *FCL is currently engaged in the business of inter alia marketing and distribution of corporate gift cards, loyalty cards and reward cards to corporate customers. The Promoters have invited the Investor to invest in FCL with a view to strengthen and augment the business of FCL. FCL believes that the Proposed Combination will provide an opportunity to FCL to learn global trends in digital payments solutions and launch new products and usage of in-built payment mechanisms can lead to acquisition of customers base and increased loyalty.*

Rationale for the Investor:

The Investor believes that FCL holds a potential for long term value creation and providing returns on its investment. The Investor has decided to invest in FCL with a view to strengthen and augment the business of FCL (including the marketing and distribution of loyalty cards, corporate gift cards and reward cards to corporate customers) and unlock the value in the company."

274. In fact, in the Notification dated 23.09.2019 (Form-I) under the Caption `Non-compete obligation, if any: Duration, scope in terms of persons, product(s) / service(s) and territory(ies) and corresponding justification', the `Appellant'/`Amazon' had mentioned the following at paragraph 34 :

`` The Parties have only executed the SSA and the SHA in relation to the Proposed Combination. It is submitted that neither the SSA, nor the SHA contain any noncompetition covenants (vide Page 43 of Convenience Compilation II (Vol.I - of `1st Respondent/CCI')."

275. Apart from the above, while responding to queries No. 6 & 7, the Appellant had furnished the details of the Parties to the `Combination' and gave a brief description being undertaken by the Parties concerned. The Appellant had also described the relevant market (The product and geographic market) along with a brief description of retail market in India (vide pages 44-108 of Convenience Compilation – II (Vol.I) of `1st Respondent/CCI').

276. It transpires that the `Appellant'/`Amazon' had provided a presentation `Taj Coupons' – `Business Plan' for five years (while responding Item 8.8 of Form-I) under the Head `Document material (including reports, studies, plan, latest version of other documents), etc. considered by and/or presented to the board of directors and/or key managerial person of the parties to the combination and/or their relevant group entities, in relation to the proposed combination'.

277. Also that, at Annexure 30 `Summary of the `Proposed Combination' in terms of Regulation 13(1A) of Competition Commission of India (Procedure in regard to transaction of business relating to Combinations) Regulations, 2011 as amended by the Competition Commission of India (Procedure in regard to transaction of business relating to combinations) Amendment Regulations, 2019 [vide Pgs 217-218 of 1st Respondent/CCI's Convenience Compilation-II (Vol.1)] under the caption `B' – The nature and purpose of Combination at S.No.5, it is mentioned as under:

> *"The Investor believes that FCL holds a potential for long term value creation and providing returns on its investment. The Investor has decided to invest in FCL with a view to strengthen and augment FCL's business relating to marketing and distribution of corporate gifts cards."*

278. The `1st Respondent/CCI' as per Regulation 14 – `Scrutiny of Notice' of the Competition Commission of India (Procedure in regard to the transaction of business, etc.) Regulations, 2011, had addressed the communications dated 09.10.2019 and 24.10.2019 to the `Appellant'/`Amazon' to delete specified information disparity in the `Notice'.

279. The `Appellant'/`Amazon' in its `Reply'/`Response' dated 15.11.2019 (To the Query No.2.13(c) raised by the `1st Respondent/CCI' in its Letter dated 09.10.2019, (vide 1st Respondent/CCI's Convenience Compilation, Page 288 (Part II) at paragraph 53) Viz., "According to media articles and statements of Mr. Kishore Biyani, the investment by Amazon is strategic to become a part of the ecosystem. Please elaborate" had mentioned the following:

> *53. "….. it is submitted that the Proposed Combination will enable the Parties to (i) enhance Investor's existing portfolio of investments in the payments landscape in India; (ii) provide an opportunity to FCL to learn global trends in digital payments solutions and launch new and innovative product offerings; and (iii) offer innovative payments solutions to entities so as to enhance consumer convenience and user experience"*

280. To the Query No. 2.5 of the letter dated 24.10.2019 raised by the `1st Respondent/CCI' addressed to the `Appellant'/`Amazon' to the effect "As per the notice, Acquirer will get certain rights over the FRL. You are

required to provide details of shareholding (directly/indirectly), affirmative rights/veto rights/rights not available with ordinary shareholders in FRL or rights with respect to FRL being acquired by Amazon and strategic and or economic rationale for such rights.”, the `Appellant’/`Amazon’ had submitted its `Response’ dated 15.11.2019 mentioning that;

> *(1) “the unique business model of FCPL addresses an existing gap in the payments landscape in India, thereby making it a strong and sound investment opportunity for Amazon (which holds similar existing investments in entities engaged in business activities within the payments market in India), and*
> *(2) while FCPL has a strong growth potential, in the short term, to add credibility to its financial position, it has invested in and proposes to invest in FRL, which is a publicly traded company with strong financials and futuristic outlook.”*

281. To put it precisely, the `Appellant’/`Amazon’ had mentioned that it does not have any direct or indirect shareholding in `FRL’ and further it would not acquire directly any rights in `FRL’ and also claimed that `Commercial Arrangements’ were not entered into pursuant to the `Combination’ and were not part of, or connected with the `Combination’ in any manner whatsoever. Moreover, the `Appellant’/`Amazon’ stated that `Commercial Arrangements’ need not be examined under the framework of the Regulation of Combinations as per the Competition Act and Combinations Regulations.

282. Viewed in this background, the `1st Respondent/CCI' had issued the `Approval Order' on 28.11.2019 as per Section 31 (1) of the Competition Act based on the `Competition Assessment' of the overlapping business activities of `Amazon', `FCPL' and their `group entities' and after arriving at the opinion that the `Combination' is not likely to cause any appreciable adverse effect on `competition' in India. In fact, the `1st Respondent/CCI' had left the exact `relevant market definition' being left open.

283. It is evident that the `2nd Respondent/FCPL' (in Comptn. App (AT) No. 1 of 2022) had addressed a Letter dated 25.03.2021 to the `Secretary of the 1st Respondent/CCI', averring among other things to the following effect beginning from paragraphs 8 to 19 (vide Pages 1377 to 1382 - Vol.VI of Convenience Compilation of the `Appellant'/`Amazon'):

> *8.``As explained hereinafter, Amazon has now made it apparent that the real transaction was not the investment in FCPL. Instead the real intention of Amazon in entering into this transaction was, from its perspective, the creation of a set of contractual rights, which it could manipulate to ensure that FRL does not enter into any transactions with Amazon's competitors. The two main pillars of Amazons complaint now are that;*
>
> > *a. Amazon invested Rs. 1400 crores in FCPL, the real object of which was fund FRL, and*
> >
> > *b. Amazon through the maze of agreements obtained a contractual right to prevent FRL from doing business with Amazon's competitors.*

9. If this intent – viz. to invest Rs.1431 crores primarily to obtain a call option in case of change in regulation, and until then to prevent FRL from entering into a contract with Amazon's competitors- was disclosed to the CCI, it is highly unlikely that the CCI would have allowed the transaction.

*10. Amazon instituted proceedings before the Emergency Arbitrator under the Rules of the Singapore International Arbitration Centre ("**SIAC**") against FCL, FRL and the promoters of FRL alleging, inter alia, that the Scheme is in breach of the respective obligations of FCL, FRL and the promoters of FRL under the FRL SHA, FCPL SHA and FCPL SSA. The proceedings have been instituted on the basis, inter alia;*

(i) That the foundation of the relationship between Amazon and the promoters of FRL "was and remains the special and material sights available with FCPL with respect to FRL's business and its Retail Assets". Amazon's investment in FCPL was made on the "express understanding" that it would have rights in FRL.

(ii) Amazon's investment was made on the "primary inducement" that it will have special and material rights in FRL.
[NOTE: (i) and (ii) are directly contrary to the statement of Amazon before the Hon'ble Commission that its investment is in the gift card business of FCPL and not the retail assets of FRL, and that its rights over FRL are only intended to protect its investment in FCPL]

(iii) The FCPL SHA, FCPL SSA and FRL SHA, constitute a "single integrated transaction" and the interplay amongst the three agreements demonstrates the "unequivocal intention and interest of the parties was to have one integrated understanding".
[NOTE: This is ex facie contrary to Amazon's statement before the Hon'ble Commission that the negotiation of the

FRL SHA by FCPL, FRL and its promoters was independent of the Investment by Amazon in FCL]

(iv) Amazon's Investment in FRL (indirectly) is permitted under the extant FDI regulations.
[NOTE: Any investment by a foreign entity in the MBRT sector is prohibited under the FDI Regulations. Amazon submitted to the Hon'ble Commission that it was not investment in the retail assets of FRL as it was prohibited from doing so under the FDI Regulations and therefore, FRL's business would not constitute a "relevant market". Amazon's submission now is contrary to that submitted to the Hon'ble Commission].

A copy of the application filed by Amazon before the Emergency Arbitration (without the annexures thereto) is annexed hereto as Annexure "6". On the basis of these submissions, the Emergency Arbitrator passed an order dated 25.10.2020 restraining FRL and its promoters from pursuing the Scheme. A copy of the order dated 25.10.2020 passed by the Emergency Arbitrator is annexed hereto as Annexure "7".

11. Various proceedings have been instituted by, against and between Amazon and FRL before the SIAC, Hon'ble Delhi High Court, the NCLT and the Hon'ble Supreme Court wherein, Amazon has continually reiterated its submissions set out hereinabove.

12. A perusal of the various submissions made by Amazon before the Hon'ble Commission on the one hand and the SIAC and Indian Courts establishes that Amazon has made misleading representations as to its intentions when it sought the permission of the CCI. A chart setting out the various submissions before the Hon'ble Commission and each of the Courts and arbitral tribunal is annexed hereto as Annexure "8".

13. The contrast and contradiction in the stand of Amazon before the Hon'ble Commission and the Emergency Arbitrator (whose decision according to Amazon is an order of a Court) is further perpetuated by Amazon's attempts to exercise of control over FRL on the basis that the agreements FCPL SSA, FCPL SHA and FRL SHA have to be read together as a single integrated transaction. The Delhi High Court on 21.12.2020 ruled that if the agreements are read together, Amazon acquires control over FRL and the transaction becomes illegal falling foul of FEMA FDI Rules. This is the reason that Amazon represented to the Hon'ble Commission that the FRL SHA was "independently" negotiated and Amazon does not exercise any control or influence over FRL. It is now evident that this representation was false.

14. As brought out above, Amazon has now taken a categorical position in the proceedings before the Emergency Arbitrator and the constitutional courts in India that its indirect rights over FRL are strategic and material in nature. Such intent of Amazon to have strategic and material influence over FRL was not disclosed to the Hon'ble Commission in the notice filed under Section 6(2) of the Competition Act. Rather, Amazon had represented before the Hon'ble Commission that the said rights are only for the limited purpose of investor protection. Had Amazon made the correct representation to the Hon'ble Commission that it had strategic and material interests over FRL and that the agreements have to be read together (as against the representation that FRL SHA was independent of the investment made by Amazon in FCPL), the Hon'ble Commission would have perhaps not acted on the Notice (filed as a Form I), and as a responsible regulator, would have forwarded the reply and the copy of the agreements to DIPP and Enforcement Directorate for necessary action.

15. In the proceedings before the Emergency Arbitrator and the constitutional courts in India, Amazon has not claimed that its rights under the agreements to restrain the transfer of the Retail Assets of FRL are sought to be exercised to protect its investment

in FCPL. Instead, it has made a brazen admission, in complete disdain to the representations made before the Hon'ble Commission, that its rights qua the Retail Assets of FRL are strategic and material in nature. These representations before the arbitrator and the constitutional courts bring out that Amazon does not consider the sale of FRL's assets to RRVL to result in any diminution of the value of investment made into FCPL, a case which could perhaps warrant exercise of Amazon's rights for investor protection. On the contrary, the rights were sought to be exercised for strategic commercial reasons to foster the business interest of Amazon, at the cost of exit of FRL and loss to the shareholders of FRL and FCPL. In simple terms, Amazon is now exercising rights to protect its business interest and not to protect its investment as a shareholder as no such occasion has arisen. If Amazon had intended to use the indirect rights over FRL to protect or secure its market position/business in an anticompetitive manner or otherwise, instead of such rights being used only for protecting the value of its investment in FCPL, such intent is a material fact which should have been disclosed to CCI. Such intent / basis of the FCPL transaction would have led to a different understanding of the nature and scope of the proposed combination and accordingly, would have had a material impact on the competition assessment fundamentals.

16. If one knowingly portrays a strategic intent as a mere investor protection rights whereas its real intention in entering into an arrangement is to acquire control over another entity, it constitutes a false representation and a suppression of material facts.

17. Further, Amazon is seeking to perpetrate and enforce anti-competitive conduct by seeking to restrain the Scheme on the basis of these purported strategic rights. Amazon knows fully well that (i) it cannot invest and acquire shares in FRL and take it out of bankruptcy; (ii) Amazon wants FRL to go into bankruptcy to

secure its strategic interest by curtailing the growth of entities which Amazon considers to be its competitors.

18. A party seeking any approval of a combination must provide a declaration vide Form I of the Combination Regulation that all the information provided to the Hon'ble Commission is "true, correct and complete to the best of its knowledge" and that it is aware of the provisions of Sections 44 and 45 of the Competition Act. Sections 44 and 45 of the Competition Act provide for strict penalties for the making of any false statement or submission of any false information. Amazon has provided such a declaration by way of its Notice."

19. This Hon'ble Commission has taken a consistent view that any submission of false information to the Hon'ble Commission would attract the penalties provided under Sections 44 and 45 of the Competition Act. In Ultratech (Order dated 12.03.2018), the Hon'ble Commission stated;

12.1``S. 44 SCN issued to UltraTech relates to omission to file material information and making an incorrect statement in the Notice. <u>The parties to a combination are required to provide complete and correct information on all the aspects asked for in the designated form for filing of notice. The competition assessment undertaken and consequent decision of the Commission is primarily based on the information provided in the notice</u>. Once the Commission has passed an order, it has no control on the subsequent consummation or non-consummation of a transaction <u>and may only be left with the option of revoking the decision in the event it comes to know that the information was either incomplete or incorrect ……"</u> (Emphasis supplied)

and finally prayed for necessary action being taken against the `Appellant'/`Amazon' for the commission of offences under Section 44

and 45 of the Competition Act, 2002, read with paragraph 16 of the Order dated 28.11.2019 passed by the 1st Respondent/CCI in Combination Registration C/2019/09/688, including the revocation of `Approval' granted to the `Combination':

284. It is to be pointed out that the `1st Respondent/CCI' in its meeting dated 17.05.2021 had considered the `Letter / Communication' of the `2nd Respondent/FCPL' dated 25.03.2021 and after taking note of some of the contradictory statements made by the `Appellant'/`Amazon' before the `1st Respondent/CCI' vis-à-vis `Arbitrator' (Application for Emergency Relief under the `Arbitration Rules' of the `Singapore International Arbitration Centre' – `Annexure 6' to the Application), etc., came to the prima facie view on 04.06.2021 at paragraphs 6.1 and 6.2 of its `Show Cause Notice' by making the following observations:

> *6.1``Amazon had represented before the Commission that FRL SHA was independent of the combination i.e., acquisition of 49% shareholding in FCPL by Amazon. However, it has now been brought to the notice of the Commission that Amazon has claimed before the arbitrator that FRL SHA is an integrated part of the combination. This factual aspect of the combination was not made known to the Commission. Rather, the submissions before the Commission presented a different factual scenario that the combination does not include FRL SHA; and the acquisition of 49% shareholding in FCPL by Amazon and FRL SHA were independent of each other. Amazon ought to have identified and notified FRL SHA as a part of the combination, in terms of Regulation 9(4) and Regulation 9(5) of the Combination*

Regulations. It is further apparent that the representations and conduct of Amazon before the Commission amount to misrepresentation, making false statement and suppression or/and concealment of material facts in relation to the scope of the combination for which approval of the Commission was sought and taken.

6.2. Amazon has concealed its strategic interest over FRL, which it now claims to be arising from the rights that were represented as mere investor protection. Such interest and the purpose of the combination (as has been claimed before the arbitrator) was not disclosed to the Commission despite specific requirements in Form I and the additional information sought from Amazon. Besides non-disclosure, false and incorrect representations have also been made in relation to the scope of the combination particularly the FRL SHA and the purpose of the combination."

285. The `Appellant'/`Amazon' furnished its `Response' on 28.07.2021 to the `Notice' dated 04.06.2021 issued by the `1st Respondent/CCI' [under Section 43A, 44 and 45 of the Competition Act, 2002 and paragraph 16 of the Order dated 28.11.2019 (vide Combination Registration No.C-2019/09/688 r/w. Regulation 48 of the Competition Commission of India (General), Regulations 2009)], stating among other things that the FCPL's complaint seek to invoke the `Statutory Powers' of the `1st Respondent/CCI' and further that the said complaint is in a negation to Section 42A of the `Arbitration and Conciliation Act, 1996' (pertaining to confidentiality of the `Arbitration Proceedings') and Sections 24 and 25.2.7 of the Shareholders Agreement dated 22.08.2019

(`FCPL SHA') which enables the `parties' to keep all information relating to disputes confidential.

286. According to the `Appellant'/`Amazon', the 2nd Respondent/FCPL's complaint discloses aspects of `Arbitration Proceedings', with a view to scuttle the `Emergency Arbitrator's Order'.

287. Furthermore, the `FRL' was never kept out of the radar of consideration before the `1st Respondent/CCI'. It is the stand of the `Appellant/Amazon' that although the investment was made into the `2nd Respondent/FCPL', it was evident that the proceeds of investment were to be utilised by `FCPL' to pay the remaining consideration for the `warrants' issued by the `FRL' to `FCPL' (`warrant transactions'). As a matter of fact, according to the `Appellant/Amazon', it was disclosed in the `Notification' that the rights granted to the `Investor', in terms of `FCPL SHA' were derived from `FRL SHA' to protect the `interest' of the `Investor'. Apart from that, the `effective date' as defined in the `FRL SHA' makes it clear that the `FRL SHA' would come into effect only after receipt of the `1st Respondent/CCI's approval'.

288. It is represented on behalf of the `Appellant/Amazon' that the `Appellant' in its `Response' dated 28.07.2021 (to the `Show Cause

Notice' dated 04.06.2021) had stated that the `relevant market' was identified, among other things, based on the overlaps between the business activities of the `Investor Affiliates' and `FRL' and all the information relevant for the `1st Respondent/CCI's assessment of the `Combination', as per Section 20 (4) of the Competition Act, 2002, was furnished.

289. The stand of the `Appellant/Amazon' to its Response dated 28.07.2021 is that the interpretation of the true scope, purport and effect of the three Agreements Viz. (a) `FCPL SSA' (b) `FCPL SHA' and (c) `FRL SHA' is a `question of law' which cannot be the subject matter of any alleged `misrepresentation', `suppression' and `concealment'.

290. Apart from the above, the `Response' of the `Appellant/Amazon' (to the Show Cause Notice dated 04.06.2021) in regard to the `internal exchange of information' (internal communications) is that the `Commercial Arrangements' with `Future Group' is negotiated since Jan'2018 and that the `Appellant' had studied `multiple investment structures' and some of the documents / these emails related to the period when the parties were still in discussions. Also that, the `Appellant' had made discloses about `BCA's and importance of FRL's Retail Assets.

291. It is the version of the `Appellant/Amazon' in its `Response' that all material particulars relating to the `Combination' and which were relevant for `Assessment' by the `Commission' were revealed in the `Notice' and in latest submissions dated 15.11.2019 Viz., (i) Information rights over business activities of FRL; (ii) all commercial agreements involving FRL were given effect to only after the approval of the Respondent No.1; and (iii) the details required as per Form I relating to relevant market and competition assessment, based on the business activities of the parties and affiliates;

292. It is projected on the side of the `Appellant/Amazon' in its `Response' that there were no incorrect statements given in the `Notification' and that `FRL SHA' was fully divulged as forming the background to Transaction III and therefore, it does not constitute a `Combination'. Also that the `1st Respondent/CCI' had noticed that the presence of `FRL' and the `Affiliates' of the `Acquirer' was not to augment any competition concern.

293. In the instant case, although it is contended on behalf of the `Appellant/Amazon' that the ambit of combination was disclosed to the `1st Respondent/CCI' and that extensive disclosures were made in the `Notification' focussing on `FRL' and its B2C, `Competitive

Assessment' presented in the `Notification' was resting upon the assumption of complete integration between the Appellant's affiliates and `FRL' and its `Affiliates', details of `rights' accruing to the Appellant's Affiliates under `BCAs' were furnished along with the rationale behind these rights and justifications for the exclusivity `covenants' mentioned in the `BCAs' were also provided, there is no two opinion of the vital fact that the `obligation' to file a `Notice' for any `Proposed Combination' is binding in character, in the considered opinion of this `Tribunal'.

294. Further, the `Combination' notified was an investment into `FCPL' (2nd Respondent) by the `Appellant/Amazon', bearing in mind the likely growth aspect of the corporate gift cards / coupons business of `2nd Respondent/FCPL'. It must be borne in mind that `an Approval' is / can be accorded only in respect of the `Combination' for which `an Approval' is claimed and not otherwise, as opined by this `Tribunal'.

295. It cannot be brushed aside that if an individual had entered into or intend to enter into any `Transaction' being a `Combination', within the `purview of Section 5 of the Competition Act, 2002', then that `person' compulsorily enjoined to file a `Notice' as per Section 6 (2) of the Competition Act, 2002 coupled with the concerned `Combination

Regulations, 2011'. No wonder, an individual who had not notified a `Combination' as per the ingredients of the Section 6 (2) of the Competition Act, 2002, cannot press into service the ingredients of Section 6 (2-A) of the Act.

296. It is not out of place for this `Tribunal' to make a significant mention that the `Appellant/Amazon' had mentioned at paragraph 44 (vide its `Response' dated 15.11.2019 to RFI1 dated 09.10.2019 – Page 682 Vol.3 of Appellant's Convenience Compilation), which is extracted as under:

> *44.``It is submitted that the Proposed Combination, in its entirety, is envisaged within the SHA and the SSA, and that the SHA and the SSA are the only transactional documents executed pursuant to the Proposed Combination. The rights proposed to be acquired by the investor in terms of the SHA have been provided in Table 3 of the Notification."*

297. More importantly, in the filing of `Notice' dated 23.09.2019 vide Section 6 (2) of the Competition Act, 2002, in Form I under Part V `Description of the Combination', by the `Appellant/Amazon', Serial No. 5.12 enjoins the `Acquirer' to make known `any other Transaction(s)' that is / are inter-connected in terms of Sub-Regulation (4) and / or (5) of Regulation 9, Regulations, 2011, in the background `Combination' being notified and in short, the `Notice' dated 23.09.2019 of the

`Appellant/Amazon' is very much silent in regard to the aspect of `FRL SHA' and `BCF'.

298. In this connection, the `Appellant/Amazon' had mentioned categorically (vide paragraph 65 of the `Notice' dated 23.09.2019 – Vol. I of `Appellant/Amazon's Convenience Compilation) that `BCAs' were not part of the `Proposed Combination' mentioning that these Agreements were `neither inter-connected with', nor `part of the Proposed Combination'.

<u>Fraud:</u>

299. Section 17 of the Indian Contract Act, 1872, defines `Fraud'. Indeed, the `Fraud' vitiate the most solemn proceedings in any civilized system of jurisprudence. A concealment of `material fact' in entirety amounts to `Fraud', as per Section 17 of the Indian Contract Act, 1872. In the decision of the Hon'ble Supreme Court in Shrisht Dhwan (Smt) v. M/s. Shaw Brothers, reported in 1992 1 SCC at Page 534, wherein it is observed and held that in `law' `Fraud' is an `element' which clouds the reason that the person defrauded cannot form a rationale judgment of the effect of `Transaction' upon his interests.

300. An underlying intent to constitute `Fraud' is to deceive another person and to induce him to enter the `contract' and it must be by the suggestion as a fact which is not true or by the active concealment of a fact by one having knowledge or belief of the fact.

301. In `Fraud', an act must be confined to the acts committed by a person to a `contract' with an intention to deceive another or his `Agent' or to induce him to enter into a contract.

Misrepresentation:

302. Section 18 of the Indian Contract Act, 1872, defines `Misrepresentation' meaning and including;

> *(1) "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;*
>
> *(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;*
>
> *(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement."*

303. It is to be pointed out that a circumstance of misrepresentation may be material if it will influence the `decision' / `judgment' of a prudent decision maker in accepting a proposal in the subject matter in issue.

Difference between `Fraud' and `Misrepresentation:

304. The pinnacle difference as regards `Fraud' and `Misrepresentation' is that in one case, the `person' making the `suggestion' does not believe it to be true and in the other, he believes it to be true, though in both, it is a `Misstatement of Fact' which misleads the `promisor'.

Burden of Proof:

305. It is to be remembered that the `onus of proof' of purported `Fraud' or `Misrepresentation' committed by a `deviant' lies on the `person' who alleges the same, by placing some `prima facie material' in support of the same and that the `level of proof' is at very high pedestal.

306. An innocent `Misrepresentation' is a `Misstatement of Facts' not intended to `Deceive'. `Fraud' is a `statement known to be false' or `made in ignorance as to its `truth' or `falsehood', but confidently so as to `represent' that the `Maker' is certain when he is uncertain.

307. The plea of the `1st Respondent/CCI' is that the `Appellant/Amazon' had not provided it with the email dated 24.05.2018, the email dated 10.07.2018 and the email dated 19.07.2019 (Internal one), which were interchanged between the Appellant/Amazon's Key

Managerial Persons which depicted the ambit and purpose of the `Proposed Combination'.

308. In this regard, the said email dated 24.05.2018 runs to the effect:

> *``Project Taj – National Multi-category Copperfield-seller* ***Background:*** *... Amazon's India team likes Taj's management team, store footprint, private label capability and believe they are one of the key players in the offline retail space to partner with ……… etc."*

309. Besides this, the `Appellant/Amazon' had mentioned that it engaged with Taj and discussed a `Business Commercial Framework' (`BCF') to build and accelerate `ultra-fast delivery' across top – 20 Cities in India leveraging FRL's National Store footprint as a `Copperfield seller'.

310. Added further, the `Appellant/Amazon' in the email dated 24.05.2018, had mentioned that because `Taj's Retail Entity' is a listed company, it could invest up to 9.99% of the company directly as `Foreign Shareholders'. Also, the `Appellant/Amazon' had proceeded to mention in the aforesaid email dated 24.05.2018 that `because Taj's Retail Entity' is a listed company, it could invest up to 9.99% of the company directly as `Foreign Shareholders'. To execute on the above Business Commercial Framework (BCF) the founder of Taj believes a close

alignment via a strategic investment with an online player is important and it sought `Approval to indicate its non-binding interest (Taj's Founder) to invest $400 to $500 MM for up to 9.99% stake in the company."

311. In addition to the above, the `Appellant/Amazon' noted the Investment Rationale as allowing it (Appellant);

> *(a) "expand coverage in top 4 Cities with improve the Merchant Fee to 13.5% (+850 bps); build a two-hour-delivery service in next 20 cities; (c) exclusively carry their private label portfolio in grocery and value-fashion; and (d) obtain option value to increase our equity stake when laws change" and in abstract,* ***against an investment of $400 to 500 MM in Taj will result in discounted cash flow value of BCF over 10 years*** *of $702 MM (INR 45.6B)."*

312. In the email dated 10.07.2018, under the Head - `Project Taj – National Multi-category Copperfield-seller' `situation update', the `Appellant/Amazon' inter alia had mentioned that its `strategic objectives' which it wants to achieve through `Taj' is;

> *(a) "Ability to become the single largest shareholder in India's largest offline retailer (TRL) when foreign direct investment (FDI) opens up in this sector.*
>
> *(b) Precluding / blocking competitive interest in TRL, and preventing an IC from acquiring TRL.*
>
> *(c) Together with the investment, Alpha will enter into a commercial agreement to utilize TRL's pan-india store*

infrastructure to bolster Alpha's ultra-fast delivery program, exclusively carry private label portfolio in grocery and value fashion, and drive higher fees for Alpha."

2.``What is our business rationale and BCF for Taj?

We believe that a two-hour delivery promise, for 15,000 SKUs across top-20 cities will be a unique differentiating capability. It will allow us to cover 85% of our Prime members and 63% of all customers. To serve this customer base, we believe working closely with a large Copperfield seller is important. We believe that Taj is one of two key pan-India retailers worth pursuing (the other being Brigade). Taj has a strong portfolio of private label selection in grocery (450+SKUs, across packaged foods, home and personal care) and value-fashion (27 brands with a median ASP of $9.2 (INR 600) contributing to 80% of their GMS for fashion). Against our investment of $400 to 600MM in TRL, we estimate the discounted cash flow value of BCF over 10 years of $702MM (INR 45.6B) please refer to Annexure // for investment rationale and more details of the BCF.

When foreign investment laws are relaxed and higher stake of acquisition of multi-brand retail assets is permitted beyond today's possibilities, we would have a foot-in-the-door to acquire more in this strategic asset, should we so desire at the time. For further details please refer to Annexure II – BCF Strategic Value. ***Importantly, our investment in TRL will be liquid given that TRL is publicly traded in the Indian stock market, and therefore, we can recover our investment in case TRL fails to deliver.***

3. What is the proposed transaction?

An overseas Amazon entity, registered as a 'foreign portfolio investor' will acquire 9.99% (through a fresh issuance of shares) of TRL. Simultaneous with the investment, Alpha India will enter into a commercial agreement (BCF) with TRL, and Taj Consumer

Limited (TCL), and Taj Lifestyle Fashion Limited (TLFL) in relation to the matters listed in FAQ2.

Indian regulations prescribe the minimum price at which a listed company may issue fresh equity to an investor (SEBI Floor Price), and the same is based on the average weekly high and low of the volume weighted average price of the shares for the last 6 months or two weeks whichever is higher. Based on our current calculations, the SEBI Floor Price for acquiring 9.99% in TRL will be $459MM (INR 31.2B)[2].

6. If we were to execute both Taj and Brigade, why is a Call Option important in both situations?

Our ICs (BB, FK, Paytm Mall) are aggressive on grocery, general merchandise and general electronics categories. Specifically in grocery and fresh categories, we are lagging behind BB and FK is also nipping at our heels. Walmart's expertise in offline retail will likely spur FK and Alibaba's investment and technology will continue to push BB ahead.

Given the above, we need to build deep strategic alignments with offline grocery retailers to leverage their execution capabilities to power our fresh and grocery offering. India has 6 offline retailers (Taj, Brigade, Reliance Retail, D-Mart, Spencers and Nature's Basket). With a process of elimination on parameters of asset quality, partner quality and availability, only two i.e., Taj and Brigade remain. If we are able to close our investment in Brigade, we would secure a high quality asset, however, it will lack the scale and national footprint that Taj offers. Further, Brigade is our bet to own a high quality grocery operation. Taj, on the other hand, is an investment in a multi-category Copperfield seller with a larger pan-India footprint. Getting a Call option in both assets allows us to acquire and raise our bet, at our discretion, in the player we feel best meets our objectives after having tested close operational alignment with both in 3-7 years following investment, when regulations permit.

7. If we were to execute both Taj and Brigade, how would we decide which Call Option to exercise then?

Keeping aside our tenets of Financial Discipline for the moment, holding a Call Option in both assets keeps our options open and it also serves as an incentive / deterrent to Brigade / Taj. If Brigade executes flawlessly, we can exercise our Call Option (when legally permissible) and make Brigade a spearhead of our 1P grocery operations. If Brigade doesn't execute to our bar, then we can choose to pull back from further investments in Brigade and double down on our investments in Taj, provided that it meets our expectations. If Taj executes well both on BCF as well as an independent retail asset, when regulations relax, we will have the ability to increase our stake in India's largest offline retailer and keep our competition. If Taj doesn't execute well, we can exit our ownership in listed stock. Holding Call Options in both assets, thus allows us to control our destiny in a thoughtful manner in the future.

Annexure II – Strategic value accruing to Amazon as a result of the Business Commercial Framework (BCF)

We started working with Taj, couple of years ago, as a Copperfield seller in three cities (across 23 stores) to learn and develop the ultrafast delivery model in India. In April-2018, we served about 2000 orders per day with an AOV of $12.3 (INR 802) and UPO of 9.3. We earn merchant fee of 5.4% and have a CPLF of ~$4.55 (-INR 296) per order (55.5%). If we improve the order economics, we believe Taj's footprint of physical infrastructure can offer a unique 2-hour-delivery service across multiple categories in top-20 cities. Therefore, we constructed a BCF to estimate value creation from this partnership across their retail assets and private label capabilities.

1. ***Offer 2-hour-ready selection in top 4 cities with improved economics:*** *An average hypermarket store carries an in-stock selection of about 15,000 SKUs – 8500 in softlines, 5500 in grocery and 2000 in general merchandising*

*(primarily home and kitchen). There are 104 stores in top 4 cities. In five years we can scale to 21K orders/day with an AOV of $24 (INR**1549**) and GMS of $181MM (INR11B). In this model we will bear only the last mile costs with increase in SoA fee for grocery at 13.5% (+810bps over current levels) and 32% for softlines. Therefore, we will improve our order economics with an OP per order of ~$0.8 (-INR53) or (+2495bps vs. 2021 LRF). OP less infra will be $1.3 (INR 84) (+2466 bps vs. 2021 LRF).*

2. ***Build and expand 2-hour-delivery service in the next 16 cities** : These cities are likely to grow faster than the top-4 cities and therefore will lead in retail consumption. Taj has nearly 120 stores in these cities and carry an average selection of 12,000 SKUs. We expect to expand the Copperfield-service to these cities within three years and scale to 31K orders per day with an AOV of $20.9 (INR 1,363) by year 5. The order economics will be similar to that in top-4 cities.*

3. ***Carry Taj's private label selection across grocery and softlines exclusively:** We will leverage Taj's private label selection to substitute and accelerate the private label selection in Pantry. Our 2020-LRP assumes private-label penetration of 7.0% as proportion of Consumables GMS. We believe we can expand private-label participation to 18% by year-3 (current penetration of Taj is at 30% in FMCG and 60% in Staples). This will give incremental margins of INR 28 per order in Pantry. Taj has capabilities from design to manufacturing for fast and value-fashion brands in apparels, shoes and luggage. Leveraging this capability, we can improve the share of private labels to overall Softlines business by 10% (+500 bps) in Year-5. Secondly, we expect Taj's fashion stores Fashion-Big-Bazaar, Central and Brand Factory to list as a seller, similar to Shopper Stop (we invested for a 5% stake in India's largest offline fashion department store to onboard*

200K+ ASINs across 300 fashion brands) and generate additional 0.5MM order per month. We expect to improve Softlines CP by 507bps by year- by a combination of accelerated PL penetration, increased selection of Central and Brand Factory and improvement in SOA fees.

4. ***Foot-in-the-door and a strategic option value:*** *Laws in India currently do not permit foreign investment in offline retail companies engaged in both food and non-food retail. This could change in the next 3-5 years, as government of India, is slowly relaxing the laws. At that point, Taj will likely still be the largest asset with pan-India footprint and the possibility of greater control."*

313. In the internal email dated 19.07.2019 of Appellant/Amazon Group on the subject `Request for Approval' for `Project Taj Privileged and Confidential it is mentioned;

"Hi…,

We are in the final stages of negotiating definitive investment documents for an INR14B (~$204MM at current exchange rates) investment to acquire a 49% stake in Future Coupons Limited ("Future Coupons"). Future Coupons will hold ~8-10% of Future Retail Limited, India's second largest offline multi-category retailer, and we are requesting <u>your approval to sign the definitive investment documents and close the transaction. Attached for your review (and reprinted below) is a legal contract summary. Please respond at your earliest convenience…</u> have all reviewed and are supportive of the investment. In addition, Legal, Tax and Accounting have signed off.

Thank you.

Regards,

….

Future Retail Limited Investment
July 18, 2019

Business summary

Founded in 1987, Future Retail Limited ("Future Retail") is India's second largest offline multicategory retailer and is headquartered in Mumbai. Future Retail is listed on Indian Stock Exchanges and has a market capitalization of ~$3.4B. Future Retail is the flagship company of the Future Group, a large Indian offline retail conglomerate.

Future Retail has a pan-India presence, with a store network spanning ~16MM square feet across ~1K branded stores (with a variety of formats such as convenience stores, supermarkets, hypermarkets, and department stores) and over 33K employees. Future Retail's 340 hypermarkets cover ~70% of Amazon India's customer base (within a drive of less than 2 hours). As of March 31, 2019, Future Retail generated ~$3B in revenues with an EBITDA margin of 5%. Future Retail and its affiliates also have a strong portfolio of private label selection in grocery (450+SKUs across packaged foods, home and personal care) and value-fashion (27 brands with a median average selling price of ~$9.40, and contributing to 80% of Future Retail's gross merchandize sales for fashion).

Future Retail is currently listed as a 3P seller on Amazon.in. Concurrent with the investment, we will enter into commercial agreements with Future Retail and Certain other members of the Future Group under which : (i) Future Retail will list the selection available in its hypermarkets on Amazon.in at significantly improved terms (representing an increase of 850 basis points). This will enable Amazon India to expand coverage (across ~15K SKUs) of our ultra-fast delivery service in the top four cities in India and launch the ultra-fast delivery service in the next 20 cities in India. Future Retail will not list its products on any other third party online website: (ii) Amazon Pay will be the exclusive third party wallet accepted in Future Retail's stores and website: (iii)

one of Future Retail's affiliates, Future Consumer Limited, which owns and produces the Future Group's private label grocery and general merchandise (such as cooking needs, storage needs, and utensils) portfolio, will supply these products to our food retail entity in India and our affiliated sellers on a B2B basis at significantly improved margins, and will agree to not supply these products to certain named competitors; and (iv) one of Future Retail's affiliates, Future Lifestyle Fashions Limited (FLFL), will list brands owned by (or exclusively licensed to) FLFL in fashion on Amazon.in and will not list these fashion products on any other third party online websites.

Lastly, we have negotiated a call option over the shares held by Future Retail's promoters (who are also its largest shareholder), leaving us well-positioned to become the single largest shareholder of Future Retail (which could be very difficult through market purchases alone), if Indian foreign investment laws change in the future."

314. A mere running of the eye of the contents of the email dated 19.07.2019, together with `Contract Summary' (Approval request) latently and patently alludes that the `Appellant/Amazon' would enter into `Commercial Agreements' with `FRL' to expand the coverage, while also involving in `strategic' discussions for `call option' over shares held by `FRL's Promoters with a view to leave the `Appellant/Amazon', `well positioned to become the single largest shareholder of FRL'. In fact, the number of Equity Shares of `FRL' to be held by `FCPL' `was calculated' such that `Amazon' can indirectly hold the same number of shares of `FRL' at a price per share representing a 25% premium on the minimum

Regulatory Price'. Lastly, it was mentioned that 25% `premium is being paid on account of the `strategic rights' and `call option' being provided to `Amazon'.

315. At this juncture, this `Tribunal' significantly refers to the observation made by the `1st Respondent/CCI' in the impugned order dated 17.12.2021 that the aforesaid Appellant's internal emails correspondence were germane to comprehend the focus and objectives of its `Combination' which was to *"secure its ability to become the single largest shareholder of FRL when the foreign direct investment opens up in the retail sector; preclude/block competitive interest in FRL and utilise the Pan-India Store Infrastructure of FRL to bolster the ultra-fast delivery program and exclusively carry private label portfolio in grocery and value fashion; and drive fees".*

316. Not resting with the above, the `1st Respondent/CCI' noticed that `Acquisition of Shares' in `FRL / FCPL' by `Amazon' (i.e., Appellant) was envisaged as a `pre-requisite' to enter into `Commercial Agreements' and further that `the purpose of the Combination was investment in FRL and establishing a strategic alignment / partnership between Amazon (Appellant) and Future Groups in the Indian retail sector'.

317. In pith and substance, the `Appellant/Amazon' had provided the presentation `Taj Coupons – Business Plan for five years' which incorrectly formulated the Appellant/Amazon's elemental intent of the `Combination' as permitting it to enter the `Gift Voucher Business of FCPL, etc.', without any indication to `FRL' and had not provided the internal email correspondences as mentioned supra which is clearly an unfavourable circumstance to and in favour of `Appellant/Amazon' in the earnest opinion of this `Tribunal'. Furthermore, the `Appellant/Amazon' had omitted to present the other documents covering the actual purpose depicted in the internal emails, in any of the materials furnished against Item 8.8 of Form I or Question 2.1 of the 1st Respondent/CCI's letter dated 24.10.2019 seeking additional information in regard to the submissions made against Item 8.8 (presentation captioned `Taj Coupons – Business Plan for five years' vide Page 219 - Convenience Compilation of 1st Respondent/CCI (Vol. 1 (Part-II)). As such, on the part of the `Appellant/Amazon' there is a `Misstatement of Fact'/`Misrepresentation' in not exhibiting the internal emails which make known the real ambit and purpose of the notified transactions, thereby misleading the `1st Respondent/CCI' in approving the `Proposed Transaction' (through an `Approval Order' dated 28.11.2019), presented by the `Appellant/Amazon', all the more, when

the `Appellant/Amazon' had not presented the `Business Transaction', as opined by this `Tribunal'.

318. Dealing with the `aspect of Misrepresentation' by the `Appellant/Amazon', in regard to the description of the `Approval' accorded by the `1st Respondent/CCI', by virtue of its `Order' dated 28.11.2019, this `Tribunal' pertinently points out that the `Appellant/Amazon' through its `Claim Statement' dated 04.07.2021 before the `Arbitral Tribunal' (pertaining to the `Arbitration Proceedings') had expressed that the `1st Respondent/CCI' had approved the `Proposed Combination' after taking into account the `Appellant/Amazon' consistent stand that `FRL', its `Retail Assets' were a material inducement for the `investment'.

319. However, the `Appellant/Amazon' before the Hon'ble High Court of Delhi in its `Appeal' had submitted that its `Notice' exhibited that it was (`Appellant/Amazon'), the ultimate beneficiary of the `rights' granted to `FCPL' under the `FRL SHA' (vide Annexure 8 to 2nd Respondent/FCPL's complaint filed before the 1st Respondent/CCI, at Page 1384 of Volume No.6 of Convenience Compilation of the `Appellant/Amazon').

320. From the above, it is candidly clear that just opposite to the `Factum of Approval' of the `Proposed Transaction', the `Appellant/Amazon' had made a `Misstatement / Misrepresentation' before the aforesaid `Forums' that the `Business Transaction' was notified to the `1st Respondent/CCI' and approved by it.

321. In so far as the `aspect of concealment of material facts / particulars' by the `Appellant/Amazon', this `Tribunal' aptly points out that in response to Item 5.3 of Form I, in and by which, the `Appellant/Amazon' was required to reveal `Economic and Strategic purpose (including business objective and rationale for each of the parties to the combination and the manner in which they are intended to be achieved) of the Combination' – the Appellant had spelt out that it had "decided to invest in FCPL with a view to strengthen and augment the business of FCPL (including the marketing and distribution of loyalty cards, corporate gift cards and reward cards to corporate customers) and unlock the value in the company."

322. In short, the `Appellant/Amazon' had averred that it has no direct or indirect shareholding in `FRL' but only some `rights' which were granted to it in regard to `FCPL's investment' in `FRL' with a view to

protect its investment in `FCPL' (vide `Appellant's Response' to Item 5.3 of Form I, Page 29 of Appellant's Convenience Compilation – I).

323. Moreover, in the `Statutory Summary' as per Regulation 13A of the Combination Regulations (vide Page 191, Vol. I of Appellant's Appeal Paper Book), the `Appellant/Amazon' had mentioned that it had `decided to invest in FCL with a view to strengthen and augment FCL's business relating to marketing and distribution of corporate gift cards".

324. The `Appellant/Amazon' in response to `1st Respondent/CCI' elucidation relating to an entry in Item 5.3 vis-à-vis Kishore Biyani's assertion that the `Appellant/Amazon's investment in `FRL' was strategic to be the part of the `Retail Ecosystem' as per `1st Respondent/CCI's letter dated 09.10.2019, the `Appellant/Amazon' had emphasized that the gift card business of the 2nd Respondent/FCPL and the interest of the `Appellant/Amazon' to elongate its portfolio in the payments scenario in India.

325. In regard to the pinpointed Query, as regards the ambit and aim of the Appellant/Amazon's rights under the `FRL SHA' as per letter of the 1st Respondent/CCI dated 24.10.2019, the `Appellant/Amazon' among other things stated vide its Response dated 15.11.2019 that its

considerations were (i) the unique business model of FCL; and (ii) to add credibility to its (FCL's) financial position, it has invested in, and proposes to invest in FRL, which is a publicly traded company."

326. In the instant case, this `Tribunal' pertinently points out that quite opposite to the internal communications/emails of the Appellant/Amazon had not shown a possibility of the `Combination' being pursued for having a foot-in-door in the Indian retail sector, acquire strategic rights over `FRL', etc. To put it precisely, the Appellant/Amazon had projected in `FRL', `FCPL' only a vehicle, for which, no intention was assigned. As a matter of fact, the whole consideration of the `Combination' was made based on the footing of 25% premium to the Regulatory Price of `FRL' shares and indeed, premium was paid on account of `Strategic Rights' and `Call Option' provided to the `Appellant/Amazon'.

327. Suffice it for this `Tribunal' to make a relevant mention that the `Appellant/Amazon' had made only the limited disclosures in regard to `FRL' only in the realm of `FRL's Equity Warrants' held by the `2nd Respondent/FCPL' and had not spelt out the real combination of the Appellant/Amazon acquiring `strategic rights' and interests over FRL as well as executing `Commercial Contracts' between it and the `FRL'. In

reality, the `FRL' was exhibited as factor from the angle of `financial strength' to the `2nd Respondent/FCPL'.

328. Proceeding further, the Appellant/Amazon had not mentioned that `FRL SHA' and `BCAs' were part of the `Combination' and that `FRL SHA' was executed to shower upon the Appellant/Amazon indirect rights over `FRL', which the `Appellant' pondered strategic in the letters/communications.

329. It cannot be gainsaid that when the 1st Respondent/CCI had raised a question relating to the nature of rights and its interests over `FRL', the `Appellant/Amazon' in its `Response' dated 15.11.2019 had among other things mentioned that these rights were obtained from the rights given to `FCL' as per terms of the `FRL SHA', which was discussed by the `Promoters', `FRL and FRL (sic., FCPL) dehors of the investment by the Investor in `FCL' and with a view to unlock value for `FCL' and this candid, unequivocal and clear cut assertion / declaration unerringly point out that `FRL SHA' is a separate and independent one of the `Combination'. Likewise, the Appellant/Amazon on the `Commercial Agreements' had stated that it was neither a part nor inter-related to the `Combination' though they were of one composite proposal Viz. `Project Taj (Future all along).

330. Because of the incorrect disclosures and there being an act of commissions/omissions in the `Notice', (like the `Commercial Agreements' were integral part of the `Combination', `Arrangements' in relation to the `Appellant/Amazon', `FRL' for listing of the products of `FRL' in Amazon's market place were stated as `neither inter-connected with nor part of the `Proposed Combination'), in the submission dated 15.11.2019 of `Amazon' (`The Appellant'), and persistently making representations that `BCAs' were independent of the `Combination', etc., there was no room for the 1st Respondent/CCI to have any `iota of needle of suspicion' that the `Commercial Agreements/Arrangements' were part of the `Combination' to establish a strategic alignment between the parties in retail sector, in the subjective considered opinion of this `Tribunal'. Therefore, the 1st Respondent/CCI had no opportunity to evaluate the effects of actual real `Combination'. Hence, this `Tribunal' comes to an inevitable and inescapable conclusion that the `Appellant/Amazon had not fulfilled its obligation as per ingredients of Section 6 (2) of the Competition Act, 2002, attracting imposition of penalty under Section 43A of the Act, extending to 1% of the total turnover or the Assets whichever is higher of such a `Combination'.

331. As regards the plea taken on behalf of the `Appellant/Amazon' that the `1st Respondent/CCI' has no power under the Competition Act, 2002, to annul / revoke or to keep the `Approval Order' dated 28.11.2019 on hold or in abeyance or issuing a direction to file Form II because of the fact that the jurisdiction of 1st Respondent/CCI is governed and limited by the Competition Act, 2002, and the Rules and Regulations made thereunder, it is to be pointed out that a reading of Section 45 (2) of the Competition Act, 2002, clearly points out that `without prejudice to the provisions of sub-section 1 (45), the `Commission' may also pass such other order as it deems fit', which, without any hesitation steers this `Tribunal' in holding that the 1st Respondent/CCI has an incidental/ancillary/residual power to pass an `Order' of keeping the `Approval Order' dated 28.11.2019 passed by the 1st Respondent/CCI in abeyance / or to put it on hold, as opined by this `Tribunal'.

332. Besides this, when the object of the Competition Act, 2002, is to prevent the practice of having an adverse effect on `Competition', etc., the `1st Respondent/CCI' by no stretch of imagination be deprived of the power to displace an `Approval Order', in terms of Section 45 (2) of the Act.

333. It is to be remembered that when an `Order of Approval dated 28.11.2019' was obtained by the `Appellant/Amazon' from the 1st Respondent/CCI based on misstatement of facts, misrepresentation/not making a full and frank enough disclosures, (with an intent to gain unfair advantage and deceive another), the suppression/concealment of material facts (amounting to `Fraud'), as required under the Competition Act, 2002, Rules and Regulations, etc., then, in Law, an `Authority' vested under the `Statute'/`Act', has an inbuilt, an implied residual power to annul, modify, vary or to keep the earlier order passed by it in abeyance / putting it on hold and there is no express fetter in this regard, in the considered opinion of this `Tribunal'.

334. The very fact that the `Appellant/Amazon' had not made known / notified the `Proposed Combination' as a `whole' and in an omnibus manner, the period of limitation of one year, as mentioned in Section 20 (1) of the Competition Act, 2002, is inapplicable, in lieu of `Absence of Notification' and there being no Approval'.

335. It is to be made mention of by this `Tribunal' that a `Fuller', `Comprehensive' and an `Indepth Appraisal' in respect of the `Combination's `AAEC' can be made / performed only when the

`Appellant/Amazon' submits `Form II' with all relevant, true, precise and full particulars / information / documents which exhibit the aim and purpose of the `Proposed Combinations'. In fact, the `Appellant/Amazon', in stricto senso, especially to a limited extent, cannot be an `Affected/Aggrieved Person' of the `impugned order' dated 17.12.2021, because of the fact that the `Approval Order' dated 28.11.2019 passed by the 1st Respondent/CCI to and in favour of the `Appellant' was directed to be `kept on Hold' while granting the `Appellant/Amazon' to give `Notice' in Form II within a period of 60 days from the receipt of this `Order'.

336. Coming to the aspect of the plea taken on behalf of the `Appellant/Amazon' that the `impugned order' dated 17.12.2021, passed by the `1st Respondent/CCI' is `Bad in Law', besides being an untenable one, in the absence of a Judicial Member, especially the `Show Cause Notice Proceedings' dated 04.06.2021 against the `Appellant/Amazon' revolves around complex, legal, mixed question of legal issues pertaining to the purported non-disclosure of relevant information of the `Combination', etc., this `Tribunal' points out that it is for the `Legislature', in their `domain and collective wisdom' to determine about the aspect of presence of a `Judicial Member' or otherwise in the `1st

Respondent/CCI', apart from other `Members', by prescribing the `qualifications' / `eligibility criteria'.

337. It is pointed out that in Special Leave Petition filed by the `Union of India' and the `1st Respondent/CCI' against the `Order' dated 10.04.2019 in W.P.(C) 11467/2018, CM APPL. 44376-44378/2018, passed by the `Hon'ble High Court of Delhi' in the matter of `Mahindra Electric Mobility Ltd. & Anr. V Competition Commission of India and Anr.', the matter is pending as on date, before the Hon'ble Supreme Court of India.

338. In fact, as per ingredients of Section 15 of the Competition Act, 2002, `no proceedings of the `Competition Commission of India' will be invalid, by reason of any `vacancy' or any `defect' in its `Constitution' or any `defect' in the `appointment of a Person acting as a `Chairperson' or as a `Member' or any irregularity in the procedure of the `Commission' not affecting the `merits' of the case'. In any event, the `impugned order' dated 17.12.2021 passed by the `1st Respondent/CCI' in the absence of a `Judicial Member' is not a fatal one.

339. To be noted, that Section 43A of the Competition Act, 2002, deals with the `imposition of penalty' and as per this Section, the penalty is

leviable for non-furnishing of information on `Combinations' even if the `Combination' has no `Appreciable Adverse Effect on Competition'. There is no requirement of `Guilty Mind' (Mens Rea) or intentional / deliberate Breach, as an element for the levy of penalty, as opined by this `Tribunal'. The `1st Respondent/CCI' can impose a maximum penalty of 1% of the total turnover or the assets, whichever is higher, of such a `Combination'. There is no two opinion of a pivotal fact that the levy of penalty, as per Section 43A of the Competition Act, 2002, is on account of violation of a `Civil Obligation', although the proceedings are admittedly neither `criminal' nor `quasi-criminal' in nature.

340. It must be borne in mind that the words `without reasonable cause' are not found in Section 43A of the Competition Act, 2002, as opined by this `Tribunal. However, the concept of failure `without reasonable cause' is incorporated for the levy of fine as per Section 42 (2) of the Competition Act, 2002. Once it is established that there was a failure to notify the `Proposed Combination', as required under Section 6 (2) of the Competition Act, 2002, the `penalty' has to follow.

341. Admittedly, the `Parties' to the `Combination' cannot deny an opportunity to the `1st Respondent/CCI', to evaluate the likely effects of

the `Proposed Combination' on `Competition' and regulate them appropriately.

342. Section 44 of the Competition Act, 2002, pertains to the levy of penalty for making false statements or omission to furnish material information by any person, being party to the `Combination' and such penalty, shall not be less than rupees fifty lakhs, but it may extend up to rupees one crore, as may be determined by the `Commission'.

343. Section 45 (1) of the Competition Act, 2002, provides for `penalty for offences pertaining to furnishing of information', which may extend to rupees one crore, to be determined by the `Commission' (`1st Respondent').

<u>Exercise of Discretion:</u>

344. An `Authority' who imposes a penalty performs a `Duty'. He must marshal all his faculties at his command in performing his duty. An `exercise of discretion' must be done according to the rules of `reason' and justice. Undoubtedly, the `Discretionary Power' is to be reasonably and fairly exercised in a `judicious' and `sound' manner. The `Discretion' to be exercised by an `Authority' is not to be a `vague', `whimsical', `fanciful', `arbitrary' and `capricious' one. In short, the discretion to be

exercised by an `Authority', must be a legal and a regular one based on `reason' and the same shall not suffer from any `Bias' in the earnest opinion of this `Tribunal'.

345. Be that as it may, this `Tribunal' in the light of `qualitative', `detailed' and `quantitative' discussions, taking into account of the divergent contentions advanced on either side, and considering the attendant facts and circumstances of the present case, in an holistic and conspectus fashion that the `Appellant/Amazon' had not made full, whole, fair, forthright and frank disclosure of relevant materials and had furnished only limited details / disclosures, pertaining to its `acquiring strategic rights and interests' over `FRL', and executing `Commercial Contracts' among itself and `FRL' concerning the ambit and purpose of `Combination' in `Form I', and omitted to state material facts/furnish material information(s) knowing to be material one, thereby leading to `Misstatement of Facts'/`Misrepresentations', comes to a resultant conclusion that the `Appellant/Amazon' because of the violations committed by it, had intentionally not made known the `real ambit and purpose' of the `Combination', as observed by the `1st Respondent/CCI' in the `impugned order' dated 17.12.2021 (vide Ref No. C-2019/09/688/7099) and in this regard, this `Appellate Tribunal' is in

complete agreement with the view arrived at by the `1st Respondent/Competition Commission of India'. However, the imposition of maximum penalty of Rs.1 Crore each, as per the `impugned order' dated 17.12.2021, passed by the `1st Respondent/CCI', as per Section 44 and 45 of the Competition Act, 2002, is slightly on the higher side / excessive one, as opined by this `Tribunal'. As such, this `Appellate Tribunal', based on the relevant facts and circumstances of the case, Viz., availability of competitions in the market, financial health of the industry, etc., which float on the surface and also, in the teeth of the `1st Respondent/CCI' in the impugned order dated 17.12.2021 had provided an opportunity to the `Appellant/Amazon' to file a fresh `Notice' in Form II, etc., to prevent an `aberration of justice', in `furtherance of justice', exercising its prudence and as a mitigating factor, imposes a penalty of Rs.50 Lakhs (Rupees Fifty Lakhs) each, as per Section 44 and 45 of the Competition Act, 2002, and the said sum, is directed by this `Tribunal' to be paid by the `Appellant/Amazon', within 45 days from today (the date of passing of this `Judgment').

346. As regards the non-furnishing of information Viz., the Appellant/Amazon's omission/lapse/failure to notify the `Combination' as per the obligation required under the ingredients of Section 6 (2) of the

Competition Act, 2002, this `Tribunal' holds the `Appellant/Amazon' for its failure to provide the relevant information on the `Combinations' being responsible and accountable in not giving `Notice' as required and in this regard, this `Tribunal', to secure the `ends of justice' is not displacing the imposition of penalty of INR Rs.200 Crore levied upon the `Appellant/Amazon' by the `1st Respondent/CCI' in the `impugned order' dated 17.12.2021, since the same is a fair and sensible one, as per Section 43A of the Competition Act, 2002. As such, this `Tribunal' directs the `Appellant/Amazon' to pay the sum of Rs.200 Crore within 45 days from today, (the date of passing of this `Judgment'). Also, this `Tribunal' directs the `Appellant/Amazon' to give notice to the `1st Respondent/CCI' in `Form II' within 45 days from today (the date of passing of this `Judgment') and till the disposal of such notice, by the `1st Respondent/CCI', the `Approval' granted on 28.11.2019 (vide Combination Registration No.C-2019/09/688), shall be `kept on hold'.

Disposition (Competition Appeal (AT) No. 01 of 2022):

347. In fine, with the above observations and directions, the instant Competition Appeal (AT) No.01 of 2022 stands disposed of. No costs. IA Nos. 122 & 123 of 2022 in Competition Appeal (AT) No. 01 of 2022 are closed.

Competition Appeal (AT) No. 02 of 2022:

Background:

348. The Appellant has focussed the present `Competition Appeal' (AT) No. 02 of 2022, as an `Affected Person', assailing the `Order' dated 28.11.2019, passed by the `1st Respondent/Competition Commission of India' in Ref No. M-2019/09/688 (`impugned order') among other things, in view of the findings of the `1st Respondent/CCI' in its `Order' dated 17.12.2021, wherein the `1st Respondent/CCI' had categorically held that the `2nd Respondent Viz., Amazon.com NV Investments Holdings had by deliberate design made false statement and suppressed and misrepresented material information(s) to the `1st Respondent/CCI' and sought an `Approval' of the `proposed combination' as notified in its `Form I' and culminating in the `impugned order'.

349. The `1st Respondent/Competition Commission of India', while passing the `impugned order' dated 28.11.2019 (under Section 31 (1) of the Competition Act,2002) (in respect of `Notice' under Section 6 (2) of the Competition Act, 2002, filed by Amazon.com NV Investment Holdings LLC) at paragraph nos. 6 to 16, had observed the following:

> *6. "ACI, the ultimate parent entity of the Amazon group, through its Indian and overseas subsidiaries ("***Acquirer**

__Affiliates__"), has business operations in India, which inter alia, relates to the retail sector, digital payments, payments processing and cloud computing. In this regard, it is noted that ACI has inter alia, investment in the following Indian enterprises:

(a) Amazon Seller Services Private Limited ("__ASSPL__"/"__Marketplace Affiliate__")

(b) Amazon Retail India Private Limited ("__ARIPL__")

(c) Amazon Pay (India) Private Limited ("__APIPL__")

(d) Amazon Wholesale (India) Private Limited ("__AWIPL__")

(e) Amazon Transport Services Private Limited ("__ATSPL__")

7. Further, it is noted that: (a) Marketplace Affiliate operates Amazon India Marketplace which offers ecommerce platform to third party sellers. It partners with various sellers and facilitates the sale of a variety of products offered by these sellers to endconsumers online; (b) ARIPL undertakes retail of food products manufactured and produced in India through the Amazon India Marketplace; (c) APIPL is engaged in the business of providing digital payment services to the customers on the Amazon India Marketplace, (d) AWIPL offers products in various categories such as health care, baby care, office supplies, food and beverage, medical supplies, home essentials, etc. to customers on a wholesale basis and (e) ATSPL provides services relating to the shipping of goods from sellers who list their products on the Amazon India Marketplace and under the Prime Now Programme. Additionally, the Acquirer has stated that it has certain non-controlling minority investments in entities ("__Acquirer Portfolio Companies__") engaged in business activities in India.

8. The Commission noted that FCRPL, FCL and FRL belong to the Future group of companies. Prior to the Proposed Combination, FCL is a wholly owned subsidiary of FCRPL and is now principally engaged in marketing and distribution of corporate gift

cards, loyalty cards and reward cards to corporate customers. Until FY19 i.e. 31st March, 2019, FCL was only engaged in the business-to-business wholesale trading of fabrics. It does not have any direct or indirect subsidiaries in India. It has been stated that so far (in Q1 of FY20), FCL only procured the gift cards and vouchers of Future group companies (such as FRL) and sold the same to its customers (such as Paytm).

*9. FCRPL, an entity incorporated in India, is engaged in business of management consultancy services and trading in goods and services. FCRPL also has investments in various Future group of companies. FCL and FCRPL are owned and controlled by the promoter group led by Mr. Kishore Biyani ("**Promoter Group**").*

10. FRL, an entity listed on National Stock Exchange of India and BSE, is flagship retail entity of the Promoter Group with FCRPL being one of the promoters and the single largest shareholder in FRL. FRL (including its subsidiaries) is active in the Indian retail market and currently operates multiple retail formats in hypermarkets, supermarkets and convenience stores under different brand names, including: Big Bazaar / Big Bazaar GenNxt / Hypercity (variety departmental chain); FBB (Fashion @ Big Bazaar); Foodhall (premium lifestyle food destination); Easyday (super market chain); Heritage Fresh (super market chain); Nilgiris (super market chain); WHSmith (books, stationery and traveller focused specialty retail chain); eZone (high end consumer electronics specialty store); and 7-Eleven.

Competition Assessment:

*11. With respect to the presence of Amazon Group and FCL in coupons / gift cards activities, the Commission, based on the submissions, noted that Amazon co-branded gift cards are issued by an independent third party, Qwikcilver Solutions Private Limited ("**Qwikcilver**") and neither ACI nor any other Acquirer Affiliate hold any shares in Qwikcilver. Further, it is stated that*

neither APIPL nor any other Acquirer Affiliate is engaged in the business of issuing/distributing gift cards in India.

*12. It is noted that the wholesale (**B2B**) and retail (**B2C**) activities of Acquirer or Acquirer Affiliates have horizontal overlap(s) and/or vertical relationship(s) with business activities of FRL (including its direct and / or indirect subsidiaries).*

13. With respect to the presence of Future Group and certain Acquirer Affiliates in the business of B2C retail, the Commission carried out the assessment at overall India retail market level, separately for organised segment, and within organised segment separately for other narrower segments. The Commission observed that the presence of FRL and Acquirer Affiliates in overall B2C retail or in any narrower segment stated above is not such as to raise any competition concern. Therefore, the Proposed Combination is not likely to raise any competition concern and the exact relevant market definition is being left open. Combination

14. With regard to potential as well as existing vertical relationship(s) in B2B sales, Amazon branded devices, digital payment and online marketplace/online intermediation services, it observed that:

(a) AWIPL is a marginal player in B2B sales and does not make any B2B sales to the FCRPL Group entities. AWIPL is merely a wholesale reseller of branded products that are widely available through various other wholesale formats and any potential vertical relationship may not raise foreclosure concern.

(b) Currently ASSPL does not directly supply the Amazon branded devices to Future Group entities for retailing and in the presence of various other sellers of Amazon branded devices and other competing products in the market, any potential vertical relationship between ASSPL and Future Group entities may not raise any competition concern.
(c) There is no existing direct commercial agreement between ATSPL and FCRPL Group entities for provision of services

relating to the shipping of goods from sellers listed on Amazon India Marketplace. It has been stated that there aren't any existing or potential direct business arrangement between ATSPL and FCRPL Group entities and multiple shipping and logistics service providers are present in India.

(d) Both APIPL and FCL have marginal presence in the overall payments market in India and currently APIPL has no existing business arrangement with FCL. It is also observed that in digital payments services, PayTM Payments Bank Limited is the biggest player in the m-wallet services and there are other players such as Google Pay and PhonePe providing similar services.

(e) The sales made by Future group entities including FRL through third party online marketplaces (including Amazon India Marketplace) are insignificant.

15. Considering the facts on record, details provided in the notice given under sub-section (2) of Section 6 of the Act and assessment of the proposed combination on the basis of factors stated in sub-section (4) of Section 20 of the Act, the Commission is of the opinion that the proposed combination is not likely to have an appreciable adverse effect on competition in India and therefore, the Commission, hereby, approves the same under sub-section (1) of Section 31 of the Act.

16. This order shall stand revoked if, at any time, the information provided by the Acquirer is found to be incorrect. This approval should not be construed as immunity in any manner from subsequent proceedings before the Commission for violations of other provisions of the Act."

Appellant's Contentions (All India Consumer Product Distributors Federation):

350. The Learned Counsel for the Appellant (All India Consumer Product Distributors Federation - ``AICPDF") submits that the proceedings before the 1st Respondent / CCI and this `Appellate Tribunal' under the Competition Act, 2002, are proceedings in `rem' and that the Members of the `AICPDF' and `AICPDF' are gravely affected by the entry of Multinational Companies, Viz., `Amazon', `Flipkart' and `Walmart', etc., who violate the `Indian Law' that was entry of `Foreign Direct Investment' in `Multi Brand Retail Trade' (`MBRT').

351. The Learned Counsel for the Appellant submits that `AICPDF' is a `person aggrieved' by the `impugned order' dated 28.11.2019 passed by the 1st Respondent/CCI as per decision of the Hon'ble Supreme Court in Samir Aggarwal v. Competition Commission of India, reported in 2021 3 SCC at Page 136 (Spl. pgs : 154 to 159), wherein at paragraphs 16 to 23, it is observed as under:

> *16. "Section 45 of the Act is a deterrent against persons who provide information to the CCI, mala fide or recklessly, inasmuch as false statements and omissions of material facts are punishable with a penalty which may extend to the hefty amount of rupees one crore, with the CCI being empowered to pass other such orders as it deems fit. This, and the judicious use of heavy costs being imposed when the information supplied is either frivolous or mala*

fide, can keep in check what is described as the growing tendency of persons being "set up" by rivals in the trade.

17. The 2009 Regulations also point in the same direction inasmuch as regulation 10, which has been set out hereinabove, does not require the informant to state how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Also, regulation 25 shows that public interest must be foremost in the consideration of the CCI when an application is made to it in writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings. What is also extremely important is regulation 35, by which the CCI must maintain confidentiality of the identity of an informant on a request made to it in writing, so that such informant be free from harassment by persons involved in contravening the Act.

18. This being the case, it is difficult to agree with the impugned judgment of the NCLAT in its narrow construction of section 19 of the Act, which therefore stands set aside.

19. With the question of the Informant's locus standi out of the way, one more important aspect needs to be decided, and that is the submission of Shri Rao, that in any case, a person like the Informant cannot be said to be a "person aggrieved" for the purpose of sections 53B and 53T of the Act. Shri Rao relies heavily upon Adi Pherozshah Gandhi (supra), in which section 37 of the Advocates Act, 1961 came up for consideration, which spoke of the right of appeal of "any person aggrieved" by an order of the disciplinary committee of a State Bar Council. It was held that since the Advocate General could not be said to be a person aggrieved by an order made by the disciplinary committee of the State Bar Council against a particular advocate, he would have no locus standi to appeal to the Bar Council of India. In so saying, the Court held:

> *"11. From these cases it is apparent that any person who feels disappointed with the result of the case is not a "person aggrieved". He must be disappointed of a benefit which he would have received if the order had gone the other way. The order must cause him a legal grievance by wrongfully depriving him of something. It is no doubt a legal grievance and not a grievance about material matters but his legal grievance must be a tendency to injure him. That the order is wrong or that it acquits some one who he thinks ought to be convicted does not by itself give rise to a legal grievance."*

20. It must immediately be pointed out that this provision of the Advocates Act, 1961 is in the context of a particular advocate being penalized for professional or other misconduct, which concerned itself with an action in personam, unlike the present case, which is concerned with an action in rem. In this context, it is useful to refer to the judgment in A. Subash Babu v. State of A.P., (2011) 7 SCC 616, in which the expression "person aggrieved" in section 198(1)(c) of the Code of Criminal Procedure, 1973, when it came to an offence punishable under section 494 of the Indian Penal Code, 1860 (being the offence of bigamy), was under consideration. It was held that a "person aggrieved" need not only be the first wife, but can also include a second "wife" who may complain of the same. In so saying, the Court held: (SCC pp. 628-29 Para 25)

> *"25. Even otherwise, as explained earlier, the second wife suffers several legal wrongs and/or legal injuries when the second marriage is treated as a nullity by the husband arbitrarily, without recourse to the court or where a declaration sought is granted by a competent court. The expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the*

content and intent of the statute of which the contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict the right of filing complaint to the first wife and there is no reason to read the said section in a restricted manner as is suggested by the learned counsel for the appellant. Section 494 does not say that the complaint for commission of offence under the said section can be filed only by the wife living and not by the woman with whom the subsequent marriage takes place during the lifetime of the wife living and which marriage is void by reason of its taking place during the life of such wife. The complaint can also be filed by the person with whom the second marriage takes place which is void by reason of its taking place during the life of the first wife." (page 628)

21. Clearly, therefore, given the context of the Act in which the CCI and the NCLAT deal with practices which have an adverse effect on competition in derogation of the interest of consumers, it is clear that the Act vests powers in the CCI and enables it to act in rem, in public interest. This would make it clear that a "person aggrieved" must, in the context of the Act, be understood widely and not be constructed narrowly, as was done in Adi Pherozshah Gandhi (supra). Further, it is not without significance that the expressions used in sections 53B and 53T of the Act are "any person", thereby signifying that all persons who bring to the CCI information of practices that are contrary to the provisions of the Act, could be said to be aggrieved by an adverse order of the CCI in case it refuses to act upon the information supplied. By way of contrast, section 53N(3) speaks of making payment to an applicant as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II of the Act, having been committed by an enterprise. By this sub-section, clearly, therefore, "any person" who makes an application for compensation, under sub-section (1) of section 53N of the Act,

would refer only to persons who have suffered loss or damage, thereby, qualifying the expression "any person" as being a person who has suffered loss or damage. Thus, the preliminary objections against the Informant/Appellant filing Information before the CCI and filing an appeal before the NCLAT are rejected.

22. An instructive judgment of this Court reported as Competition Commission of India v. Steel Authority of India, (2010) 10 SCC 744 dealt with the provisions of the Act in some detail and held: (SCC pp. 768, 788-89 & 794, paras 37-38, 101-06 & 125-26).

> *"37. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a prima facie case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no prima facie case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53-A of the Act.*
> *38. In contradistinction, the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any*

right or obligation of the parties to the lis. Closure of the case causes determination of rights and affects a party i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations."

101. The right to prefer an appeal is available to the Central Government, the State Government or a local authority or enterprise or any person aggrieved by any direction, decision or order referred to in clause (a) of Section 53-A [ought to be printed as 53-A(1)(a)]. The appeal is to be filed within the period specified and Section 53-B(3) further requires that the Tribunal, after giving the parties to appeal an opportunity of being heard, to pass such orders, as it thinks fit, and send a copy of such order to the Commission and the parties to the appeal.

102. Section 53-S contemplates that before the Tribunal a person may either appear "in person" or authorise one or more chartered accountants or company secretaries, cost accountants or legal practitioners or any of its officers to present its case before the Tribunal. However, the Commission's right to legal representation in any appeal before the Tribunal has been specifically mentioned under Section 53-S(3). It provides that the Commission may authorise one or more of chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers before the Tribunal. Section 53-T grants a right in specific terms to the Commission to prefer an appeal before the Supreme Court

within 60 days from the date of communication of the decision or order of the Tribunal to them.

103. The expression "any person" appearing in Section 53-B has to be construed liberally as the provision first mentions specific government bodies then local authorities and enterprises, which term, in any case, is of generic nature and then lastly mentions "any person". Obviously, it is intended that expanded meaning be given to the term "persons" i.e. persons or bodies who are entitled to appeal. The right of hearing is also available to the parties to appeal.

104. The above stated provisions clearly indicate that the Commission, a body corporate, is expected to be party in the proceedings before the Tribunal as it has a legal right of representation. Absence of the Commission before the Tribunal will deprive it of presenting its views in the proceedings. Thus, it may not be able to effectively exercise its right to appeal in terms of Section 53 of the Act.

105. Furthermore, Regulations 14(4) and 51 support the view that the Commission can be a necessary or a proper party in the proceedings before the Tribunal. The Commission, in terms of Section 19 read with Section 26 of the Act, is entitled to commence proceedings suo motu and adopt its own procedure for completion of such proceedings. Thus, the principle of fairness would demand that such party should be heard by the Tribunal before any orders adverse to it are passed in such cases. The Tribunal has taken this view and we have no hesitation in accepting that in cases where proceedings initiated suo motu by the Commission, the Commission is a necessary party.

106. However, we are also of the view that in other cases the Commission would be a proper party. It would not only

help in expeditious disposal, but the Commission, as an expert body, in any case, is entitled to participate in its proceedings in terms of Regulation 51. Thus, the assistance rendered by the Commission to the Tribunal could be useful in complete and effective adjudication of the issue before it." *(page 788)*

125. We have already noticed that the principal objects of the Act, in terms of its Preamble and the Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalise the Indian economy to bring it on a par with the best of the economies in this era of globalisation would be jeopardised if time-bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53-B(5) and 53-T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure timebound disposal of such matters.

126. The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the legislature upon the Commission under Sections 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner,

> *as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification." (page 794)*

23. Obviously, when the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act."

and as such, the Learned Counsel for the Appellant contends that the `Appellant' is a `Necessary and Proper Party' to the instant `Appeal'.

352. The Learned Counsel for the Appellant submits that `Fraud vitiates all acts, judicial and ecclesiastical'. According to the `Appellant', `all acts and orders/permissions', obtained by `Fraud' are `nullity' and has `no legs to stand` in the `eye of law'.

353. According to the Learned Counsel for the Appellant, the language of the `impugned order' dated 28.11.2019 of the `1st Respondent/CCI' in (Combination Registration No. C-2019/09/688) employed at paragraph 16 i.e., `shall stand revoked', if the information is found to be `incorrect' is not a `discretionary one', but a `mandatory one'. Therefore, in lieu of the findings of `false statements', `suppression' and `misrepresentations'

in the `1st Respondent/CCI' Order and the requirements of the ingredients of Section 43A, 44 and 45 of the Competition Act, 2002, having been fulfilled, the `impugned order' dated 28.11.2019 is to be revoked and set aside by this `Tribunal' in the interest of justice.

Appellant's Case Law:

354. The Learned Counsel for the Appellant relies on the decision of the Hon'ble Supreme Court in A.V. Papayya Sastry v. Govt. of A.P., (2007) 4 SCC, Page 221 (vide paragraphs 21 to 23), inter alia to the effect that `Fraud avoids all Judicial acts, ecclesiastical or temporal and that a `Judgement', `Decree' or `Order' obtained by playing `Fraud' on the `Court', `Tribunal' or `Authority' is a `nullity' and `non est' in the `eye of law' and moreover, `No Judgement of a Court', `No Order of a Minister', can be allowed to stand, if it has been obtained by `Fraud', as per decision in Lazarus Estates Ltd. v. Beasley 1956 1QB 702.

Pleas of 2nd Respondent/Amazon.com NV Investment Holdings LLC in Comptn App (AT) Nos. 2 and 3 of 2022):

355. It is the submission of the Learned Counsel for the 2nd Respondent states that the `Appellants' (in Comptn. App (AT) Nos. 2 and 3 of 2022) have no locus standi to intervene in the confidential proceedings (Viz.

Show Cause Notice proceedings issued by the `1st Respondent/CCI') or to prefer `Appeals' before this `Tribunal' because of the fact that they are strangers to the proceedings before the `1st Respondent/CCI', since they are not relevant `Stakeholder' in `Combination' between the `Appellant/Amazon' and the 2nd Respondent/FCPL. That apart, they are not `Parties' to the `Combination' between the `Appellant/Amazon' and the `2nd Respondent/FCPL' as per Section 5 of the Competition Act, 2002, which defines a `Combination' read with Regulation 2 (1) (f) of the Combination Regulations, which defines a `Party' to the `Combination'.

356. The Learned Counsel for the `2nd Respondent/Amazon' refers to Section 29 of the Competition Act, 2002, which enumerates the conditions when the `1st Respondent/CCI' may allow third parties to participate in the `Combination' proceedings.

357. Section 29 (2) of the Competition Act, 2002, specifies that the Commission may invite any third party which is affected or is likely to be affected by the said `Combination', only when the `1st Respondent/CCI' after considering the Response of the Parties to the Combination has formed the prima facie opinion that the `Proposed Combination' is likely to cause `AAEC' and that, till date, no such `prima

facie opinion' has been formed by the `Commission'. As such, it is the stand of the `2nd Respondent/Amazon' that till a prima facie opinion is formed and a `Notice' is issued under the Section 29 of the Competition Act, 2002, the proceedings pertaining to the review of a notified Combination are in personam.

358. The Learned Counsel for the `2nd Respondent/Amazon' points out that the `Show Cause Notice' dated 04.06.2021 was issued by the `1st Respondent/CCI' only to the Appellant/Amazon (in Comptn App (AT) No. 1 of 2022) as per Section 43A, 44 and 45 of the Competition Act, 2002 and not under Section 29 of the Act. In fact, all the proceedings undertaken qua, the penal provisions are in personam proceedings against the `Appellant/Amazon' and rightly, the `Show Cause Notice' had not mentioned the `Confederation of All India Traders'.

359. According to Learned Counsel for the `2nd Respondent/Amazon', the `1st Respondent/CCI' had not considered the `Appellant/Confederation of All India Traders' (Comptn. App (AT) No. 3 of 2022) to be a `Stakeholder' in the `Show Cause Proceedings' before the `Order' dated 19.11.2021. In fact, the Hon'ble High Court of Delhi without delving into the merits of the matter had directed the `1st Respondent/CCI' to consider the `Show Cause Notice' aspect within two

weeks, after considering all objections raised by the `Appellant' and to pass an order, after hearing all the `Stakeholders'. In fact, the Hon'ble High Court of Delhi's order, according to the Appellant had not directed CAIT (Appellant in Comptn. App (AT) No. 3 of 2022) to be heard but only directed the Commission to hear all the `Stakeholders'. However, the `1st Respondent/CCI' had allowed a third person / `CAIT' to take part in the hearing in the `Show Cause Notice Proceedings' against the `Appellant/Amazon'.

360. The version of the Learned Counsel for the 2nd Respondent/Amazon is that in the detailed oral hearing on 22.09.2021 when the `1st Respondent/CCI had heard the `Appellant' in a detailed oral hearing, `CAIT' was not part of the proceedings. In fact, on 15.11.2021, the Commission had directed the `FCPL' and the `Appellant' to file their pleading Viz. Reply and Rejoinder and the hearing was slated on 04.01.2022. Indeed, CAIT's letter dated 08.11.2021 was not part of the `Commission's record as on 23.11.2021, when an inspection of Commission's record pertaining to the `Show Cause Proceedings' was conducted by the `Appellant'. In reality, the `Show Cause Notice' was not issued pursuant to any information provided by the `Appellant/CAIT' (in Comptn. App (AT) No. 3 of 2022).

361. The Learned Counsel for the `2nd Respondent/Amazon' vehemently takes a plea that both the Appellants in Comptn. App (AT) Nos. 2 and 3 of 2022, have `abused the process of law' by filing these two Appeals and they have no `Locus' to assail the `impugned order' dated 28.11.2019, passed by the `1st Respondent/CCI' under Section 53B of the Competition Act, 2002.

362. Further, the aforesaid `Two Appellants' are not affected by the `Combination' or the `Approval Order' being `kept on hold'. Besides this, this `Appellate Tribunal' is not empowered to assess as to whether there was `AAEC' or otherwise. Neither the `1st Respondent/CCI' nor the aforesaid `Appellants' have been able to exhibit that the notified transactions caused any `AAEC' in the Indian market, even after two years of consummation.

363. The Learned Counsel for the `2nd Respondent/Amazon' points out that the `Appellant/AICPDF' (in Comptn. App (AT) No.2 of 2022) is acting as `Proxy Litigant' for `Future Group' and `Appellant/CAIT' (in Comptn. App (AT) No. 3 of 2022. As a matter of fact, both the `Appellants' in the aforesaid two Appeals should have preferred an `Petition' for `impleadment' before the Commission showing tangible interest in the outcome of `Show Cause Proceedings' against the

`Appellant' and only then, the `Commission' was under an obligation to pass an order of `impleadment of CAIT', as a necessary party, in public interests, in the outcome of `SCN' proceedings.

364. The Learned Counsel for the `2nd Respondent/Amazon' contends that `Amazon' (Appellant in Comptn. App (AT) No. 1 of 2022 has not committed any fraud upon the `1st Respondent/CCI' in obtaining an `Approval' for its investment in `Future Group' and that it had disclosed all material particulars pertaining to its investment in `Future Group'. Equally, there was no misrepresentation from the `Appellant/Amazon's `Response to Query 6.7 of Form I', wherein the `Amazon/Appellant' had stated that `the `Proposed Combination' pertains to overall retail market in India, etc.'

2nd Respondent/Amazon's Decisions:

365. On behalf of the 2nd Respondent/Amazon, the Learned Counsel for the 2nd Respondent/Amazon refers to the decision of the Hon'ble Supreme Court of India in Bhaurao Dagdu Paralkar V State of Maharashtra and Others (2005) 7 SCC 605, wherein it is observed that non-disclosure of information that was not required to be disclosed, will not amount to `Fraud'.

366. It is represented on the side of the 2nd Respondent/Amazon that the bundle of rights flowing from `FCPL SHA' and `FRL' was fully disclosed in the main Notification Form as well as in the subsequent responses. Therefore, there is no `aspect of any suppression or concealment of the alleged rights granted to the Amazon, by virtue of its investment in `2nd Respondent/FCPL'. Added further, there was no concealment of control related rights, to avoid notifying the real transaction. There was full disclosure relating to `FRL', `FRL SHA' and `BCAs' notwithstanding the fact that `BCAs' were not related to the `notified combination'.

367. The Learned Counsel for the `2nd Respondent/Amazon' brings to the notice of this `Tribunal' the `Appellant/Amazon' investment in `2nd Respondent/FCPL' was under `IOCC Structure'. In fact, the rights accruing to the Appellant/Amazon under `FCPL SHA' was not to be read without reference to `FRL SHA', since several of these rights contained express reference to `FRL SHA'. Furthermore, nowhere in the `Notification', the `Appellant/Amazon' had urge the `1st Respondent/CCI' not to examine the `BCAs'. In short, it is the submission of the Learned Counsel for the 2nd Respondent/Amazon the allegation of `Fraud' levelled against it is without any basis.

Discussions:

368. It is to be pointed out that `an Informant’ need not be an `affected party’ to prefer a case before the `1st Respondent/Commission’. An `Informant’ need not necessarily be `an Aggrieved / Affected Party’ to file a case before the `1st Respondent/Commission’. In fact, there is nothing in the Section 18 and 19 read with Section 26 (1) of the Competition Act, 2002, from which, one can come to a conclusion that the `1st Respondent/Commission’ has power to deny the `Reliefs’ sought for, in respect of an `Investigation’ into an `Allegation’ pertaining to Section 3 and 4 of the Competition Act, 2002, on the basis that the `Informant’ has `no personal interest’ in the matter, or he appears to be acting at the instance of someone else.

369. To put it succinctly, the Competition Act, 2002, does not prescribe `any qualification’ for a `person’, who desires to file an `information’ under Section 19 (1) (a) of the Competition Act, 2002.

370. Considering the fact that the Hon’ble High Court of Delhi in W.P.(C) 12889/21 (Confederation of All India Traders V Union of India and Another) filed by the Confederation of All India Traders (Appellant in Comptn. App (AT) No. 3 of 2002) had passed an `Order’ dated 16.11.2021 in directing the `1st Respondent/CCI’ to determine the issue

raised in the `1st Respondent/CCI's `Show Cause Notice' dated 04.06.2021 within a period of two weeks' from today, and the said decision to be taken after giving an opportunity of hearing to the `Stakeholders', this `Tribunal' unhesitatingly holds that the `Appellants' in Comptn. Appeal (AT) Nos. 2 and 3 of 2022 (`AICPDF' and `CAIT') do have the `Locus' to prefer these `Two Appeals' and as such, the said `Appeals' are `maintainable in Law' and answered accordingly.

371. Although, the `Appellant' (`AICPDF') in Comptn. App (AT) No. 02 of 2022, has prayed for setting aside the `Approval Order' dated 28.11.2019 to the limited extent stating that the `1st Respondent/CCI' cannot examine a `Transaction' which is an `illegality' and further that the `1st Respondent/CCI' cannot approve a `Transaction' which is in `negation to law' and as such, the `Commission' should have revoked the `Approval Order' dated 28.11.2019, all the more, when there was no valid `Notice' at all, in the `eye of law', there was blatant suppression and misrepresentation and moreover, in the absence of a valid `Notice', the Appellant/Amazon's `Proposed Combination' could not at all take effect or exist, in the `eye of law' and is `void ab initio' and that apart, the `1st Respondent/CCI' should not have `kept on hold' the `Approval Order' dated 28.11.2019, etc., it is pertinently pointed out by this

`Tribunal' that the `1st Respondent/CCI' (as a `Statutory Regulator'), keeping in tune with the objectives of `Competition Law' in our Country, to reach the highest sustainable level of economic growth, entrepreneurship, to promote sustainable and economic development, support good governance, etc., has wide powers to keep the `Approval' granted by it `on Hold' / `Abeyance', etc., as per Section 45 (2) of the Competition Act, 2002, when the `Commission', earlier, came to a conclusion that Section 44 of the Competition Act, 2002, was breached vis-à-vis `Combination Approval' by the `Appellant/Amazon'. Suffice it for this `Tribunal', to point out that the `Power given to the `1st Respondent/CCI' to even annul an `Approval Order', takes within its purview to `keep on hold, the `Approval Order' dated 28.11.2019 in `Abeyance', when it provided an opportunity to the `Appellant/Amazon' to present `Form II' afresh. Looking at from any angle, the Comptn. App (AT) No. 02 of 2022 sans merits.

<u>Conclusion (Competition Appeal (AT) No. 02 of 2022):</u>

372. In the result, the Competition Appeal (AT) No. 02 of 2022 is dismissed. No costs. IA Nos. 127, 128 and 129 of 2022 in Competition Appeal (AT) No. 02 of 2022 are closed.

Competition Appeal (AT) No. 03 of 2022:

373. The Appellant has projected the present `Competition Appeal' (AT No. 03 of 2022, questioning the `Order' dated 17.12.2021, passed by the `1st Respondent/Competition Commission of India' in Ref No. M-2019/09/688 (`impugned order') to the limited extent of findings rendered in paragraph 80 of the said order, wherein the `1st Respondent/CCI', although had categorically held that the `2nd Respondent/Amazon.com NV Investments Holdings LLC had by deliberate design made `false statement' and `suppressed' and `misrepresented' material information to the `1st Respondent/CCI', failed to revoke the `Approval' and only directed that the `Approval Order' dated 28.11.2019, be kept in abeyance.

374. The `1st Respondent/Competition Commission of India', while passing the `impugned order' dated 17.12.2021 (in respect of proceedings) against the `2nd Respondent/Amazon.com NV Investment Holdings LLC (Appellant in Competition App (AT) No. 01 of 2022) (under Sections 43A, 44 and 45 of the Competition Act, 2002), at paragraph nos. 74 to 84, had observed the following:

> *74. "Seen in the scheme of the Act and the underlying spirit, the notice given under Section 6(2) of the Act is not a document of*

complex defence with legal arguments submitted in an adversarial litigation, but an application for approval containing relevant facts and particulars regarding the proposed combination that are true, correct and complete to the best of knowledge and belief of the notifying party. The facts, particulars and documents required to be furnished under Form I, including the purpose of the combination (item 5.3), inter-connected transactions (item 5.1.2) and documents considered by boards of the parties or key managerial personnel (Item 8.8), are essential to have a full, clear and complete picture of the notified combination. The requirement to disclose these material facts and particulars is paramount as they enable the Commission to appreciate the commercial and economic contours of the combination and decide appropriate framework for assessment in the matter. If a party conceals/suppresses and/or misrepresents to the Commission the scope and purpose of the Combination and obtains approval, the same would effectively amount to approval/consent having been obtained by way of fraud. Such breach of trust of the Commission, established under the Act for the benevolent purpose of promoting and sustaining competition in markets in India, manifests a deliberate disregard to the trust based regulatory mechanism provided under the Act.

75. A holistic appreciation of the Notice and material brought on record reveals that there has been a wilful and deliberate design threaded across the Notice and subsequent submissions dated 15th November, 2019 of Amazon, to suggest that the Combination consists of only Transaction I, Transaction II and Transaction III; and that FCPL SSA and FCPL SHA are the only two agreements entered into between the parties in relation to the Combination. The manner and extent of assertions regarding FRL SHA is that the same was a pre-existing arrangement amongst the shareholders of FRL, executed pursuant to the Warrants Transaction, and it was negotiated independent of Transaction III i.e., acquisition of 49% stake in FCPL by Amazon. The inter-connection between FRL SHA and the Combination was

suppressed. Similarly, the BCAs, although disclosed, were claimed as neither inter-connected with, nor a part of the Combination. However, the Internal Correspondence brings out that BCAs and acquisition of strategic rights over FRL, through the acquisition of shares in FCPL, had been considered together as parts of one composite package, viz., 'Project Taj [Future Group] – Investment in National Multi-category Copperfield Seller'. FCPL was merely a vehicle for Amazon to acquire interest over FRL, and such interest was considered necessary to implement strategic alignments between the business activities of Future and Amazon groups in India.

76. The learned counsel appearing for Amazon argued that it had disclosed FRL as a material entity, the object of attention and that its businesses were essential consideration for Amazon to pursue the Combination. This does not meet the requirement of notification in Form I read with Regulation 5(2) of the Combination Regulations and Section 6(2) of the Act. It is true that Amazon had disclosed several materials relating to the overlapping business activities of the parties to the Combination, FRL and other affiliates. However, such disclosures relating to the overlapping activities of Amazon group and FRL were claimed to be by way of abundant caution as FCPL held warrants issued by FRL[38] (. Amazon has not provided any details in the context of the actual combination, including FRL SHA and BCAs, being pursued for strategic alignments between the business activities of Amazon group and FRL / its affiliates. In the letter dated 24th October, 2019 of the Commission, the following specific query was posed to Amazon: '2.9 According to the notice, in certain overlapping segments of the areas of the operations of the parties, the combined market shares are exceeding the thresholds given in regulation 5 (3) of the Combination regulations, you are required to provide justification for filing the notice in Form I'. In response, Amazon had inter alia submitted that:

The Investor's has no shareholding in FRL, and does not exercise any control or influence on it, therefore the Proposed Combination should not be subjected to Form II filing requirement…In the present case, with a view to assist the Hon'ble Commission and out of abundant caution, the overlap in the retail market has been identified, ***pursuant to the FRL Warrants held by FCL…****"*

[Emphasis Supplied]

These claims were made by completely masking the fact that FRL SHA and BCAs are inter-connected parts of the Combination, contemplated to establish strategic alignments between the business activities of FRL and Amazon Group. This is a critical factor for determining the need for filing Form II in the matter. However, consistent with the design across the Notice and subsequent submissions of Amazon, the said details were suppressed in response to the said query 2.9.

77. The Commission notes that the details of overlap between FRL and Amazon Group, provided in the Notice, and subsequent submissions of Amazon as well as the competition assessment conducted in the Approval Order are in the context of FCPL holding warrants in FRL. However, the said assessment is definitely not from the perspective of strategic alignments between FRL and Amazon Group. This is obvious from the Approval Order as it does not make any reference to FRL SHA or the BCAs. The Commission observes that the effect of commercial contracts entered into between FRL and Amazon Group entities, in their normal course of business, would be considerably different from parties contemplating strategic alignments between their business through strategic investments. The regulatory process of notification by the parties that would follow an admission of the commercial contracts being part of the combination and also the purpose of the strategic acquisition of shares and rights would entail consequential presentation of facts, representations, clarifications and undertakings, if any, which would not be present when such contracts are independent of the combination. The

nature of inquiry by the Commission in these cases would also be necessarily with due regard to the acquisition and contracts being part of one single understanding to establish a strategic partnership. This regulatory process, in itself, makes the notifying party to furnish true, correct and complete information regarding the actual combination pursued by the parties and thus, meet the requirements of the Act and the Regulations framed thereunder. Concurrently, such process would enable the Commission to appreciate the combination in its actual sense, and accordingly, discharge its functions in terms of the Act. If one were to argue otherwise, it would be sufficient that the notice filed with the Commission merely describes the name of the parties and their business activities and there would be no need to give any other detail as required in Form I or Form II, including the scope of arrangements, their purposes and context of the combination. This is ex facie contrary to the scheme and intendment of the Act and Combination Regulations.

78. The above discussed omissions, false statements and misrepresentations have the effect of influencing the line of inquiry in assessing the Combination. Irrespective of what would have been the outcome of a notice with true, correct and complete disclosures, the misleading submissions, false statements, omission and suppression of material particulars, facts and documents discussed above, have denied and disabled the Commission an opportunity to assess the effects of the actual Combination, with specific focus to the actual intended objectives. Condonation of such lapses would effectively mean that a notifying party could disclose its legal contracts in a distorted and elongated manner of its convenience and engage in suppressions and misrepresentations of the actual scope and purpose of the Combination. This makes all details sought in Form I and purpose of regulation of combination under the Act, otiose, besides stultifying the very legislative intent for merger review process.

79. In sum, Amazon ought to have notified the combination, inter alia, consisting of the following inter-connected steps: (a) Transaction I; (b) Transaction II; (c) Transaction III; (d) FRL SHA for the purpose of acquisition of strategic rights over FRL through FCPL SHA; and (e) commercial agreements between Amazon and Future groups, for the purpose of establishing strategic alignment and partnership between Amazon Group and FRL as well as have a 'foot-in-the-door' in the India retail sector. Amazon failed to notify FRL SHA and the commercial arrangements, as parts of the combination between the parties, and supressed the actual purpose and particulars of the combination, as discussed above, in contravention of the obligation contained in subsection (2) of Section 6 of the Act read with Regulation 5 and sub-regulations (4) and (5) of Regulation 9 of the Combination Regulations.

80. Given that the Combination is between players who are known in the online marketplace and offline retailing and they have contemplated strategic alignment between their businesses, the Commission considers it necessary to examine the combination afresh based on a notice to be given in Form II with true, correct and complete information, as required therein. Accordingly, in exercise of the powers conferred under sub-section (2) of Section 45 of the Act, the Commission hereby directs Amazon to give notice in Form II within a period of 60 days from the receipt of this order, and, till disposal of such notice, the approval granted vide Order dated 28th November, 2019, in Combination Registration No. C-2019/09/688, shall remain in abeyance.

81. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination. In case of a contravention under Sections 44 and 45 of the Act, each of the said provision renders the contravening person liable, inter alia,

to a penalty, as provided therein. Though the penalty under Sections 43A, 44 and 45 of the Act can be to the extent mentioned therein, the Commission has sufficient discretion to consider the conduct of the parties and the circumstances of the case to arrive at an appropriate amount of penalty.

82. In the instant case, all the contraventions discussed above arise from a deliberate design on the part of Amazon to suppress the actual scope and purpose of the Combination, and the Commission finds no mitigating factor. Resultantly, the Commission considers it appropriate to levy the maximum penalty of INR One Crore each under the provisions of Section 44 and Section 45 of Act. Accordingly, Amazon is directed to pay a penalty of INR Two Crore.

83. As regards failure to notify combination in terms of the obligation cast under Section 6(2) of the Act, Section 43A of the Act enables the Commission to impose a penalty, which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination. Accordingly, for the above mentioned reasons, the Commission hereby imposes a penalty of INR Two Hundred Crore upon Amazon.

84. Amazon is directed to pay monetary penalty as imposed vide paras 82 and 83 above, within a period of 60 days from the receipt of this order."

375. In the instant `Appeal' (Comptn. App (AT) No. 03 of 2022 notwithstanding the fact that the `Appellant/CAIT' has prayed for setting the `impugned order' dated 17.12.2021 passed by the `1st Respondent/CCI' (to a limited extent), to set aside the `Approval Order' dated 28.11.2019, passed by the `1st Respondent/CCI' in `Notice' dated 23.09.2019 (Registration No.C-2019/09/688) filed by the

`Appellant/Amazon', among other grounds that a `Party' cannot get away from the consequences of `suppression', `false statements' and `misrepresentations', and that the direction of the `1st Respondent/CCI' in permitting a `Notification' is in effect, condoning the serious offences of the `Appellant/Amazon', etc.

376. This `Tribunal' taking note of the fact that the `1st Respondent/CCI' has wide powers (including the residuary powers) as per Section 45 (2) of the Competition Act, 2002, besides, the `inherent implied powers' as a `Statutory Regulator', to satisfy the aim and objective of the Competition Act, 2002, is of the cock sure opinion that the power of the `1st Respondent/CCI' to grant an `Approval' includes the power to keep its `Order' in `Abeyance', when the `Appellant/Amazon' had breached vis-à-vis `Combination Approval' and as such, even though the `Appellant' as a `Stakeholder' / `Aggrieved' has filed the instant Comptn. App (AT) No. 03 of 2002, the same being maintainable, is not entitled to the `Reliefs' prayed for in the subject matter in issue, in the present `Appeal'. Consequently, the Comptn. App (AT) No. 03 of 2022 is devoid of merits.

<u>Result (Competition App (AT) No. 03 of 2022):</u>

377. In fine, the Competition Appeal (AT) No. 03 of 2022 is dismissed. No costs. IA Nos. 140, 141 and 142 of 2022 in Competition Appeal (AT) No. 03 of 2022 are closed.

The `Office of the Registry' is directed to send copy of this `Judgment' to the `Parties' in Comptn. App (AT) No. 1, Comptn. App (AT) No. 2 and Comptn. App (AT) No. 3 of 2022, accordingly.

[Justice M. Venugopal]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

13/06/2022
SR/GC