NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Competition Appeal (AT) No.16 of 2019

[Arising out of Order dated 06.11.2018 passed by Competition Commission of India in Case No.20 of 2018]

IN THE MATTER OF:	**Before CCI**	**Before NCLAT**
All India Online Vendors Association (Sellers Association) Through its authorised Representative Mr. Mitesh Saladiya, H-501, Rajyash Reevanta, Vasna, Ahmedabad, Gujarat – 380007	Informant	Appellant
Versus		
1. Competition Commission of India, The Competition Commission of India, through its Secretary, 9th Floor Office Block – 1, Kidwai Nagar (East), New Delhi – 110023	…	Respondent No.1
2. Flipkart India Private Limited, Vaishnavi Summit, Ground Floor, 7th Main, 80 Feet Road, 3rd block, Koramangala, Industrial Layout, Bengaluru – 560034	Opposite Party No.1 (OP1)	Respondent No.2
3. Flipkart Internet Private Limited,	Opposite Party No.2 (OP2)	Respondent No.3

Vaishnavi Summit,
Ground Floor,
7th Main,
80 Feet Road,
3rd block,
Koramangala,
Industrial Layout,
Bengaluru – 560034

For Appellant: **Shri Chanakya Basa, Advocate**

For Respondent: **Shri Amit Sibal, Sr. Advocate with Shri Rajshekhar Rao, Shri Yaman Verma, Ms. Neetu Ahlawat, Ms. Sonali Charak, Shri Chaitanya Puri, Shri Saksham Dhingra and Shri Areeb Y. Amanullah, Advocates**

J U D G E M E N T

(4th March, 2020)

A.I.S. Cheema, J. :

1. This Appeal has been filed by the Appellant - All India Online Vendors Association against Competition Commission of India (CCI - in short) (Respondent No.1), Flipkart India Private Limited (Respondent No.2) and Flipkart Internet Private Limited (Respondent No.3). Respondents 2 and 3 were arrayed as OP1 and OP2 before CCI. We will refer to these Respondents as OP1 and OP2.

2. This Appeal has been filed as the information submitted by the Appellant under Section 19(1)(a) of the Competition Act, 2002 (Act – in brief) against OP1 and OP2, inter alia, alleging that contravention of provisions of Section 4 of the Act, was ignored by CCI holding that no case of contravention of provisions of Section 4 of the Act was made out and the

matter was directed to be closed in terms of provisions under Section 26(2) of the Act.

3. The Appellant (Informant) claims that it had placed information as well as additional informations twice, putting on record sufficient material to direct the Director General to cause investigation in the affairs of the OP1 and OP2.

4. The Appellant claims that OP1 sells goods to companies like, WS Retail Services Private Limited, which was owned by founders of OP2 till 2012. The sale is made at discounted price to OP2 and thereafter, these are sold on the platform operated by OP2. OP1 is engaged in wholesale trading/distribution of books, mobiles, computers and related accessories. OP2 is engaged in e-commerce marketplace business under the brand name "Flipkart.com". According to the Appellant, OP2 connects buyers and sellers on its electronic marketplace platform, for which it receives platform fee from the registered sellers. The Appellant claims that the act of OP1 selling goods to companies like, WS Retail Services Private Limited, at discounted price and thereafter, the same being sold on platform operated by OP2 on discounted prices, was in the nature of preferential treatment to certain sellers. Unfair trade practices were being followed and corporate veil was required to be lifted. The acts of the OP1 and OP2 were in conflict with other manufacturers selling on their platform and their own brands like 'Smartboy' and 'Billion'.

5. By additional informations submitted, the Appellant referred to various reports showing activities indulged in by OP1 and OP2 to claim that action was required to be taken under the Act.

6. The Impugned Order shows that CCI heard the parties and noticed Judgement dated 25th April, 2018 passed by Hon'ble Income Tax Appellate Tribunal, Bangalore Bench. CCI recorded that it has examined the rival contentions of the parties. CCI observed in Paragraphs -18 and 19 of the Impugned Order as under:-

> "18. Perusal of the Information reveals that the Informant has essentially made allegations against Flipkart Internet/OP-2. It is alleged in the information that OP-2, which operates the Flipkart marketplace for selling of goods online in India, has abused its dominant positon in the said market by facilitating discounts and by further leveraging its positon to enter into another market of manufacturing products through private labels. In this connection, the Informant alluded to the role of OP-1 by pointing out that the strategy of OP-1 was to acquire goods from various persons and to immediately sell the same to WS Retail Services Private Limited at a discount which would, in turn, sell such goods as sellers on the internet platform Flipkart.com of OP-2.
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> 19. Thus, it is evident that there is no need to define two relevant markets as urged by the counsel appearing on behalf of Flipkart and the impugned conduct can be examined with reference to delineation of one relevant market alone which is relatable to OP-2."

7. Thus, the CCI concentrated only on the role of OP2- Flipkart Internet India Ltd. The CCI then went on to consider as to how OP2 operates on

marketplace-based e-commerce platform, which facilitates trade between end-customers and third party sellers. According to CCI, such platforms are merely an alternate distribution channel to offline distribution (or brick and mortar stores). It was observed that sellers on the Flipkart marketplace not only have the option but also the ability and choice to sell their products on other marketplace-based e-commerce platforms as also through offline modes of retail distribution. It held that e-commerce marketplaces are connecting links between buyers and sellers. It observed that several e-commerce companies are opening physically offline stores to offer online buyers the touch-and-feel experience. It was stated that there are also various offline retailers who have started their online ventures. It considered difference between online retail store and online marketplace platform and held that the relevant product market, in the case, may be considered as "Services provided by online marketplace platforms." It also held that geographical market in the matter is "India" and relevant market could be defined as "Services provided by online marketplace platforms for selling goods in India".

8. Impugned Order shows that CCI considered the question of dominance and observed that the Informant has not given any credible source for the market share data to claim that OPs hold over 40% market share. It considered the defence of opposite parties that there are multiple players in the online marketplace platforms. It observed that presently Flipkart and Amazon were bigger competitors. It observed that with regard

to entry barriers, it is possible for new entrants to create online marketplace platforms but the advantage gained by incumbents due to network effects may be difficult to breach. Respondents pointed out that there were other new players in the marketplace as Paytm Mall. CCI observed that Flipkart India is not dominant in the relevant market of "Services provided by online marketplace platforms for selling goods in India". It observed that there was no restriction on any entity desirous of dealing with Flipkart India as a business to business customer. Further business to business customers are independent third party ventures with whom Flipkart India has arm's length arrangement. It was observed in Para – 31 (Page 72) as under:-

> "31. ……. With reference to abusive conduct attributable to Flipkart Internet, it was submitted that the terms and conditions on which sellers access the Flipkart marketplace are standard and the incentive are based on objective criteria such as quality of product and volume and value of sales. Any person/entity desirous of selling its products through the Flipkart marketplace can register on it, subject to satisfaction of standard terms and conditions. ……."

For such reasons, CCI found that the matter deserves to be closed.

9. We have heard Counsel for both sides and perused the record. The Appellant and the Respondent have also submitted written submissions (Diary Nos.13925 and 13918). We have gone through the written submissions also.

10. Parties are making various averments against each other. However, considering the stage at which matter stood before CCI, it appears to us that the only question which was required to be looked into by CCI under Section 19(1)(a) read with Section 26(1) was:-

Whether the Informant made out "prima facie" case of contravention of Section 4 of the Act.

At such stage, it is necessary for the Informant to only establish a prima facie case. In the present matter, violation of provisions of Section 4 was alleged. According to the Appellant, the OP1 and OP2 were abusing their dominant position by OP1 purchasing goods and selling the same to vendors owned by founders of OP2 who in their turn sold the same at discounts on the platforms operated by OP2.

Section 4(i) and (ii) and the first explanation may be reproduced for reference:-

> "**4. Abuse of dominant position**—(1) No enterprise or group shall abuse its dominant position.
>
> (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group,--
>
> (a) directly or indirectly, imposes unfair or discriminatory--
>
> (i) condition in purchase or sale of goods or service; or
>
> (ii) price in purchase or sale (<u>including predatory price</u>) of goods or service.

> Explanation.--For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause *(ii)* shall not include such discriminatory condition or price which may be adopted to meet the competition; or……"
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> [Emphasis supplied]

11. In this context, the learned Counsel for the Appellant has referred to Judgement dated 25th April, 2018 passed by the Hon'ble Income Tax Appellate Tribunal, Bangalore Bench in the matter of **"Flipkart India Private Limited Vs. Assistant Commissioner of Income-Tax"** in ITA No.202/Bang/2018. Copy of the said Judgement is at Page – 298 of the Appeal Paper Book. The learned CCI noticed this Judgement – "Flipkart India" but did not discussed the same. The Appellant is relying on the observations made by the Assessment Officer which was extensively referred to in the Judgement by Income Tax Appellate Tribunal (ITAT). With regard to this Judgement, the defence of the OP1 and OP2 is that ITAT had rejected the findings of the Assessing Officer. That, the observations were made by Assessing Officer relating to OP1, which is wholesale business to business entity, and that the same were not with regard to Flipkart Internet. According to the Respondents, Flipkart India has a miniscule position in business to business market and cannot act independent of market forces. According to them, ITAT found that the parties purchasing products from Flipkart India were unrelated third parties.

12. As at the present stage, we are concerned only to see whether a prima facie case is made out. It appears necessary to make some reference to this Judgement of ITAT which ultimately was a result of Assessing Officer taking certain actions under the Income Tax Act and coming to certain findings to impose tax. No doubt, the findings were found fault with by the ITAT to set aside the imposition of tax but that would be besides the issue as in the Judgement, naturally, Appellate Tribunal was dealing only with the question of applicability of the concerned provisions of the Income Tax Act to the facts which were found by the Assessing Officer. It is thus, necessary to see what were the "facts found" by the Assessing Officer which are matter of record. Assessee referred in the Judgement was present OP1. Present OP2 is engaged in e-commerce marketplace business under the brand name "Flipkart.com".

13. The ITAT Judgement (Page – 298) in Para – 3 recorded:-

> "3. The AO noticed that the Assessee was a wholesale dealer and acquired goods from various persons and was immediately selling the goods to retail sellers like M/S. WS Retail Services Pvt. Ltd. and others, who subsequently would sell those goods as sellers on internet platform under the name 'Flipkart.Com'. The AO further noticed that the Assessee has been purchasing goods at say Rs.100/- and selling them to the retailers at Rs.80/-. The purchases during the relevant previous year was Rs.10335,73,05,882/- and sales was Rs.9351,75,05,319/-. After excluding closing stock of unsold goods, the purchase and sales figure were as follows:
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> | | |
> |---|---|
> | Purchases | Rs.10335,73,05,882 |
> | Less: Stock Unsold | Rs. 741,83,06,836 |
> | | Rs. 9593,89,99,046 |
> | Less: Sale Value | Rs.9351,75,05,319 |
> | Gross Loss | Rs. 242,14,93,727 |

> 4. The loss in terms of percentage was 2.52% of the cost of purchase value. The AO was of the view that the action of the Assessee in selling goods at less than cost price was not a normal business practice. He therefore called upon the Assessee to explain the purpose of selling goods at less than cost price."

ITAT Judgement shows that the Assessing Officer had examined Senior Vice-President and Finance Controller of Flipkart Group and it was noted by ITAT (Para – 7 of the Judgement) as under:-

> "7. ……. The sum and substance of the statement of the Vice-President according to the AO was that the strategy of selling at a price lower (predatory pricing) than the cost price is to capture market share and to earn profits in the long run. According to the AO the benefit to the online buyer in the short run in the form of lower price is to create indirect benefit to the Assessee in the long run."

The above Judgement further shows as under:-

> "9. The AO thereafter concluded that the losses incurred by the Assessee was to create marketing intangible assets and therefore the loss to the extent it is created due to predatory pricing should be regarded as capital expenditure incurred by the Assessee and should be disallowed. The AO was however gracious in holding that the value of marketing intangibles should be considered as an asset used for the purpose of business for which the Assessee should be eligible to claim depreciation at 25%. In coming to this conclusion, the AO made the following observations in his order.:
>
> > *"3.9. Assessee is following a business model of creating marketing intangible assets for long-term benefits. Various evidences of same can be summarized as under:*

A. Assessee sells its goods at a price lower than cost price

*B. Assessee has made losses consistently for the last 5 years. Yet it has a **high valuation**. What could be the rationale for high valuation other than the value of business model the marketing intangible and consumer goodwill.*

C. Assessee has not made profit even once till date. Its equity is being eroded. Yet it gets fresh investments from venture and angel investors at a high valuation. Fund managers and investors make detailed verification and analysis of the business model and approve a valuation. These fund managers accept that Assessee inspite of incurring losses, has generated huge marketing intangible, brand.

3.10. At this juncture it is important to stress that the predatory pricing strategy of assessee is a long term strategy and hence the capital asset generated have enduring benefits for the company. Assessee has taken over the business "Flipkart Online Pvt.Ltd." by a slump sale in FY 2011-12. But prior to take over of the business, the business has been consistently making losses. The business has eroded its equity in losses; yet has attracted heavy investments from India and abroad. By accounting standards as well as provisions of Income Tax Act, expenditure made towards generation of capital assets should be capitalized. Assessee should not such expenditure as revenue expenditure. Hence the value of marketing intangibles should be disallowed and 25% only should be allowed as depreciation u/s. 32 of IT Act, 1961."

[Emphasis supplied]

Para – 11 of the Judgement is as follows:-

"11. The AO however concluded that the Assessee followed predatory pricing in order to create marketing intangibles and brand. According to him

> the enhanced valuations at which venture capitalists invest in the Assessee is based on intangibles generated by Assessee. Hence, selling at a price below prices is not an irrational economic behaviour. It is a clearly thought strategy to establish a monopoly in market by brand building by generating consumer goodwill. This strategy naturally leads to generation of intangible assets and enduring benefit."
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> [Emphasis supplied]

14. Judgement of the ITAT shows that against Order of Assessing Officer, the Assessee (OP1) preferred Appeal to CIT(A) which confirmed the Order of Assessing Officer and rather withdrew depreciation of 25% on intangible assets which had been allowed by the Assessing Officer. Judgement of the ITAT shows that it then heard the parties and considered the provisions of the Income Tax Act, 1961 and discussed (in Para – 50 of that Judgement) that the retailers therein were unrelated parties of the Assessee and that the retailers were selling goods through Assessees web portal (Flipkart.com). The learned ITAT considered the case of the Assessee and did not agree with the Assessing Officer observing in para – 55 as under:-

> "55. As rightly contended by the learned counsel for the Assessee there was no accrual of any liability on account of any expenditure or actual outflow of funds towards expenditure. One cannot proceed on the basis of presumption that the profit foregone is expenditure incurred and further that expenditure so incurred was for acquiring intangible assets like brand, goodwill etc.

It found that it was not possible to say that profits foregone created goodwill or any other intangibles or brand to the Assessee. For such reasons, it was found that the loss declared by the Assessee in the return

of income should be accepted by the Assessing Officer and the action of Assessing Officer disallowing expenses and arriving at positive total income by assuming that there was an expenditure of a capital nature incurred and that it was chargeable to tax without any basis.

15. The above discussion makes it clear that ITAT set aside the Orders passed by the Assessing Officer, confirmed by CIT(A) as they did not fit into the requirements of law under the Income Tax Act. But then the Judgement still shows manner in which OP1 was operating in the market and predatory pricing was resorted to. The Order also shows that OP1 was selling goods to retail sellers like, WS Retail Services Private Limited and others who subsequently, would sell their goods as sellers on internet platform under the name Flipkart.com, i.e. OP2. The Appellant has rightly pointed out there is a link between what OP1 and OP2 were doing. Predatory pricing by OP1 is also pointed out. The facts recorded by Assessing Officer regarding the manner in which OP1 and OP2 were operating is material. The conclusions drawn to impose tax may have been set aside by ITAT; but the facts noticed do make out a prima facie case to have a look under the Competition Act. These were actions by Government Authorities. What happened ultimately in the Appeal before ITAT is not material as far as the issues which are for our consideration.

16. We find that the Appellant did make out a prima facie case which required CCI to direct the Director General to cause an investigation to be made in the matter. For such reasons, we set aside the Impugned Order

passed by CCI and remit back the matter to CCI. The CCI is directed to direct the Director General to cause an investigation to be made into the matter considering the information submitted by the Appellant and observations made by us in the present Judgement.

The Appeal is disposed accordingly. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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