NATIONAL COMPANY LAW APPEALLATE TRIBUNAL, NEW DELHI

Competition Appeal (AT) No.11 OF 2019

(Arising out of Order dated 6th November, 2018 passed by the Competition Commission of India in Case No. 37 of 2018)

IN THE MATTER OF:

Samir Agrawal ....Appellant

Versus

Competition Commission of India & Ors. ..Respondents

Present:

For Appellant: **Mr. Samir Agrawal and Mr. Pranaynath Jha, Advocates.**

For Respondents: **Mr. Rajshekhar Rao, Mr. Rishabh Juneja and Mr. Shiv Johar, Advocates for R-2.**
Mr. Samar Bansal, Mr. Rohan Arora, Mr. Aman Singh Sethi, Ms. Anjali Kumar, Ms. Devahuti Patha, Advocates for R-3.
Mr. Rohan Arora, Mr. Aman Singh Sethi and Ms. Anjali Kumar, Advocates for R-4.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant- Mr. Samir Agrawal claiming to be an Independent Law Practitioner filed Information with the Competition Commission of India (hereinafter referred to as "Commission") alleging contravention of provisions of Section 3 of the Competition Act, 2002 (hereinafter referred to as "Act") in as much as the cab aggregators viz Ola and Uber

used their respective algorithmic to facilitate price fixing between drivers. To put it in a different manner, the Informant alleged collusion on the part of drivers through the above named cab aggregators App who purportedly used algorithm to fix prices which the drivers were bound to accept. The Commission, after hearing the Informant, while observing that neither their appears to be any agreement, understanding or arrangement between the cab aggregators and their respective drivers nor between the drivers *inter se* qua price fixing, was of the view that there exists no *prima facie* case, closed the matter. Aggrieved thereof, the Informant has filed the instant appeal assailing the impugned order on various grounds to which reference shall be made as the narration proceeds.

2. To grasp the competition concern raised by the Informant, reference to the relevant factual matrix is inevitable. Respondent No.2 'ANI Technologies Pvt. Ltd.' (OP-1) is a domestic radio taxi service provider operating through a software application 'Ola' App. Respondent Nos. 3 to 5 respectively styled as 'Uber India Systems Pvt. Ltd.', 'Uber B.V.' and 'Uber Technologies Inc.' (OPs- 2 to 4), as a group, are engaged in the business of facilitating on demand taxi service with such services being provided in India through OP-2. OP-4 is stated to be the holding company of the Uber Group. OP-3 engages with the taxi owners attached to Uber network and is responsible for making payment of rider services and incentives to drivers. OP-2 acts as an agent of OP-3

and provides assistance for conducting business in India. The Informant, is a consumer of services provided by Ola and Uber, claiming to be aggrieved by the pricing mechanism adopted by the OPs alleged that the algorithmic pricing adopted by the OPs takes away the liberty of individual drivers to compete with each other which amounts to price fixing by the OPs in contravention of provisions of Section 3 of the Act.

3. The Commission, on the basis of material placed before it by the Informant, while arriving at a conclusion that no *prima facie* case existed to order an investigation by the Director General, observed that the Informant, while alleging that Cab Aggregators i.e. Ola and Uber, had used their respective algorithms to facilitate price fixing between the drivers but no collusion was alleged between Ola and Uber through their algorithms. Such collusion has been alleged on the part of drivers through the platform of Ola and Uber who purportedly used algorithms to fix prices which the drivers are bound to accept. The Commission while dismissing the allegation of Informant that the business model of Ola and Uber was a hub and spoke cartel and their platforms acted as a hub for collusion between the spokes i.e. drivers, dealt with the issue elaborately in para 15 of the impugned order which is extracted herein below:

> "*15. In the conventional sense, hub and spoke arrangement refers to exchange of sensitive*

information between competitors through a third party that facilitates the cartelistic behaviour of such competitors. The same does not seem to apply to the facts of the present case. In case of Cab Aggregators model, the estimation of fare through App is done by the algorithm on the basis of large data sets, popularly referred to as 'big data'. Such algorithm seemingly takes into account personalised information of riders along with other factors e.g. time of the day, traffic situation, special conditions/events, festival, weekday/weekend which all determine the demand-supply situation etc. Resultantly, the algorithmically determined pricing for each rider and each trip tends to be different owing to the interplay of large data sets. Such pricing does not appear to be similar to the 'hub and spoke' arrangement as understood in the traditional competition parlance. A hub and spoke arrangement generally requires the spokes to use a third party platform (hub) for exchange of sensitive information, including information on prices which can facilitate price fixing. For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers. In the case of ride-sourcing and ride-

> *sharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators. Thus, the Commission finds no substance in the first allegation raised by the Informant."*

4. The Commission did not find any *prima facie* evidence of an agreement between drivers *inter se* to delegate pricing power to the Cab Aggregators. The allegation emanating from the Informant pertaining to minimum resale price maintenance agreement between the Cab Aggregators and their drivers has not been pressed in appeal before us and rightly so as no resale of services is involved. The Commission, while dealing with the allegation of price discrimination, observed that the price discrimination falls within the prohibition under Section 4(2)(a)(ii) of the Act only when its imposition is indulged by a dominant enterprise. It noted that the Informant had not alleged that any of the OPs was dominant in the app based taxi services market. It also noted that Ola and Uber being two independent enterprises could not be said to be holding a dominant position collectively as the Act does not recognise collective dominance. The allegation in regard to price

discrimination came to be rejected in view of the above noticed circumstances.

5. The Commission also noticed that Ola and Uber being Cab Aggregators operating through their respective apps were not an association of drivers and they acted as separate entities from their respective drivers. It observed that a rider books his ride at any given time which is accepted by an anonymous driver available in the area and such driver has no opportunity to co-ordinate its action with other drivers thereby ruling out such activity being termed as a cartel activity. Having regard to all relevant considerations, the Commission declined to order investigation by the Director General.

6. The impugned order has been assailed on the ground that the Commission has erroneously concluded on the genuineness and legality of the pricing model of Ola and Uber in the absence of their defence, that the Commission has not refuted the allegation that the OPs fixed prices which the drivers are bound to follow and has, therefore, acquiesced the fact of price fixing, that the Commission has erroneously implied that price fixing done by way of an app is immuned from scrutiny, that the Commission's observations that the 'app determined pricing on many occasions goes lower than what an independent driver would have charged' does not legitimise the price fixing, that the price determined by a private enterprise cannot be considered as competitive

price for all of the drivers for taking that price, that the Commission has erred in treating drivers and the app providers as a single economic enterprise, that the Commission has erred in holding that there is no agreement amongst the drivers to fix prices where the app provider is acting as a hub and lastly that the Commission was not justified in ignoring the fact that Uber's business model was challenged in USA with identical allegations which was considered fit for investigation.

7. In its reply, OP-1 stated that there does not exist any anti-competitive behaviour in the business model of Ola. It is further stated that Ola merely acts as an intermediary which connects two ends of the supply chain i.e. taxi driver and the commuter. Ola and taxi drivers connected to Ola are not at the same level of supply chain. Existence of an agreement between enterprises at the same stage of service chain which are engaged in identical or similar trade of goods or provision of services is *sine qua non* to an offence under Section 3(3) of the Act. It is stated that the Informant has not been able to establish an agreement between Ola and Taxi drivers connected to it, or between the taxi drivers themselves, where they have agreed to fix prices. As regards pricing mechanism, it is stated that there are numerous variables such as, distance, time, availability of cab, weather etc. based on which the Ola App algorithm sets the fare of the trip which makes it impossible for anyone to fix prices. Dismissing the allegations of 'hub and spoke' emanating from the Informant, it is stated that there is no evidence of

the taxi drivers entering into a conspiracy by way of Ola App to exchange price sensitive information amongst each other for fixing prices and maintaining the same. Under the business model of Ola, there is no such information which is exchanged amongst the drivers and Ola. There is no alleged horizontal agreement between drivers who act independently while entering into an agreement with Ola. The drivers, though agreed to use the pricing algorithm set in the Ola app, can easily "multi home" which gives them the ability to plough their vehicle to any platform which they wish to. The consumers and drivers can switch between different radio taxi apps without incurring any significant costs.

8. OP-2 in its reply stated that the price structure offered by Uber is comparable to metered taxis as well as auto rickshaws which follow standard price mechanism at different points of the day. Moreover, the driver partners are free to charge any amount which is lower than the one recommended by the App. They are also free to pick-up passengers not using the Uber App. It is further stated that the recommended pricing protects the riders from transportation providers' arbitrarily charging high prices. Reference is made to appropriate clauses in the services agreement between Uber and its driver partners dated 8th September, 2015. It is further stated that the surge pricing model is a product of the demand and supply in the city and each specific city/ area where the services are being provided. Prices recommended by

Uber comply with the rules framed by the Government under the relevant law and the driver partners are free to charge lower amount thereby eliminating any apprehension of fares being inflated.

9. Learned counsel for the Appellant submits that Uber unilaterally fixes/ restricts the price leaving Transportation Service Providers (TSPs) and ultimate riders with no choice on pricing as Uber has total control on the pricing. It is further submitted that each and every TSP is aware that it is signing the identical terms on pricing which implies there is meeting of minds between the TSPs. Thus, the offence of Section 3(3)(a) is committed at the time of signing the Uber Services Agreement alleging that there is 'hub and spoke' cartel as the hub (Uber) fixes/ restricts prices and the spokes (TSPs) merely accede to that fixed and restricted pricing. It is submitted that there is no requirement of an explicit agreement to restrict pricing as both Uber and TSPs knew that there is zero competition on pricing. It is further submitted that an App cannot fix/ restrict prices for the App users as the same violates law and the option with the TSPs to switch from one platform to the other does not in any manner negate the offence as such option is meaningless in the sense that it is switching to another cartel run in concert with Ola. On the issue of locus, it is submitted that the Informant falls within the definition of "any person" under Section 19(1)(a) of the Act which includes an individual who can file an information virtually like an F.I.R in a criminal case can be filed by anybody. As regards existence of

prima facie case, it is submitted that in terms of the law laid down by the Hon'ble Apex Court in "***CCI v. SAIL reported in (2010) 10 SCC 744"***, the Commission is supposed to record minimum reasons without entering into any adjudicatory or determinative process.

10. Per contra, it is submitted on behalf of OP-1 that Ola App is a software platform which can be downloaded by riders/commuters as well as licensed taxi drivers on their respective mobile phones. Ola enables the drivers to connect with each other through the Ola App. It is submitted that the Informant has failed to demonstrate as to how there exists an agreement between Ola and taxi drivers connected to it, or between the taxi drivers themselves, where they have allegedly agreed to fix prices. It is further submitted that the Informant is not an aggrieved person and no prejudice has been caused to him. It is submitted that on the basis of foreign law, in inquiry initiated in a foreign jurisdiction cannot be basis for interfering with the impugned order nor can same be done on the basis of opinion of authors of some article in foreign journals. Lastly, it is submitted that the Informant has miserably failed to provide even an iota of evidence to faintly establish that drivers have entered into a conspiracy to exchange information with each other or that the business model of OP-1 in any way violates the provisions of the Act.

11. It is submitted on behalf of OP-2 that the Informant has failed to make out a prima facie case on the strength of bald allegations before the Commission. It is submitted that the Commission was not required to call OPs for hearing before recording its satisfaction in regard to existence of *prima facie* case. A discretion is vested with the Commission which does not postulate that each and every party must be heard prior to arriving at a *prima facie* opinion. Reference is made to decision rendered by the Hon'ble Apex Court in "***CCI v. SAIL reported in (2010) 10 SCC 744"*** wherein the Hon'ble Apex Court has held that there is no right of hearing and notice at the threshold stage. With regard to initiation of proceedings in a foreign jurisdiction in a similar case, it is submitted that the case pertains to arbitral proceedings between two parties and is not an investigation initiated by an Anti-Trust Authority. It is further submitted that the Uber App is a technology service offered by Uber to its driver partners with riders having the choice to go for alternative modes of transport and driver partners having choice to undertake offline private or corporate transport duties. Further the driver partners are free to negotiate a lower fare than what is recommended. It is further submitted that Uber does not function as an association with its driver partners, as such it cannot facilitate a cartel between them as alleged. It is further submitted that there is no evidence of meeting of minds between Uber and its driver partners or the driver partners *inter se*. It is further

submitted that there is no material on record to demonstrate horizontal collusion between all the driver partners to adopt Ubers platform in order to fix prices. Such driver partners are in thousands who can also operate on other taxi aggregating Apps or even privately. It is submitted that the Informant's comparison of the Cab Aggregators with Zomato and Airbnb is misplaced as the users have no material information about the drivers available in the area before booking the rides while the business model of Zomato and Airbnb is entirely different. As regards price discrimination, it is submitted that OP-2 does not hold any dominant position in the relevant market where it competes not only with Ola but also several other alternative modes of transport including Motor vehicles. It is submitted that there is vibrant and dynamic competition in the market and case of price discrimination is not made out.

12. Heard learned counsel for the parties and surfed through the record meticulously.

13. The Act was enacted to ensure fair competition by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India. To achieve this object, it provides for the establishment of quasi-judicial body styled as Competition Commission of India. The Act also aims at curbing negative aspects of competition. Chapter II of the Act deals with prohibition of agreements qua

production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause adverse effect on competition within India by any enterprises or person, singularly or in the form of an association. Such agreements are declared void. Section 3(3) deals with agreement between enterprises or persons singularly or in the form of an association including cartels engaged in similar trade of goods or provisions of services which *inter alia* directly or indirectly determines purchase or sale prices. Such agreements are presumed to have an appreciable adverse effect on competition. Section 4 prohibits abuse of dominant position which includes imposition of unfair or discriminatory condition in purchase or sale of goods or services or price in purchase or sale of goods or services.

14. The issues surviving for consideration in this appeal relate to allegations of unfair price fixation mechanism and abuse of dominant position, it is apt to notice the procedure governing inquiry by the Commission in allegations of anti-competitive agreements, including price fixation, cartelisation and abuse of dominant position. Section 19 of the Act provides for inquiry into certain agreements and dominant position of enterprise. Under this Section, the Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4 through either of the following modes:-

(a) on its own motion; or

(b) on receipt of any information from any person, consumer or their association or trade association; or

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

15. On a plain reading of this provision, it is abundantly clear that the Commission is empowered to take cognizance of any allegation of alleged contravention of the aforestated provisions of the Act on its own motion or on the basis of the complaint or on the basis of reference made to it by the appropriate Government or statutory authority. Information into allegations of alleged contravention of such provision may be filed by any person, consumer or their association or trade association. **The question that arises for consideration is whether a 'person' would mean any natural person irrespective of he being a consumer who has suffered invasion of his legal rights or a person whose legal rights have been or are likely to be jeopardised by the alleged anti-competitive agreement or abuse of dominant position.**

16. **It is true that the concept of *locus standi* has been diluted to some extent by allowing public interest litigation, class action and actions initiated at the hands of consumer and trade associations. Even the whistle blowers have been clothed with the right to seek redressal of grievances affecting public interest by**

enacting a proper legal framework. However, the fact remains that when a statute like the Competition Act specifically provides for the mode of taking cognizance of allegations regarding contravention of provisions relating to certain anti-competitive agreement and abuse of dominant position by an enterprise in a particular manner and at the instance of a person apart from other modes viz. *suo motu* or upon a reference from the competitive government or authority, reference to receipt of any information from any person in section 19(1) (a) of the Act has necessarily to be construed as a reference to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices. Any other interpretation would make room for unscrupulous people to rake issues of anti-competitive agreements or abuse of dominant position targeting some enterprises with oblique motives. In the instant case, the Informant claims to be an Independent Law-Practitioner. There is nothing on the record to show that he has suffered a legal injury at the hands of Ola and Uber as a consumer or as a member of any consumer or trade association. Not even a solitary events of the Informant of being a victim of unfair price fixation mechanism at the hands of Ola and Uber or having suffered on account of abuse of dominant position of either of the two enterprises have been brought to the notice of this Appellate Tribunal. We are, therefore, constrained to hold that the Informant has

no *locus standi* to maintain an action qua the alleged contravention of Act.

17. Assuming though not accepting the proposition that the Informant has locus to lodge information qua alleged contravention of the Act and appeal at his instance is maintainable, on merits also we are of the considered opinion that business model of Ola and Uber does not support the allegation of Informant as regards price discrimination. According to Informant, the Cab Aggregators used their respective algorithms to facilitate price fixing between drivers. It is significant to notice that there is no allegation of collusion between the Cab Aggregators through their algorithms which necessarily implies an admission on the part of Informant that the two taxi service providers are operating independent of each other. It is also not disputed that besides Ola and Uber there are other players also in the field who offer their services to commuters/ riders in lieu of consideration. It emerges from the record that both Ola and Uber provide radio taxi services on demand. A consumer is required to download the app before he is able to avail the services of the Cab Aggregators. A cab is booked by a rider using the respective App of the Cab Aggregators which connects the rider with the driver and provides an estimate of fare using an algorithm. The allegation of Informant that the drivers attached to Cab Aggregators are independent third party service provider and not in their employment, thereby price determination by Cab Aggregators

amounts to price fixing on behalf of drivers, has to be outrightly rejected as no collusion *inter se* the Cab Aggregators has been forthcoming from the Informant. **The concept of hub and spoke cartel stated to be applicable to the business model of Ola and Uber as a hub with their platforms acting as a hub for collusion *inter se* the spokes i.e. drivers resting upon US Class Action Suit titled *"Spencer Meyer v. Travis Kalanick"* has no application as the business model of Ola and Uber (as it operates in India) does not manifest in restricting price competition among drivers to the detriment of its riders. The matter relates to foreign antitrust jurisdiction with different connotation and cannot be imported to operate within the ambit and scope of the mechanism dealing with redressal of competition concerns under the Act.** It is significant to note that the Informant in the instant case has alleged collusion on the part of drivers through the platform of the Cab Aggregators who are stated to be using their algorithms to fix prices which are imposed on the drivers. In view of allegation of collusion *inter se* the drivers through the platform of Ola and Uber, it is ridiculous on the part of Informant to harp on the tune of hub and spoke raised on the basis of law operating in a foreign jurisdiction which cannot be countenanced. The argument in this core is repelled.

Admittedly, under the business model of Ola, there is no exchange of information amongst the drivers and Ola. The taxi drivers

connected with Ola platform have no *inter se* connectivity and lack the possibility of sharing information with regard to the commuters and the earnings they make out of the rides provided. This excludes the probability of collusion *inter se* the drivers through the platform of Ola. In so far as Uber is concerned, it provides a technology service to its driver partners and riders through the Uber App and assist them in finding a potential ride and also recommends a fare for the same. However, the driver partners as also the riders are free to accept such ride or choose the App of competing service, including choosing alternative modes of transport. Even with regard to fare though Uber App would recommend a fare, the driver partners have liberty to negotiate a lower fare. It is, therefore, evident that the Cab Aggregators do not function as an association of its driver partners. Thus, the allegation of their facilitating a cartel defies the logic and has to be repelled.

18. Now coming to the issue of abuse of dominant position, be it seen that the Commission, having been equipped with the necessary wherewithal and having dealt with allegations of similar nature in a number of cases as also based on information in public domain found that there are other players offering taxi service/ transportation service/ service providers in transport sector and the Cab Aggregators in the instant case distinctly do not hold dominant position in the relevant market. Admittedly, these two Cab Aggregators are not

operating as a joint venture or a group, thus both enterprises taken together cannot be deemed to be holding a dominant position within the ambit of Section 4 of the Act. Even otherwise, none of the two enterprises is independently alleged to be holding a dominant position in the relevant market of providing services. This proposition of fact being an admitted position in the case, question of abuse of dominant position has to be outrightly rejected.

19. Lastly, coming to the issue of the Commission's powers under Section 26(2), be it seen that where the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith. This is in contrast to provision engrafted in sub-section (1) of Section 26 which provides that if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter. It is abundantly clear that the Commission must arrive at an opinion in regard to existence or otherwise of a *prima facie* case qua alleged contravention of provisions contained in Section 3(1) or Section 4(1) of the Act. Such opinion has to be formed on the basis of consideration of the material placed before the Commission. Dealing with the import of Section 26 of the Act, the Hon'ble Apex Court observed in Para 97 (so far it is relevant for purpose of this case) and Para 98 in "***CCI v. SAIL reported in (2010) 10 SCC 744"***, as follows:

"97.....At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

98. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as

> *the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act."*

20. The dictum of law laid down by the Hon'ble Apex Court in unambiguous terms emphases the necessity of recording reasons while passing an order under Section 26 of the Act which includes an order passed under 26(2) providing for closing of information by the Commission on arriving at an opinion that no *prima facie* case exists. A quasi-judicial body like Commission while appreciating the material placed before it in support of allegations of anti-competitive agreements or abuse of dominant position has to form an opinion in regard to existence or otherwise of a *prima facie* case through proper application of mind and the order reflecting such opinion of the Commission has to be informed of reasons. Any view taken by the Commission without recording reasons would demonstrate lack of application of mind and exercise of arbitrary power which cannot be supported. In the instant case, the Commission has dealt with the allegations clearly identifying the issues and recording its opinion thereon in the light of law and contemporary decision occupying the field. Nothing to the contrary could be demonstrated by the Informant to warrant interference.

21. In view of the foregoing discussion, we are of the considered opinion that even on the merits there is no substance in the allegations emanating from the Informant. The opinion of the Commission in regard to non-existence of a *prima facie* case warranting closure of the information cannot be faulted on any ground. We find no legal infirmity in the impugned order. There being no merit in this appeal, it is accordingly dismissed.

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

NEW DELHI
29th May, 2020

AR