1. HARI SANKARAN v. UNION OF INDIA [SC]

Hint: CG filed application to NCLT for the books of accounts and recasting of the financial statements of IL & FS and other two companies for the last 5 years viz. FY 2012-13 to FY 2017-18. NCLT consider the preliminary report submitted by the ICAI and SFIO and invoke the provision of Section 130 of the Companies Act. NCLAT confirm the same decision of the NCLT. Appellant filed appeal to SC and SC held that that **no reason to interfere with the impugned order** passed by the NCLT under Section 130 of the Companies Act for reopening of the books of accounts and recasting the financial statements of the IL & FS. Consequently, appeal is dismissed.

Fact of the Case	☞ CG filed an application to NCLT for reopening of the books of accounts and recasting of the financial statements of IL & FS and other two companies for the last 5 years viz. FY 2012-13 to FY 2017-18. ☞ NCLT has considered the preliminary report submitted by the ICAI and SFIO and the observations made in the aforesaid reports/preliminary reports. Based on the reports, NCLT satisfied that Conditions stated in section 130(1)(i) and 130(1)(ii) of the companies Act, 2013 for invoking powers under section 130. ☞ Ex-director (Hari Sankaran) of the IL & FS appeal to NCLAT against impugned order of NCLT. However, NCLAT affirmed the impugned order passed by the NCLAT. ☞ Later on, Appellant appeal to SC against the impugned order of NCLAT.
Applicable Provision: [Section 130: Re-opening of Accounts on Court's or Tribunal's Order]	**(1)** A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by the CG, the Income-tax authorities, the SEBI, any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that— (i) the relevant earlier accounts were prepared in a fraudulent manner; or (ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements: Provided that the court or the Tribunal, as the case may be, shall give notice to the CG, the Income-tax authorities, the SEBI or any other statutory regulatory body or authority concerned or any other person concerned and shall take into consideration the representations, if any, made by that Government or the authorities, SEBI or the body or authority concernedor the other person concerned before passing any order under this section. **(2)** Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final. **(3)** No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than 8FY(s) immediately preceding the current FY: Provided that where a direction has been issued by the CG under the proviso to section 128(5) for keeping of books of account for a period longer than 8 years, the books of account may be ordered to be re-opened within such longer period.
Supreme Court Decision	➢ The Hon'ble Supreme Court held that **no reason to interfere with the impugned order** passed by the NCLT under Section 130 of the Companies Act for reopening of the books of accounts and recasting the financial statements of the IL & FS; IL&FS Financial Services Limited and IL&FS Transportation Networks Limited for the last 5 years, viz. from FY 2012-13 to the 2017-18, which came to be confirmed by the NCLAT. ➢ Consequently, the present appeal fails and deserves to be dismissed and is accordingly dismissed.

2. PR. COMMISSIONER OF INCOME TAX, DELHI v. REGISTRAR OF COMPANIES, DELHI & ORS [NCLAT]

Hint: Revenue has failed to give representation to the ROC within 30 days. Later on, Revenue file appeal to the NCLAT to restored back the name of the company to recover the tax due. However, NCLAT rejected the appeal of revenue on the ground that ROC has comply the provisions of the company law in true letter and spirit and Revenue has another remedy in Income Tax Act, 1961 to recover the tax due from the directors of the company by virtue of section 179 of the IT Act, 1961.

Fact of the Case	☞ M/s Nexus Marketing Pvt. Ltd (hereinafter referred to as "Company") was incorporated in 2007 and in 2011 the Company applied for striking off its name under 'Fast Track Exit Scheme, 2011' [FTE], which was processed by the Respondent (i.e. ROC). ☞ ROC issued notice to the Company and forwarded a copy of the notice to the appellant Revenue for seeking objections, if any. Since, no objections were received by ROC from any stakeholder within the prescribed period of 30 days. So, name of the Company was struck off. ☞ The Revenue filed an appeal to the NCLT seeking restoration of the name of the company on the ground **that the tax dues against the company were not determined, which was dismissed**. ☞ It is submitted that the Company and its Directors are trying to escape their tax liability, moreso as one of the erstwhile Directors, despite making an undertaking before the Tribunal did not comply with the Tax demand in relation to the Company. It is during the pendency of appeal proceedings before the Tribunal that an assessment order dated 28th December, 2017 is stated to have been passed ascertaining tax liability of the struck off Company at Rs.10,87,680/-, thereby bringing the Revenue within the definition of 'Creditor'. ☞ Against the dismissal, the Revenue is in appeal before NCLAT.
Applicable Provisions	☞ Guidelines for Fast Track Exit Mode (FTE) for Defunct Companies under Section 560 of the Act issued vide General Circular No. 36/2011 by the Ministry of Corporate Affairs and implemented w.e.f. 3rd July, 2011 provided for fast track exit by a defunct company for getting its name struck off from the Register of Companies. ☞ For these Guidelines **a 'defunct company' meant** any company having Nil asset and liability and not commenced any business activity or operation since its incorporation or not carrying on any business activity for1 year prior to making of an application under FTE. ☞ Nil asset and liability was a sine-qua-non (means essential conditions) for a company to fall within the ambit of a 'defunct company'. ☞ Section 179 of the Income Tax Act, 1961 deals with vicarious liability of directors of private company in liquidation **(1)** Notwithstanding anything contained in the Companies Act, 1956, where any tax due from a private company in respect of any income of any PY or from any other company in respect of any income of any PY during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant PY shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. **(2)** Where a private company is converted into a public company and the tax assessed in respect of any income of any PY during which such company was a private company cannot be recovered, then, nothing contained in sub-section

	(1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any AY commencing before the 1st day of April, 1962. Explanation.—For the purposes of this section, the expression "tax due" includes penalty, interest or any other sum payable under the Act.
Legal Procedures	☞ The Report-cum-Affidavit filed by ROC and supported by Annexures - I and II satisfactorily establishes that the procedure laid down for striking off the name of Company from Register of Companies has been **observed in letter and spirit**. ☞ Unfortunately, even the **Revenue has not made any feeble attempt** at disclosing any details of the assets (i.e. movable and immovable), that the company possessed and liability, if any, on the material date.
Decisions	☞ Unfortunately, the Revenue has not even made any feeble (i.e. soft) attempt at disclosing any details of the assets, movable and immovable, that the Company possessed and liability, if any, on the material date. Liability to pay Income Tax would necessarily depend on assets besides (in addition to) trade and business activity culminating in profit or loss. The proof in regard to possession of assets by the Company and owing of any liabilities by it as also in regard to factum of any income from legitimate sources assessable to Income Tax being abysmally (highly) absent, **no fault can be found in regard to striking off the Company by ROC under FTE which has been duly notified in the 'Gazette of India'**. ☞ Same is true about the plea of Revenue being a 'Creditor' within the meaning of Section 252(3) of the Companies Act, 2013, when admittedly it had not raised any demand or passed any assessment order prior to passing of the order of striking off the Company from the Register of Companies by ROC. ☞ Striking off the Company which was a Private Company from the **REGISTER** of Companies, indisputably does **not absolve** its erstwhile Directors who are liable as provided under Section 179 of the Income Tax Act, 1961 to pay the amount of Tax leviable in respect of income of any previous year. ☞ Why, in presence of such mechanism within the legal framework available to Revenue, insistence is on restoration of Company without laying any proof of its being possessed of any assets and liabilities and without any evidence of the Company being in operation. ☞ For the foregoing reasons, we are not inclined to interfere with the impugned order, which does not appear to be legally infirm or unsustainable. **The appeal is dismissed leaving the Revenue to pursue appropriate legal remedy (i.e. use section 179) in the light of observations in this judgment**. There shall be no orders as to costs.

3. KANODIA KNITS PVT LTD v. REGISTRAR OF COMPANIES DELHI & HARYANA [NCLAT]

Hint: Case related notice STK-1 and STK-5 properly served in pursuance of company law by NCLT and Appellant Company had not been carrying on business or not in operations for two immediately preceding FY(s) based on the documents produced by the appellant and sales and purchase bill are bogus because of same address of vendor and customer. NCLAT had rejected the appeal and held no reason to make differ from the NCLT decision.

Fact of the Case	✫ The name of the appellant company was struck off by the ROC due to the following reasons: **(a)** The company had **not been carrying** on business or nor in operations for two immediately preceding FY(s) and **(b)** The company **had not obtained the status of dormant company** u/s 455 of the Companies Act, 2013.

	☆ The Appellant filed the appeal before NCLT claiming that ROC had **not been served notice** under Section 248(1) of the Act and the ROC had proceeded to issue notice under Section 248(5) of the Act and then, the name of the appellant company was struck off. ☆ The appellant **claimed** that the company had been doing business and was in operation and audited financial statements for the year financial year 2012-13 to FY 2016-17 were filed. ☆ **In view of these,** the ROC filed reply before NCLT and affidavit of ROC claims that the appellant company had not filed financial statements from the FY ending **31.3.2004 till 31.3.2011**. The balance sheet and annual return was filed for the year ending 31.3.2012 and thereafter again there **was no filing**. ☆ According to ROC, STK-1 notice was duly issued to company on 21.3. 2017 and the copy of the same has been filed. According to the ROC, the appellant **did not respond to the said notice**. ☆ Moreover, notice issued under section 248 was **published in official gazette**, copy of notice STK 5 also gave opportunity to the appellant to move the ROC if it was aggrieved by the proposed removal of the company name. Even, after such notice, the appellant made **no effort to move the ROC** and put up its case that the appellant was in business or in operation when the name was struck off.
Applicable Provisions	☆ Section 248(1) Where the Registrar has reasonable cause to believe that— **(a)** a company **has failed to commence its business** within one year of its incorporation; **(b)** the subscribers to the memorandum have not paid the subscription which they **had undertaken to pay within a period of 180 days** from the date of incorporation of a company and **a declaration under section 11(1) of the Act to this effect has not been filed within 180 days of its incorporation**; or **(c)** a company is not carrying on any business or operation for a period of 2 immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455, Registrar **shall send a notice** to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and **requesting them to send their representations** along with copies of the relevant documents, if any, **within a period of 30 days from the date of the notice**. ☆ **Section 248(5)**At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.
Reason for making decision	☆ Based on the aforesaid discussion, it was rightly said that contention of the appellant w.r.t. opportunity is not given was not acceptable. ☆ **Appellant produced documents to substantiate its business is in operation before NCLAT which includes ITR for two AY(s) viz. 2016-17 & 2017-18. Appellant claimed gross income in ITR for FY 2016-17, amounting to Rs. 504 and for FY 2017-18, amounting to Rs. 1473/- shown income in ITR is substantially low.** ☆ **Moreover, the invoices are seen, the seller is shown as Kanodia Hosiery Mills and buyer is Kanodia Knit (P) Ltd. If the address of the seller is perused in these invoices it is 35, North Basti Harphool Singh, Sadar Thana Road, Delhi. This is the same address of the appellant, Kanodia Knits Pvt Ltd. As a result of which, it will ultimately create a doubt with respect to bogus sale and purchase is not recorded.**

	✰ We are not impressed by such documents to claim that the company was in business or in operation.
Decision	☞ **NCLAT** has rejected the appeal of the appellant after considering the aforesaid documents and finding and observation of the NCLT and ☞ NCLAT held there was no reason to make differ from NCLT and confirm the validity of the act of ROC in relation to removal of name of the appellant under section 248 of the Companies Act, 2013.

4. JOHN THOMAS v. Dr. K. JAGADEESAN [SC]

Hint: Journalist (i.e. John Thomas) has published in newspaper about the company as the abattoir (i.e. slaughter house) of human kidneys for trafficking purposes. As a result of which, Director of the Company has filed a complained against the journalist w.r.t. defamation against the company. Appellant contended that Director has **NO LOCUS STANDI** to complain because he is only a Director of K.J. Hospital about which the publication was made and that the publication did not contain any libel against the complainant personally. Supreme dismissed the appeal of Mr. John Thomas and held that Director has locus standi to the complaint in accordance with the explanation to Section 499 read with Section 199(1) of the IPC, 1860. SC confirm the validity of the act of Director to filed defamation case against the publisher.

Fact of the Case	✰ A renowned hospital in the Metropolis of Madras (Chennai) has been **CARICATURED** in a newspaper as the abattoir (i.e. slaughter house) of human kidneys for trafficking purposes. ✰ When the Director of the Hospital complained of defamation, the publisher of the newspaper sought shelter under the umbrage (annoyance) that the libel is not against the Director personally, but against the hospital only and hence he cannot feel aggrieved. ✰ The accused (or publisher), who raised the objection before the trial court, on being summoned by the court to appear before it, succeeded in stalling the progress of the trial by clinging to the said contention which the trial magistrate has upheld. ✰ However, the HC of Madras disapproved the action of the magistrate and directed the trial to proceed. Hence, the accused has come up to this Court by filing the special leave petition (SLP). ✰ Moreover, counsel of the appellant contended that the respondent, who filed the complaint, has **NO LOCUS STANDI** to complain because he is only a Director of K.J. Hospital about which the publication was made and that the publication did not contain any libel against the complainant personally. It is not disputed that the complainant is the Director of K.J. Hospital.
Applicable Laws	✰ **Explanation to Section 499** states that it may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. In view of the explanation, it cannot be disputed that a publication containing defamatory imputations as against a company would escape from the purview of the offence of defamation. ✰ If the defamation pertains to an association of persons (AOP) or a body corporate, who could be the complainant? This can be answered by reference to Section 199 of the IPC, 1860. "According to 199 (1), No court shall take cognizance of an offence under Chapter XXI of the IPC, 1860 except upon a complaint made **by some person aggrieved by the offence**." ✰ The collocation of the words "by some persons aggrieved" definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has **reason to feel hurt on account of the publication** is a matter to be determined by the court depending upon the facts of each case.

	☆ If a company is described as **engaging itself in nefarious activities** its impact would certainly fall on every Director of the company and hence he can legitimately feel the pinch of it. ☆ Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it.
Decision	☆ If K.J. Hospital is a private limited company, it is too farfetched to rule out any one of its Directors, feeling aggrieved on account of **pejoratives hurled at the company** ☆ **Hence, the appellant cannot justifiably contend that the Director of the K.J. Hospital would not fall within the wide purview of "some person aggrieved" as envisaged in Section 199(1) of the Code.** ☆ However, counsel of the appellant made last attempt to save the appellant from the prosecution by taking reference of the decision of the court in **K.M. Mathew v. State of Kerala**. In that case prosecution against Chief Editor was quashed for want of necessary averments (allegation) in the complaint regarding his role in the publication. That part of the decision rests entirely on the facts of that case and it cannot be imported to this case. ☆ The Hon'ble SC had dismissed the appeal. ☆ **SC held that Director has locus standi to the complaint in accordance with the explanation to Section 499 read with Section 199(1) of the IPC, 1860. SC confirm the validity of the act of Director to filed defamation case against the publisher.**

5. JAIPUR METALS & ELECTRICALS EMPLOYEES ORGANISATION v. JAIPUR METALS & ELECTRICALS LTD & ORS [SC]

Hint: A refence made by Company to BIFR under SICA and BIFR form a prima facie opinion that the company ought to be wound up, which opinion was forwarded to the HC. In meanwhile, Assets Reconstruction company who acquired substantially all financial debts of the company and they made application under section 7 of IBC, 2016 to the NCLT. NCLT admitted the application of the financial creditor. In pursuance of Section 14 and Section 238 of the IBC, 2016, NCLT pass order and require the HC to transfer winding up proceeding pending before HC to NCLT. The High Court then passed the impugned judgment dated 01.06.2018, in which it refused to transfer the winding up proceedings pending before it and set aside the order of Tribunal. Appeal goes to the SC against the order of HC. all proceedings under the Companies Act, 2013 which relate to winding up of companies and which are pending immediately before such date as may be notified by the CG in this behalf shall stand transferred to the NCLT. The stage at which such proceedings are to be transferred to the NCLT is such as may be prescribed by the CG.

Fact of the Case	☆ The account of the Respondent No. 1 company had become a non-performing asset, and since the company's net worth had turned negative, a reference was made to the Board for Industrial and Financial Reconstruction ("BIFR") under the Sick Industrial Companies (Special Provisions) Act, 1985 ("SIC Act"). On 26.09.2002, the **BIFR was of the prima facie opinion that the company ought to be wound up, which opinion was forwarded to the HC**. The HC ultimately registered the case as Company Petition No. 19/2009. The Alchemist Asset Reconstruction Company Ltd. (Respondent No. 3) **acquired substantially all the financial debts** of Respondent No. 1. ☆ In the meanwhile, on 11.01.2018, the Respondent No. 3 herein preferred an application under Section 7 of the IBC, 2016 stating that it had an assigned debt of Rs. 356 crores owed to it by the Respondent No. 1. Considering the fact that the debt was admitted by the company and that **till date no liquidation order had been passed in the winding up proceedings** that were pending before the High Court, the NCLT held, **referring to the non-obstante clause contained in Section 238 of the IBC, 2016**, that it was satisfied that the conditions of Section 7 had been fulfilled and that, therefore, the application should be admitted. Accordingly, **a**

	moratorium was declared in terms of Section 14 of the Code and an interim resolution professional was appointed. ✰ The High Court then **passed the impugned judgment dated 01.06.2018**, in which it **refused to transfer the winding up proceedings pending before it**, and set aside the NCLT order dated 13.04.2018, stating that it had been passed without jurisdiction.
Applicable Law	✰ **Section 434 of the Companies Act deals with Transfer of Certain Pending Proceeding** (1) On such date as may be notified by the CG in this behalf,— (a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the CLB) constituted under section 10E(1) of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act; (b) any person aggrieved by any decision or order of the CLB made before such date may file an appeal to the HC within 60 days from the date of communication of the decision or order of the CLB to him on any question of law arising out of such order: Provided that the HC may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding 60 days; and **(c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or HC, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:** Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the CG. Provided also that only such proceedings relating to cases **other than winding-up**, for which orders for allowing or otherwise of the proceedings are not reserved by the HC(s) shall be transferred to the Tribunal: Provided further that – (i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or (ii) the proceedings relating to winding up of companies which have not been transferred from the HC(s); shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959” Provided also that proceedings relating to cases of **voluntary winding up of a company** where notice of the resolution by advertisement has been given under section 485(1) of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with

	in accordance with provisions of the Companies Act. 1956 and the Companies (Court) Rules, 1959." (2) The CG may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the CLB or the courts, to the Tribunal under this section." ✩ **Section 238 of the IBC, 2016 "Provisions of this Code to override other laws"** "The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law".
Decisions	✩ It is clear that under Section 434 of the Companies Act, 2013 as substituted by the Eleventh Schedule to the IBC, 2016 vide notification dated 15.11.2016, **all proceedings under the Companies Act, 2013 which relate to winding up of companies and which are pending immediately before such date as may be notified by the CG in this behalf shall stand transferred to the NCLT**. The stage at which such proceedings are to be transferred to the NCLT is such as may be prescribed by the CG. ✩ The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before **the High Court cannot be proceeded with further in view of Section 238 of the Code**. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment.

6. BANK STREET SECURITIES PVT LTD & ORS. v. REGIONAL DIRECTOR, NORTHERN REGION [NCLAT]

Hint: Application for Amalgamation has been filed before HC and HC could be decided to transferred to the learned NCLT in view of the powers getting vested with NCLT. NCLT heard the same and considered report of the Regional Director and concluded that certain companies in the **scheme were carrying on NBFC activities and approval of RBI had not been taken and the petition required to be rejected**. Appellant counsel argued that the appellant company **had ZERO income**. So, appellant company is **not fall in the RBI Circular with respect to requirement of principal business** of NBFC. NCLT held that RD rightly observed that transferor company show "**Zero Income"** from operation and still show huge investment to be their assets. If there are huge investments as assets and it shows that financial assets are more than non-financial assets and income from operation is zero without its break up between financial income and non-financial income, **the required criteria to determine the principal business of the company being finance company gets met. NCLAT passed order in favour of RD, Northern Region** [i.e. confirm the order passed by NCLT]

Fact of the Case	✩ It appears that the appellants had filed first motion before the Hon'ble High Court of Delhi and the Court was pleased to dispense with the requirement of convening meetings of equity shareholders, secured and unsecured creditors of the Companies in view of their consent being obtained. ✩ The appellant then filed joint petition for sanction of scheme of amalgamation before the Court vide second motion under Section 391 to 394 of Companies Ac, 1956 ("Old Act" in short). ✩ Notice was issued to the ROC/Regional Director and Official Liquidator. Notice by newspaper publication was also directed. ✩ The second motion petition, before it could be decided **came to be transferred to the Learned NCLT in view of the powers getting vested with NCLT**. It is stated that when the matter came up before NCLT, ***NCLT heard the same and considered report of the Regional Director and concluded that certain companies in***

	the scheme were carrying on NBFC activities and approval of RBI had not been taken and the petition required to be rejected. ☆ A **copy of the report of RD has been filed at Annexure-21**. The report shows that the RD had issued query to the appellant company by letter dated 8th March, 2016 and the letters returned undelivered. Then one Advocate Mr. Ashish Middha by letter dated 15th March, 2016 filed reply with the RD on behalf of the company. The ***impugned order shows that the ROC during the pendency of the matter before NCLT took action under Section 12(1) read with Section 12(4) of the Companies Act, 2013***and **imposed penalty which came to be reduced by Regional Director in an appeal and which penalty was paid by the appellants**. This relates to not giving notice of change of the registered office to the ROC.
Applicable Law	☆ Para 2 of RBI Circular dated 19th October, 2006 (which has been referred by the Regional Director) may be reproduced. The same reads as under: *"In this regard, it is further clarified that the business of nonbanking financial institution (NFI) means a company engaged in the business of FI as contained in Section 45 I(a) of the RBI Act, 1934.* *For this purpose, the definition of 'Principal Business' given, vide Press Release 1998-99/1269 dated April 8, 1999 (copy enclosed) and mentioned in brief below may be followed: The company will be treated as a NBFC* ☞ *if its financial assets are more than 50 per cent of its total assets (netted off by intangible assets) and* ☞ *income from financial assets is more than 50 per cent of the gross income.* *Both these tests are required to be satisfied as the determinant factor for principal business of a company."* ☆ Section 12(4) of the companies Act, 2013 state that Notice of every change of the situation of the RO, verified in the manner prescribed, after the date of incorporation of the company, **shall be given to the Registrar within 15 days of the change**, who shall record the same.
Legal Principles held—	☆ In pursuance of Para 7, 8 and 9 of Regional Director report, it was clearly stated that appellant companies were prima facie engaged in investment activities or extending loans and advances to certain parties like corporate bodies and there **was no mention that these companies are registered** with RBI as NBFC to carry on such business. Furthermore, the appellant who had made their submission to RD through letter dated 15.03.2016 were unable to convince the RD regarding the issue of NBFC. ☆ The learned counsel for **appellants argued** that if the appellant company No.1,2,4,5,6 had 'zero' income and transferee company **also had 'zero' income** and so it **cannot be said** that both the conditions as referred in RBI Circular (i.e. more than 50% of assets should be invested in financial activities and more than 50% of income should be from financial activities) were satisfied. ☆ Having gone through the matter if the transferor companies show 'zero' income from operations and still show huge investments to be their assets, **the Regional Director rightly observed that the intrinsic value of these investment (assets) is not known and the reasonableness of the proposed exchange ratio could not be ascertained**. ☆ Such accounts showing 'zero' income and showing huge investments as assets must be said to be not inspiring confidence. **If there are huge investments as assets and it shows that financial assets are more than non-financial assets and income from operation is zero without its break up between financial income and non-financial income, the required criteria to determine the principal business of the company being finance company gets met**.

	✰ The NCLT not being satisfied from the case put up by the appellant declined to accept the scheme and we find it difficult to interfere with the impugned order
Decision	✰ When the report of the Regional Director shows that the appellant companies were engaged in investment activities or extending loans and advances, So, it can be said that the aforesaid provisions would be attracted even with or without the circular of RBI 19th October, 2006, keeping in view the above legal provisions, **the appellants have not been able to satisfy the Regional Director or the NCLT that they are not involved in NBFC activities**. ✰ Even, the counsel for the appellants **has not been able to satisfy us also**. ✰ The appeal does not even plead that the appellants **are not indulging in NBFC activities**. ✰ The appeal memo while referring to the appellant companies merely stated that the objects of the companies were as amended from time to time and which have been set out in MOA of the different companies. ✰ **No such AOA or MOA have been produced before us to show what are aims and objects of these companies**. ✰ **No documents are shown as to what are the activities of these companies**. ✰ **Thus, no material has been brought to satisfy that the impugned order is erroneous and deserves to be interfered with.**

7. THE ASSOCIATED JOURNALS LTD & ANR v. LAND & DEVELOPMENT OFFICE [Del]

Hint: Delhi High Court apply the Doctrine of Lifting of Corporate veil (i.e. Decision goes in favour of Land & Development Office) SC in various judgement held that **we have no hesitation in holding** that the purpose for which the **doctrine of lifting of the veil is applied is nothing but a principle followed to ensure that** a corporate character or personality is not misused as a device

- ☞ to conduct something which is improper and not permissible in law,
- ☞ fraudulent in nature and goes against public interest and
- ☞ is employed to evade obligations imposed in law.

Fact of the Case	✰ Though this case covered law on various aspects of the issue such as cancellation of lease, right to re-entry, transfer of property by transfer of shareholdings, **we are concerned with the issue of 'piercing the corporate veil' and how and when the smoke screen of corporate identity could be pierced to identify the real beneficiaries in the camouflaged (hide or secrete) transaction**. ✰ The following are relevant facts for the above issue: ☞ Indian National Congress sometimes referred to as AICC had advanced a loan of Rs.90 crores to AJL. ☞ On 13th August 2010, an application was made for incorporation of a charitable non-profit company (a company under Section 25 of the Companies Act) named Young India and ultimately on 23rd November 2010 Young India was incorporated with Sh. Suman Dubey and Sh. Sam Pitroda as its founder Directors. This company had an authorized share capital of 5,000 shares of Rs.100/- each valued at Rs.5, 00,000/- and the paid-up share capital was 1100 shares of Rs.100/- each valued at Rs.1, 10,000/- and the company at that point of time had two shareholders, **(a)** Shri Sam Pitroda - 550 shares valued at Rs.100/- each and **(b)** Shri Suman Dubey - 550 shares valued at Rs.100/- each. ☞ On 13th December 2010, the **FIRST** Managing Committee Meeting of Young India took place and Shri Rahul Gandhi was appointed as its Director, namely, a non-shareholder and Shri Motilal Vora and Shri Oscar Fernandes as ordinary members. Within 5 days thereafter, i.e., on 18th December 2010, by a deed of

	assignment the loan of Rs.90 crores and old outstanding in the books of Indian National Congress as recoverable from Associated Law Journals for the period 2002 to 2011 was transferred to Young India. ☞ Three days thereafter, on 21st December, 2010, a Board Meeting of AJL called for an EGM which was subsequently held on 24th December, 2010 and on the said date a loan of Rs.1 Crore was received by Young India from another company M/s Dotex and thereafter on 28th December, 2010 i.e. within a week a formal deed of assignment was executed by AICC assigning the loan of Rs.90 crores in favour of Young India. ☞ Immediately thereafter on 21st January, 2011, an EGM of Associated Law Journal was held approving fresh issue of 9.021 crores shares to Young India and on 22nd January, 2011 i.e. on the next day the **SECOND** Managing Committee of Young India was held in which Smt. Sonia Gandhi, Mr. Motilal Vohra and Mr. Oscar Fernandes were appointed as Directors and the 550 shares of the existing shareholders of Young India - Suman Dubey and Sam Pitroda were transferred to Smt. Sonia Gandhi and Mr. Oscar Fernandes and on the same day fresh allotment of Young India shares were made in the following manner: **(a)** 1,900 shares having paid up value of Rs.1,90,000/- to Shri Rahul Gandhi, **(b)** 1,350 shares with a paid-up amount of Rs.1,35,000/- in the name of Smt. Sonia Gandhi, **(c)** 600 shares with a paid-up value of Rs. 60,000 in the name of Sh. Motilal Vohra and **(d)** 50 shares with a paid-up value of Rs.5,000 in the name of Sh. Oscar Fernandes and after issuance of PAN by the Income Tax Department a bank account was opened by Young India with Citibank on 14th February, 2011 and the cheque issued by M/s Dotex for Rs.1 crore was deposited in the Young India Bank account on the said day and on 26th February, 2011 Young India issued a cheque of Rs.50 lakhs to AICC as consideration for assignment of Rs.90 crore debt payable by ALJ to AICC. ☞ On the same day, i.e., 26th February, 2011, ALJ allotted 9,02,16,899 equity shares to Young India in pursuance to the AGM Meeting decision held on 21st January, 2011 and the ALJ Board Meeting on 26th February, 2011 and **thereafter Young India applied for exemption under Section 12A on 29th March, 2011 and on 9th May, 2011 the Income Tax Authorities granted the exemption with effect from the F.Y. 2010-11**. ☞ In consequence of this, Young India became 99% or rather 100% shareholder of AJL.
Applicable Law	☆ It is an equally settled principle of law that in public interest and for **assessing the actual nature of a transaction or the modus operandi** employed in carrying out a particular transaction, the **theory of lifting of the corporate veil is permissible** and ☆ A Court can always **apply this doctrine to see as to what is the actual nature of transaction that has taken place, its purpose and then determine** the question before it **after evaluating the transaction or the modus operandi employed in the backdrop of public interest or interest of revenue to the State** etc. ☆ The theory and doctrine of lifting of corporate veil had been considered by the SC in the case of **Gotan Lime Stone (Supra)** and in the said case, judgments in the case of **Vodafone (supra)**and **Skipper Construction (supra)** etc. have been taken note of and in para 30, specific reference has been made to the Constitution Bench judgment in the case of **Bacha F. Guzdar (supra)**.

Legal Principles held –	☆ SC in various judgement held that **we have no hesitation in holding** that the purpose for which the **doctrine of lifting of the veil is applied is nothing but a principle followed to ensure that**a corporate character or personality is not misused as a device ☞ to conduct something which is improper and not permissible in law, ☞ fraudulent in nature and goes against public interest and ☞ is employed to evade obligations imposed in law.
Delhi HC Decision	☆ **In the present case,** we have observed the following transaction permit to us, to apply the doctrine of Lifting of Corporate Veil: **(a)** How the transfer of shares between AJL and Young India took place; **(b)** Within a period of about 3 months, i.e., between 23rd November, 2010 to 26th February, 2011, Young India was constituted. It took over the right to recover a loan of more than 90 Crores from Indian National Congress via making consideration of Rs.50 Lakhs. **(c)** Thereafter, replaced the original shareholders of Young India by introducing new four shareholders including Sh. Moti Lal Vohra, Chairman of AJL and **(d)** Young India after acquiring 99% of shares in AJL became the main shareholder of AJL and acquiring the administrative right to administer property of more than 400 Crores of AJL. **(e)** Even though Dr. Singhvi had argued that **there is nothing wrong in the aforesaid transaction and it is legally permissible.** ☆ The HC held that we need to give more emphasised on the principles and the doctrine for which the theory of lifting of the corporate veil has received legal recognition, we have **no hesitation in holding that the entire transaction** of transferring the shares of AJL to Young India was nothing **but a clandestine and surreptitious transfer of the lucrative interest** in the premises to Young India. In fact, **the contention of Dr. Singhvi has to be rejected and rightly so was rejected by the Single Judge**. ☆ **Delhi HC** gives the judgement in favour of LAND & DEVELOPMENT OFFICE i.e. **Principle of Corporate Veil is applied in the present case.**

8. STEEL AUTHORITY OF INDIA LTD. V. SHRI AMBICA MILLS LTD. & ORS [SC]

Hint: SC held that SAIL is not a government department. SC held in earlier judgement that the companies which are incorporated under the Companies Act have a corporate personality of their own, distinct from that of GOI.

Fact of the Case	✫ The Respondent (i.e. SHRI AMBICA MILLS LTD. & ORS) obtained an advance license and submitted to SAIL for the supply of rolled strips in coils under a special scheme. ✫ As the **licence was defective**, **SAIL rejected the license** and **refused to supply the goods at concessional price**. ✫ Respondent company contended that the license issuing authority and the major shareholder of SAIL **are the same government and because of this, SAIL could not have rejected the defective advance license**. ✫ In the given case, HC held that SAIL was a Department of Union of India. ✫ **The Appellant company file** appeal to the SC against the order of High Court.
Decision	✫ **The case decided in favour of the Appellant (SAIL).** ✫ The SC held that the in view of the earlier judgements viz., Dr. S.L. Agarwal v. The General Manager, Hindustan Steel Ltd (SC), and Western Coalfields Ltd. vs. Special Area Development Authority, Korba & ANR (SC), wherein the SC earlier held that the companies which are incorporated under the Companies Act have a corporate personality of their own, distinct from that of GOI.

	✰ **In view of the above decision of the SC in earlier cases,** we have no hesitation to hold that the HC erred in thinking that SAIL was a department of the Union of India and most of the reasons given in the judgment are based on this wrong premise. ✰ **Moreover, it was** also held that SAIL is a government company and it is distinct from the Department of the Union. The company, even though fully owned by the Union of India, when incorporated, takes its own entity/identify and cannot be considered as department of the Government.

9. USHA MARTIN VENTURES LTD. & ORS. v. USHA MARTIN LTD. & ANR [NCLAT]

Hint: NCLAT allowed Impleadment of SBI. Because, **nominee director appointed by the SBI on the BOD of the company** who represent the interest of SBI. So, petition filed by the appellant alleging oppression and mismanagement against the respondent under section 241 and 242 of the Companies Act, 2013 is indirectly impact SBI.

Fact of the Case	✰ The Appellant (i.e. USHA MARTIN VENTURES LTD) filed Petition under Section 241 & 242 of the Companies Act, 2013 alleging oppression and mismanagement against Respondents (i.e. USHA MARTIN LTD. & ANR). ✰ The SBI filed an intervention application, which was allowed by NCLT. ✰ Appellants challenged the impleadment (to sue/to hesitate) of SBI in this appeal.
Legal Principle held	✰ Appellant Company argued that the **SBI being a lender is not a necessary party nor a formal party and, therefore, it cannot be impleaded** as Respondents in a petition under Section 241 & 242 of the Companies Act, 2013. ✰ Respondent submitted a response that the SBI has a nominee director in the BOD of the Company who is required to be present in the BM in the interest of the company. ✰ Moreover, the appellant had alleged mismanagement of the company. This **would have a direct impact in Nominee director and as a result of which, it would indirectly impact SBI**, because nominee director in the BOD of the company represent the SBI and he is working in the representative capacity.
Decision	The NCLAT held that SBI had been **rightly impleaded in the suit**. This Appeal is accordingly dismissed. No Cost.

10. MEL WINDMILLS PVT. LTD. v. MINERAL ENTERPRISES LIMITED & ANR [NCLAT]

Hint: Appellant file application with NCLT under section 230(1) for convening a meeting of the members and creditors of the company in order to get a scheme of demerger sanctioned by them. However, NCLT reject the scheme on the ground of certain investigation are pending against the demerged company without passing any order to convey any meeting of creditor or member for obtaining sanction of the scheme.

Reply: NCLAT passed decision in favour of appellant and refer back the case of NCLT because of non-compliance of Section 230(1) of the Act. Moreover, the pending investigation belongs to Mining Business. It will not impact on the scheme of Merger.

Fact of the Case	✰ The Appellant (MEL Windmills) filed a first motion petition with the NCLT for convening a meeting of the members and creditors of the company in order to get a scheme of demerger sanctioned by them. ✰ The NCLT **passed an order declining to sanction the scheme of demerger** on the ground that **several issues were pending finalization and certain investigations were pending** in relation to the mining business of the demerged company. ✰ The demerged company disclosed in para IV(h) of its application **the factum of pendency of certain proceedings** in relation to the **mining business** of the demerged Company. Demerged company also stated that **investigations registered arising out of charge sheet lodged** by Special Investigation Team. Moreover, demerged company also contented that pending investigations were those which had been stayed by the High Court.

	☆ According to the appellant, **the said proceedings had no bearing and could not be an impediment in considering approval of the scheme of demerger**.
Applicable Law	☆ **Section 230(1)** states that where a compromise or arrangement is proposed— **(a)** between a company and its creditors or any class of them; or **(b)** between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, **ORDER A MEETING** of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs. ☆ **Section 230(6) states that** where, at a meeting held in pursuance of sub-section (1), **majority of persons representing 3/4th** in value of the creditors, or class of creditors or members or class of members, as the case may be, **voting in person or by proxy or by postal ballot**, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company. ☆ **Section 230(9) states** that the Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least 90%, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.
Legal Principles held—	☆ **On the plain reading of the aforesaid provisions**, it was stated that while dealing with an application under section 230 of the Act, Tribunal on being satisfied that the compromise or arrangement has been proposed in connection with ☞ a scheme for the reconstruction of the company or companies involving merger/amalgamation of two or more companies and ☞ under the scheme property or liabilities of the transferor company is required to be transferred to transferee company or divided among/transferred to two or more companies **is required to order meeting of the creditors or members**, as the case may be, to be called. Moreover, **Section 230(9)** empowers the Tribunal to dispense with calling of a meeting of creditors where such creditors, **having at least 90% value agree to and confirm the scheme of compromise or arrangement**. The creditors/members are **required to file an affidavit stating that they agree to and confirm** the scheme of compromise or arrangement. **Section 230(6)** states that proposed scheme of compromise or arrangement can be passed by the Tribunal only after sanctioning of the said scheme **by majority of the persons representing 3/4th in value of the creditors or members** as the case may be **agree to any compromise or arrangement**. ☆ Once the companies concerned approach the Tribunal for sanctioning of a compromise or an arrangement, **the Tribunal, at the very outset is required to order a meeting of the creditors/members** to be held for according consideration to the proposed scheme.

	This is a **sine quo non**(i.e. essential) for proceeding further and any order of sanctioning or refusing to sanction such compromise or arrangement by the **Tribunal would be without jurisdiction unless the Tribunal has dispensed with calling of such meeting of creditors/ members in terms of Section 230(9)**. It is **manifestly clear that at the stage of calling of meeting of creditors/members** for consideration of the scheme of compromise or arrangement **the Tribunal is not required to examine the merits of the scheme qua the proposed compromise/ arrangement**. Any such **indulgence on the part of Tribunal would fall foul of the provision engrafted in Section 230 (1) of the Act and would be without jurisdiction**.
Decision	✫ The Court remanded the matter back to the NCLT for fresh adjudication on the following grounds: **(a)** Once the **companies concerned approach the Tribunal for sanctioning** of a compromise or an arrangement, the Tribunal, **at the very outset is required to order a meeting of the creditors/ members** to be held for according consideration to the proposed scheme. **(b)** At the very threshold stage, **the Tribunal was not required to venture into the merits of the proposed scheme of demerger** which had to be examined only after obtaining the consent of creditors/members with requisite majority. **(c)** **For proper exercise of jurisdiction vested in the Tribunal,** it was imperative either ☞ To call the meeting of creditors/members for consideration of the proposed scheme of demerger or ☞ **To dispense with such meeting** by invoking section 230(9) as 100% of shareholders of each company, 100% of creditors of Resulting Companies and 97.18% of creditors of the Demerged Company had filed consent affidavits. **(d)** That the pending issues **could not be construed as an impediment** in sanctioning the proposed scheme of demerger because the demerger scheme proposed by the Appellants **was not with regard to business of Mining** which **would continue with the Demerged Company** and the pending investigation would **continue unhindered against the director of the demerged company without having any impact on the proposed scheme** of demerger. ✫ The NCLAT held that the **Tribunal failed to adhere to the mandate of law** which was mandatory and imperative in nature. ✫ The NCLAT decided in favour of the Appellant (MEL Windmills).

11. BACHA F. GUZDAR v. COMMISSIONER OF INCOME TAX [SC]

Hint: Supreme Court dismissed the appeal of appellant and require the appellant to pay tax on the whole amount of dividend. Dividend income is not considered as Agricultural income in order to claim exemption to the extent of 60% of the Dividend Income. Because, dividend income is not generating via direct association with land for agricultural purposes.

Facts of the Case	✫ The appellant (Bacha F. Guzdar) was a shareholder in **two tea** companies and **received dividend** from these companies, amounting to Rs. 2,750.

	✫ The two companies carried on **business of growing, manufacturing and sale** of tea. ✫ As per income Tax Act, 1922, 40% of the income of the tea companies **was taxed** as income from the manufacture and sale of tea and 60% of such income **was exempt** from **tax** as agricultural income. ✫ The Appellant contend that the dividend received by her from these companies is considered as agriculture income to the extent of 60% of Dividend Income and remaining part of dividend income is considered as taxable income. However, the Income Tax department (i.e. Revenue) sought to impose tax on the total amount received as dividend. ✫ The Appellant denied payment of tax on the ground that the dividend received was out of profits from the business of production and manufacture of tea and hence, 60% of it was exempt from tax. ✫ The Department disagreed with these arguments.
Applicable Law	✫ In Accordance with Income tax Acct, 1922, the agricultural income **REFERS** to the revenue received by **direct association with the land** which is used for agricultural purposes and **not by indirectly extending it** to cases where that revenue or part thereof changes hands either by way of distribution of dividends or otherwise. ✫ It is well established truth that dividend is derived from the investment made in the shares of the company and the foundation of it rests on the contractual relations between the company and the shareholder. **Dividend is not derived by a shareholder by his direct relationship with the land** which is used for agricultural purposes**.**
Decisions	The Court decided in favour of the Respondent (Department)
Legal Principles held	✫ That the shareholders are not the owners of the assets of the company. They merely have a right to participate in the profit accrued by the company by using such assets. Assets are held by the company in its own name. ✫ That in order to avail benefits under the said section, there has to be a direct nexus between the income and the Agricultural land. In the instant case, income from dividend did not accrue from land directly. It accrued from the shares of the company. Therefore, the benefits cannot be granted. ✫ That accepting the contention of the appellant would defeat the intention of the legislature in enacting the said section.
Conclusion	✫ The Supreme Court dismiss the appeal on the following grounds: **(a)** Definition of agricultural income which emphasizes the necessity of the recipient of income having a direct and an immediate rather than an indirect and remote relation with land. So, dividend income is not considered as agricultural income. However, ***<u>we admitted the fact that the creditor recovering interest on money debt due from the agriculturist who pays out of the produce of the land is equally entitled to the exemption</u>***. **(b)** **<u>Lord Anderson in Commissioners of Inland Revenue v. Forest (1924)</u>** ☞ That a shareholder **acquires a right to participate in the profits** of the company may be readily conceded but it is **not possible to accept** the contention that the **shareholder acquires any interest in the assets** of the company. ☞ A shareholder **has got no interest in the property of the company** though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. ☞ There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders.

	☞ Shareholder **has undoubtedly a further right to participate** in the assets of the company which would be left over after winding up, but not in the assets as a whole. ✫ The Appellant was not given the benefit of the exemption and require the assessee the assessee to show in his return the whole dividend including the portion **which is excluded** on the ground of agricultural income.

12. UNION OF INDIA & ANR v. MAHALAXMI SAW MILLS P. LTD [DEL]

Hint: Delhi High Court divisional bench give decision in favour of appellant and require the responded to pay unearned increase and penalty. Conversion of Partnership into company is consider as transfer or assignment for the purpose of clause (b) supra of the Lease Deed.

Fact of the Case	☞ The lease of land admeasuring 207 sq. yards bearing No.3/13, Industrial Area, Kirti Nagar, New Delhi **was granted by the President of India to one Jagjodh Singh vide Lease Deed** dated 31st December, 1962 for a term of 99 years. ☞ **Clause (b) supra of the Lease Deed** of the land aforesaid requires the lessee to obtain approval in writing of the appellants L&DO before any "assignment or transfer" of the leased premises. ☞ **Clause (c) supra of the Lease Deed** entitled the appellants L&DO to claim and recover unearned increase at the time of "transfer" subsequent to the first "transfer". ☞ In 1966, the lessee Jagjodh Singh transferred the leasehold rights in the said property to M/s Mahalaxmi Saw Mills, a partnership firm ("MSM"). ☞ The **constitution of the said MSM changed** from time to time but **NO INTIMATION thereof was given** to the appellants L&DO. **As on**7th May, 1986 **there were 7 partners** in the partnership firm. ☞ The aforesaid 7 partners of MSM, on 26th August, 1986 **got incorporated the respondent Company** and transferred the business, assets and liabilities of partnership firm MSM to the respondent Company **at their net book value and became shareholders of respondent Company in proportion of their shares in the partnership firm**. ☞ Thereafter, the respondent Company applied to the appellants L&DO **for mutation of the leasehold rights in the land aforesaid** from the name of MSM to the name of the respondent Company.
	☞ The appellants L&DO **demand the payment of unearned increase** of Rs.13,04,294/- together with penalty of Rs. 35,532/- for giving permission.
	☞ The respondent Company challenged the demand under a writ petition and the Single Judge, relying on **Vali Pattabhirama Rao v. Sri Ramanuja Ginning and Rice Factory (P) Ltd.**, had allowed the writ petition of the respondent Company **by quashing the demand for unearned increase and by directing the appellants L&DO to mutate/record the leasehold rights** in the property from the name of the partnership firm to the name of the respondent Company. ☞ The appellants appealed to the Division Bench.
Legal Principles held—	☞ The "transfer" if any by M/s Mahalaxmi Saw Mills (partnership firm) to respondent Company is a transfer **subsequent to the first transfer which was affected** by Sh. Jagjodh Singh in favour of M/s Mahalaxmi Saw Mills. Thus, if it is a **transfer or assignment within the meaning of clauses (b) supra of the Lease Deed**, as is contended by appellants L&DO, **unearned increase would be payable thereon**. ☞ A firm under the Indian Partnership Act, 1932 **is not a juristic person** and has **no entity independent from that of its partner**s and is merely a **compendious**

	name for its partners. The property of a firm is the property of all its partners in proportion to their share in the partnership firm. ☞ The said partners of the partnership firm M/s Mahalaxmi Saw Mills **converted the partnership firm into a private limited company** i.e. the respondent Company herein and further provided in the MOA of the respondent Company that all the assets of the partnership firm stood vested in the respondent Company by so doing, what was earlier the **property of the partners of the partnership firm M/s Mahalaxmi Saw Mills became the property of the respondent Company**. ☞ Even though **all the erstwhile partners** of M/s Mahalaxmi Saw Mills **were shareholders of the respondent Company in proportion to their share** in the partnership firm but a company incorporated under the Companies Act, 1956 as distinct from a partnership firm is not only a juristic person and a corporation sole but also, as distinct from a partnership firm, a legal entity different from its shareholders. ☞ In the aforesaid state of law, **it cannot be said that the change in the ownership/title** to leasehold rights from that of the partners of M/s Mahalaxmi Saw Mills to the respondent Company **did not result in change of ownership/title to leasehold rights**. ☞ As per Black's Law Dictionary, 8th Edition: **(a)** Transfer refers to any mode of disposing of or parting with an asset or an interest in an asset; **(b)** Assignment refers to defined as transfer of rights or property. ☞ A change in ownership of leasehold rights in the land underneath the property from partners of M/s Mahalaxmi Saw Mills to respondent Company would thus amount to the said partners parting with the leasehold rights to the respondent Company and would **constitute a transfer or assignment of leasehold rights within the meaning of Clauses (b) & (c) supra of the Lease Deed**. ☞ It is **not as if the vesting even if any under Section 575 of the Companies Act of the property is an involuntary act**. The conversion of a partnership firm into a private limited company was a voluntary act of the partners of M/s Mahalaxmi Saw Mills and it is not the case of the respondent Company that there was any legal compulsion therefor. The vesting of leasehold rights in the property from the partners of Mahalaxmi Saw Mills (partnership firm) to the name of the company, even if under Section 575 supra was thus **A VOLUNTARY ACT TO QUALIFY AS A TRANSFER**. ☞ Moreover, in view of the Clauses (b) & (c) supra of the Lease Deed do not require the transfer or assignment to be **FOR CONSIDERATION**. The measure for unearned increase provided therein, of the difference between the premium paid and the market value of the land prevailing, also **DOES NOT REQUIRE EXCHANGEOF ANY CONSIDERATION** for computation of unearned increase. ☞ We are **unable to find any requirement of monetary consideration as a necessary concomitant of transfer**, neither in Transfer of Property Act nor in any other law. If it were to be so, a gift, for consideration of natural love and affection, would also cease to be a transfer and would not attract any stamp duty or unearned increase. The consideration for the partners of M/s Mahalaxmi Saw Mills (partnership firm) to transfer their property to the respondent Company was the issuance of shares of the respondent Company to the partners in lieu thereof.
Decision	☞ **Divisional Bench** allow the appeal and set aside the judgment of the learned Single Judge and dismiss the writ petition filed by the respondent Company. ☞ **Respondent** require to pay unearned increase of Rs. 13,04,294 to the appellant along with penalty.

13. SIDDARTH GUPTA v. THE DELHI GOLF CLUB LIMITED & ANR [DEL]

Hint: Delhi HC reverse the resolution with respect to expulsion of member without following the due process contained in the provisions of the AOA and grant plaintiff is entitled to interim injunction.

Fact of the Case	✰ On 7th August, 2009, the Plaintiff (i.e. Siddharth Gupta) had applied for obtaining membership in the Delhi Golf Club Ltd (Respondent) after making payment of Rs. 44,120 via cheque. ✰ On 16th April, 2014, the plaintiff received a communication from defendant No. 2 **approving nomination of 'Out of Turn'** regular membership. ✰ Upon the receipt of the said communication, the plaintiff applied afresh to defendant on **21st April, 2014** along with a cheque of Rs. 67,416/-. ✰ Defendant vide a communication dated 3rd June, 2014 **informed the plaintiff of being duly elected as an associate 'C' member** and was instructed to pay the balance fees. ✰ The letter also stated that the **plaintiff will be entitled to all the rights and privileges of a member of the club as per the AOA**. Plaintiff **has been availing these facilities** since he became a member on 3rd June, 2014. ✰ Plaintiff vide letter dated 23rd July, 2014 sought refund of Rs. 44,120/- deposited in 2009 which was returned by defendant with covering letter dated 14th August, 2014. ✰ Plaintiff **after paying the requisite fees and was enjoying the rights and privileges guaranteed** to the members of the Club. ✰ The plaintiff states that **he got information from a well-wisher**, who is also a member of the defendant that general committee of the defendant had passed the resolution to invoke **his** membership on 10th August, 2015. ✰ On receipt of such information, the plaintiff **had reviewed the minutes of the meeting** (held on 10th August, 2015) on the defendant website. In perusal of minutes, the plaintiff found that his **membership was decided to be cancel**. ✰ Plaintiff filed a Petition against the decision made by defendant are bad in law and illegal, **seeking permanent injunction against removal/revocation of the plaintiff membership** with the defendants. The plaintiff had **also prayed for an interim injunction** as well.
Applicable Provisions given in MOA and AOA of the company	✰ While careful reading of Article 34 and 35 of MOA and AOA, it was observed that **before expelling a member** the conditions and rules laid down have to be complied with whether those are mandatory or directory. ✰ Article 34 of the MOA and AOA of the defendant No.1 provides the circumstances or reasons in/for which any membership can be revoked/cancelled. **None of the conditions mentioned therein arise in the present case.** ✰ Article 35 of the MOA and AOA, which mandates that before action is taken against any member, he/she must be given notice of such proposed action and also an opportunity to explain his/her alleged misconduct. **In the present case, no opportunity of hearing was granted to him.** ✰ **<u>Charles Mantosh & Ors v. Dalhousie Institute & Ors</u>** It was contended that terminating membership without even giving an opportunity of hearing is not permissible. It was emphatically mentioned that member has prima facie case for grant of temporary injunction restraining authority of club from giving effect to its decision to remove. ✰ **<u>T.P. Daver v. Lodge Victoria</u>** It was contended on behalf of the respondents that expulsion of a member no doubt demands strict compliance of the rules and it is to be done in good faith and in fairness.

Legal Principles held –	✫ That the membership of a person can be cancelled **only after compliance of provisions contained** in the Article 34 and 35 of MoA and AoA of the Club and also the Principles of Natural justice. ✫ That neither any notice was given to the appellant **nor any opportunity of being heard was provided to him**. Further, the provisions related to expulsion of members as provided in the MOA and AOA were not followed. In such a scenario, **the resolution could not be sustained**.
Decision	✫ Delhi HC directed the club to reverse the Resolutions and were refrained from cancelling the membership of the Petitioner. As a result of which, Club are require to restored back the club membership of appellant. ✫ The Court decided in favour of the Petitioner (Siddharth Gupta)

14. MADHUSUDAN GORDHANDAS & CO v. MADHU WOOLLEN INDUSTRIES PVT. LTD [SC]

Hint: The appellants **claiming that they were the creditors of the company, alleged that the company was liable to be wound up under the provisions of section 433 (c) of the Companies Act, 1956 as the company is unable to pay the debts**. It was alleged that the substratum (i.e. ground) of **the company disappeared and there was no possibility of the company doing any business at profit**. The **company was insolvent and it was just and equitable to wind up the company**.

Decision: SC laid down the principles for winding up.

Fact of the Case	✫ The appellants are a partnership firm. The partners are the Katakias. They are three brothers. The appellants carry on partnership business in the name of Madhu Wool Spinning Mills. ✫ The respondent company has the nominal capital of Rs. 10,00,000 divided into 2000 shares of Rs. 500 each. The issued subscribed and fully paid up capital of the company is Rs. 5,51,500 divided into 1,103 Equity shares of Rs. 500 each. The three Katakia brothers had three shares in the company. The other 1,100 shares were owned by N.C. Shah and other members described as the group of Bombay Traders. ✫ Prior to the incorporation of the company, **there was an agreement between the Bombay Traders and the appellants** in the month of May 1965. ✫ The Bombay Traders **consisted of two groups known as the Nand kishore and the Valia groups**. ✫ The Bombay Traders was floating a new company for the purpose of running a Shoddy Wool Plant. The Bombay Traders agreed to pay about Rs. 6,00,000 to the appellants **for acquisition of machinery and installation charges thereof**. The appellants had imported some machinery and were in the process of importing some more. **The agreement provided that the erection expenses of the machinery would be treated as a loan to the new company**. ✫ Another part of the agreement was that **the machinery was to be erected in portions of a shed** in the compound of Ravi Industries Private Limited. ✫ The company was to pay Rs. 3,100 **as the monthly rent of the portion of the shed occupied by them**. ✫ The amount which the Bombay Traders **would advance as loan to the company was agreed to be converted into Equity capital of the company**. ✫ Similar option was given to the **appellants to convert the amount spent by them for erection expenses into equity capital.** The company was incorporated in the month of July, 1965. ✫ The appellants allege that the company adopted the agreement between the Bombay Traders and the appellants. However, **the company denied that the company adopted the agreement**.

	✫ The **appellants filed a petition for winding up in the month of January, 1970**. The appellants **claiming that they were the creditors of the company, alleged that the company was liable to be wound up under the provisions of section 433 (c) of the Companies Act, 1956 as the company is unable to pay the debts**. ✫ It was alleged that the substratum (i.e. ground) of **the company disappeared and there was no possibility of the company doing any business at profit**. The **company was insolvent and it was just and equitable to wind up the company**. The learned Single Judge **refused to wind up** the company and asked the company to deposit the disputed amount of Rs. 72,556.01 in court. ✫ The further order was that if within six weeks, **the appellants did not file the suit in respect of the recovery of the amount the company would be able to withdraw the amount** and if the suit would be filed the amount would stand credited to the suit. The High Court on appeal upheld the judgment and order and found that the alleged claims of the appellants were very strongly and substantially denied and disputed. Hence, the appeal to the Supreme Court.
Judicial Decisions	**Amalgamated Commercial Traders (P) Ltd. v. A. C. K. Krishnaswami & Anr (1965) (SC)**: ☞ The SC dealt with **the winding up petition** of the company on the ground that the company was indebted to the petitioner for a sum of Rs. 1,750 being the net dividend amount payable on 25 equity shares **which sum the company failed and neglected to pay in spite of notice of demand**. ☞ There were other shareholders supporting the winding up on identical grounds. ☞ The company alleged that **there was no debt due and that the company was in a sound financial position**. ☞ The **RESOLUTION** of the company declaring a dividend made the payment of the dividend **contingent on the- receipt of the commission from two sugar mills**. The commission **was NOT received till the month of May, 1960**. The **resolution was in the month of December, 1959**. ☞ Under section 207 of the Companies Act, **a company was required to pay a dividend which had been declared within 3 months from the date of the declaration**. A company cannot declare a dividend payable beyond three months. ☞ This Court held **that the non-payment of dividend was bona fide disputed by the company. It was NOT a dispute 'to hide' its inability to pay the debts**. There are two well settled rules: **(1)** First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable [See **London and Paris Banking Corporation [1968]**]. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company, when the company contended that the work had not been done properly was not allowed. [See In **Re. Brighton Club and Norfold Hotel Co. Ltd. (1865)**]. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt [See **Re. A Company (1894)**].

	However, where there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantity the debt precisely (See **Re. Tweeds Garages Ltd (1962)**]. The principles on which the court acts are: **(a)** The defence of **the company is in good faith**; **(b)** The defence **is likely to succeed in point of law** and **(c)** The company **adduces prima facie proof of the facts on which the defence depends**. **(2)** If **there is opposition to the making of the winding up order** by the creditors, the court will consider their wishes and **may decline to make the winding up order**. Under section 557 of the Companies Act 1956, all matters relating to the winding up of the company **the court may ascertain the wishes of the creditors**. The wishes of the shareholders are also considered **though perhaps the court may attach greater weight to the views of the creditors**. The law on this point is stated in Palmer's Company Law, 21st Edition page 742 as follows: "This right to a winding up order is qualified by another rule, viz., **that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order**". However, **the wishes of the creditors will be tested by the court on the grounds** as to **(a)** Whether the case of the persons opposing the winding up is reasonable; **(b)** Whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The **grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case** (See **Re. P. & J. Macrae Ltd (1961)**]
Legal Principles held—	☆ The HC correctly gave **FOUR principal reasons to reject the claims of the appellants to wind up the company as creditors**. **(a)** The books of account of the company did **NOT show the alleged claims of the appellants save** and **except the sum of Rs. 72,556.01**. **(b)** Many of the alleged claims **are barred by limitation**. There is **NO allegation by the appellants to support acknowledgement of any claim to oust the plea of limitation**. **(c)** The Katakia brothers **who were the Directors resigned** in the month of August, 1969 and their three shares were transferred in the month of December, 1969 and up to the month of December, 1969 **there was NOT a single letter of demand to the company in respect of any claim**. **(d)** One of the Katakia brother was the Chairman of the Board of Directors and therefore the Katakias were in the knowledge as to the affairs of the company

and the books of accounts and **they signed the balance sheets which did NOT reflect any claim of the appellants EXCEPT the two invoices for the amounts of Rs. 14,650 and Rs. 36,000**.

- The High Court characterised the claim of the appellants **as tainted (i.e. corrupt) by the vice of dishonesty**. The **alleged debts of the appellants are disputed, denied, doubted and atleast in one instance proved to be dishonest by the production of a receipt granted by the appellants**.

- It was said by the appellants that the books would not bind the appellants. **The appellants did NOT give any statutory notice to raise any presumption of inability to pay debt**. Therefore, the appellants would be required to prove their claim.

- In the present case, the claims of the appellants are disputed in fact and in law. The company has given prima facie evidence that **the appellants are NOT entitled to any claim for erection work**, because there **was NO transaction between the company and the appellants** or those persons in whose names the appellants claimed the amounts. The **company has raised the following defences:**
  (a) Defence of lack of privity.
  (b) Defence of limitation.

- As to the appellant's claim for compensation for use of shed the **company denies any privity** between the company and the appellants. The **company has proved the resolution of the company that the company will pay rent to Ravi Industries for the use of the shed**.

- As to the three claims of the appellants for invoices one is proved by the company to be **utterly unmeritorious**. The company- produced a receipt granted by the appellants for the invoice amount. **The falsehood of the appellants' claim has been exposed**. However, the company stated that the indebtedness is for the sum of Rs. 14,850 and **the company alleges the agreement between the company and the appellants that payment will be made out of the proceeds of sale**. On these facts and on the principles of law **to which reference has been made the High Court was correct in refusing the order for winding up**.

- The appellants contended that the shortfall in the assets of the company by an amount of Rs. 2,50,000 after the sale of the machinery which would indicate
  (a) The substratum (i.e. foundation) of the company was gone and
  (b) The company was insolvent.

- An allegation that the substratum of the company is gone is to be alleged and proved as a fact. The **sale of the machinery was alleged in the petition for winding up to indicate that the substratum of the company had disappeared**. It was also said **that there was NO possibility of the company doing business at a profit**.

- In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case the, **company alleged that with the proceeds of sale the company intended to enter into some other profitable business.**

	☆ The mere fact that **the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the court is reluctant to hold that it has no such prospect**. (See Re. Suburban Hotel Co. (1867); and Davis & Co. v. Brunswick (Australia) Ltd (1936)]. ☆ The company alleged that out of the proceeds of sale of the machinery the company **would have sufficient money for carrying on export business** even if the company were to take into consideration the amount of Rs 1,45,000 alleged to be due on account of rent. **Export business, buying and selling yarn and commission agency are some of the business which the company can carry on within its objects**. ☆ One of the Directors of the Company is Kishore Nandlal Shah who carries on export business under the name and style of M/s. Nandkishore & Co. in partnership with others. **Nandkishore & Co. are creditors of the company to the extent of Rs. 4,95,000. The company will not have to meet that claim now**. ☆ On the contrary, the Nandkishore group will bring in money to the company. **This Nandkishore group is alleged by the company to help the company in the export business**. **The company has NOT abandoned objects of business**. There is no such allegation or proof. ☆ On the basis of the facts and circumstances of the present case, **(a)** **It cannot be held that the substratum of the company is gone**. **(b)** Moreover, it cannot be also held that the company is unable to meet the outstandings of any of its admitted creditors. **(c)** The company has not ceased carrying on its business. **(d)** Therefore, the company will meet the dues as and when they fall due. **(e)** The Respondent Company **has reasonable prospect of business and resources**. **(f)** The appellants presented the petition out of improper motive. Improper motive can be spelt out **where the position is presented to coerce the company in satisfying some groundless claims made against it by the petitioner**. The facts and circumstances of the present case **indicate that motive**. The appellants were Directors. They sold their shares. They went out of the management of the company in the, month of August, 1969. They were parties to the proposed sale. Just when the sale of the machinery was going to be effected the appellants presented a petition for winding up. ☆ In the recent English decision in **Mann v. Goldstein [(1968)]** it was held that even though it appeared from the evidence that the company was insolvent, as the debts were substantially, **disputed the court restrained the prosecution of the petition as an abuse of the process of the court**. It is apparent that the appellants did not present the petition for any legitimate purpose.
Decision	☆ **The SC decide the case in favour of the Respondent.**

15. MADRAS PETROCHEM LTD & ANR v. BIFR & ORS [SC]

Case: Section 22 of the SICA read with section 13 of the SARFESI Act – Enforcement of security of the sick compa ny by creditor banks – Whether provisions of SICA prevail over the provisions of SARFESI Act, 2002.

Decision: No.

Supreme court provides guidelines to be followed.

Fact of the Case	☞ The Appellant (Madras Petro Chem Ltd & ANR) filed a reference under SICA before the BIFR under section 15 of SICA and ICICI was appointed as the Operating Agency **to formulate a rehabilitation scheme. Two rehabilitation schemes were framed** over a period of time **but failed to implement**. ☞ Despite efforts by the Operating Agency **to attempt to revive the company**, all such efforts failed. ☞ Finally, on the basis of the recommendation of the Operating Agency, **BIFR formed a prima facie opinion that the appellant company should be wound up**. ☞ Therefore, BIFR recommend to the Bombay HC that said company be wound up. The Company filed an appeal with the AAIFR against the order of BIFR and AAIFR dismissed appeal. ☞ ICICI issued a notice under section 13(2) of the SARFAESI Act, 2002 to the appellant company and followed it up with a possession notice. ☞ Meanwhile, appellant **filed a writ petition** before the Delhi HC challenging the AAIFR order and the BIFR order. ☞ Such an interplay of petition filed under SICA as well as SARFAESI Act resulted in conflict between the two Acts. The instant Petition was filed in order to understand the correct position of law as to which Act would prevail over the other.
Decisions	**The Court decided in favour of the Respondents (BIFR)**
Legal principles held	That the following is the correct position of law when there is a conflict between the SARFAESI Act and SICA: **(a)** Section 22 of the SICA will continue to apply in the case of unsecured creditors seeking to recover their debts from a sick industrial company. This is for the reason **that the SICA overrides the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993**. **(b)** **In case of Secured Creditors:** Where there is a **single secured creditor** of a sick industrial company who seeks to **recover its debt in the manner provided by Section 13(2) of the SARFAESI Act, 2002**, such secured creditor may realise such secured debt under Section 13(4) of the SARFAESI Act, 2002 notwithstanding the provisions of Section 22 of the SICA. **(c)** Where there are **more than one secured creditor** of a sick industrial company or it has been jointly financed by secured creditors, and **at least 60 per cent of such secured creditors** in value of the amount outstanding as on a record date **do not agree upon exercise of the right to realise their security under the SARFAESI Act, 2002**. **[Section 22 of the SICA will continue to have full play]** **(d)** Where there are **more than one secured creditor** of a sick industrial company or it has been jointly financed by secured creditors representing **60 per cent or more in value of the amount outstanding** as on a record date **wish to exercise their rights to enforce** their security under **the SARFAESI Act, 2002. [Section 22 of the SICA will have no full play]** **(e)** Where secured creditors representing **not less than 75 per cent in value of the amount outstanding against financial assistance decide to enforce their security under the SARFAESI Act**, any reference pending under the SICA cannot be proceeded with further – **the proceedings under the SICA will abate.**
Conclusion	The Court held that since more than 75% of the Secured Creditors had agreed to enforce their security interests under SARFAESI, the proceeding under SICA shall abate.

16. REGISTRAR OF COMPANIES v. RAJSHREE SUGAR & CHEMICALS LTD & ORS [SC]

Hint: The SC decide the case in favour of ROC and held that ROC is competent (i.e. Locus Standi) to file complaint against the Company w.r.t. delay in issuance of Certificate of shares under section 113 and ROC has filed Complaint on time in pursuance of Section 621 of Companies Act, 1956 read with Section 469(2)(a) of the Criminal Procedure Code, 1973. Moreover, ROC is a statutory body to protect the interest of the shareholder.

Fact of the Case	☞ Two lots of share transfer forms along with share certificates were sent to the Respondent Company on 23.11.1990 and 18.12.1990. **(a)** The first batch of applications for transfer was received by the company on 11.12.1990, approved on 29.3.1991 and dispatched on 6.4.1991. **(b)** The second batch of applications for transfer was received by the company on 26.12.1990 approved on 3.4.1991 and dispatched on 16.4.1991. ☞ It was apparently seen that the company failed to comply with section 113 of the Companies Act, 1956 **which prescribes for the time period within which the company has to issue fresh certificates** to the transferee(s). This come to the knowledge of the Appellant (i.e. ROC) on 20.07.1992 when the Appellant inspected the books of account of the company under Section 209A (1)(i) of the Act. ☞ ROC filed a case against the company which was dismissed on grounds of **(i)** **Limitation period under section 468** of the Code of Criminal Procedure, 1973 and **(ii)** that the ROC had **no locus standi** to bring a petition under the said section i.e. incompetent to file complaint in respect of an offence under section 113 of the Act. ☞ The ROC filed an appeal with the Supreme Court.
Applicable Law	☞ Section 113 of the Companies Act, 1956 states that Every company, unless prohibited by any provision of law or of any order of any court, tribunal or other authority, shall, **within two months after the application for the registration of the transfer of any such shares, debentures or debenture stock, deliver**, in accordance with the procedure laid down in section 53, the certificates of all shares, debentures and certificates of debenture stocks allotted or transferred: ☞ **Section 621 (1) of the Companies Act, 1956:** *No Court shall take cognizance of any offence against this Act (other than an offence with respect to which proceedings are instituted under Section 545), which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, or of a shareholder of the company, or of a person authorised by the Central Government in that behalf."* ☞ Section 468(2) of the Criminal Procedure Code, 1973, **the period of limitation shall be–** (a) six months, if the offence is punishable with fine only; (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year; (c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years. ☞ S**ection 469(1) of the Criminal Procedure Code, 1973**, The period of limitation, in relation to an offender, shall commence, – **(a)** on the date of the offence; or **(b)** where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier."
Legal Principles held—	☞ That the Government Officers **are obliged to work with reasonable expedition** and **within the time frame prescribed by the Act**. However, in the instant case, the delay to file the petition was condoned but heavy costs were imposed on the appellant (ROC).

	☞ The phrase person aggrieved has **NOT** been defined in the Code of Criminal Procedure, 1973. **If the words person aggrieved are read to mean only the person affected by the failure of the Company to transfer the shares or allot the shares**, then the only person aggrieved would be the transferee or the allottee, as the case may be. However, as far as offences under the Companies Act are concerned, **the words must be understood and construed in the context of Section 621 of the Companies Act.** Therefore, in Pursuance of Section 621(1) of the Companies Act, 1956**, the appellant is COMPETENT to file a written complaint** in respect of offences under Section 113 of the Companies Act. ☞ Where the transferee or allottee is **NOT an existing share-holder** of the Company, if the words **person aggrieved is read in such a limited manner**, it would mean that **Section 469 (1)(b) of the Code would be entirely inapplicable to offences under Section 113 of the Companies Act**. Therefore, there is **NO** justification to interpret the words **"Person Aggrieved"** as used in Section 469(1)(b) restrictively particularly **when the statute creating the offence provides for the initiation of the prosecution ONLY on the complaint of particular persons**. ☞ Having regard to the **clear language of Section 621 of the Companies Act, 1956** we have **no manner of doubt that the appellant would be a person aggrieved within the meaning of Section 469 (1) (b) of the Code in respect of offence** (except those under Section 545) defined in the Companies Act. ☞ That the words "any person aggrieved" used in section 113 of the Act **includes** the registrar of Companies and hence, the ROC had the locus to file the instant petition.
Decision	☞ The Court decided the case in favour of the Appellant (ROC). ☞ **The SC** held that the **appellant as a person aggrieved would be entitled to the benefit of the provisions** of Section 469(1)(b) of the Code of Criminal Procedure, 1973. It is **not in dispute** that the appellant came to know of the offences on 20th July 1992. The commencement of the **period of limitation of six months for initiating the prosecution** would have to be calculated from that date of knowledge of offence.

17. OM PRAKASH PARASRAMPURIA & ORS v. UNION OF INDIA & ORS [DEL]

Hint: SC decide the case in favour of Respondent and held that Section 22(1) of the SICA, 1985 does not give protection to the Guarantor to a loan obtained by the SICK Industrial Company.

Fact of the Case	☞ In the case of "**KSL & Industries Ltd. vs. Arihant Threads Ltd. & Ors (2015)**" the Supreme Court held that provisions of section 22 of SICA will prevail over section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act). This **judgement reiterated** the legal principle that "coercive **recovery proceedings** could **NOT** be **initiated against a sick company**." ☞ The Appellants **are the guarantors to a loan obtained** by a **sick company and recovery proceedings against them were initiated** under **the RDDBFI Act,** 1993. ☞ The Appellant contend that the said decision **holds that recovery proceedings** under RDDBFI, 1993 **are to be treated as a suit** and therefore **if the principal borrower is declared as a sick industrial company proceeding** under RDDBFI Act, 1993 **CANNOT lie or be continued against the guarantors**.
Applicable Law	Section 22(1) of Sick Industrial Companies (Special Provisions) Act, 1985 states that where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a

	sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, ☞ notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, ☞ **NO** proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and ☞ **NO** suit for the recovery of money or for the **enforcement of any security** against the industrial company or of **any guarantee** in respect of any loans or advance granted to the industrial company **shall lie or be proceeded with further**, except with the consent of the Board or, as the case may be, the Appellate Authority.
Legal Principles held –	☞ ***The word used in Section 22(1) of the SICA is 'guarantee' and not 'guarantor'. The possible argument that the term 'guarantee' meant a guarantee extended by the sick industrial company need not be debated upon in view of the law declared by the Supreme Court in the decision reported as M/s. Pathreja Brothers Forging & Stamping & ANR. Vs. ICICI Ltd. & Ors. (2000) 6 SCC 545.*** ☞ That Section 22 of the SICA puts a bar on the continuation or institution of proceedings for the winding up of the industrial Company or on the continuation or institution of suits for the recovery of money or for the enforcement of any security against any sick company without the consent of BIFR. ☞ That the word ***"suit" as used u/s 22 cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. Therefore, the term, "suit" would apply only to proceedings in a civil court and not on actions for recovery proceedings filed before a Tribunal, such as, the DRT***.
Decision	☞ The Court held that the petition under RDDBFI Act can be maintained against the guarantors of a sick company. ☞ The Court decided in favour of the Respondents (UOI).

18. B.I.F.R. & ORS v. KMA LTD & ORS [Bom]

Hint: Bombay HC in this case resolved question in respect of payment to dissenting workmen.

Fact of the Case	☞ The company had a total of about 1162 workmen, majority of whom have **accepted the consent terms between the registered union and the secured creditors** filed in the writ petitions and approved by the Company Court. ☞ Moreover, 63 workmen through the rival union are the **only dissenting workmen** out of these 1162 workmen. The dissenting workmen argued that they are **not bound by the consent terms and** must be paid in accordance with the adjudication originally made by the Industrial Court or at any rate, on the principles of that adjudication and in the alternative, in accordance with their entitlement in law under Sections 529A and 530 of the Companies Act, 1956.

Based on these rival submissions, the following questions broadly arise for the consideration of this Court:

Q1	**Whether the dissenting workmen are bound by the consent terms or whether they are entitled to be paid in accordance with Sections 529 and 529A of the Act?**
Reply	➢ The dissenting workmen **cannot be said** to be represented by the Union which signed the consent terms. The 63 workmen whom the rival union, KMA workers and Staff Union, Bangalore, claims to represent say that they were not consulted when the consent terms were arrived at; that they never authorised the union to enter into any consent terms; and that they have throughout objected to the consent terms. ➢ For the registered union, it was submitted that many of these workmen including the Applicant in Company Application No. 593 of 2011 **did sign affidavits** in favour of the registered union **accepting the consent terms**.

	➢ These dissenting workmen have to be paid dues on the basis of their entitlements in law, particularly under Sections 529 and 529A of the Act. That is how the Company Court had sanctioned the consent terms, noticing that the funds set apart were adequate to meet the claims of dissenting workmen upon adjudication thereof by the Liquidator. ➢ The issue of their entitlement was clearly kept open.
Q2	**If they are to be paid according to their entitlement under Sections 529 and 529A, up to what date are they entitled to be paid wages?**
Reply	➢ As per Consent terms, the registered Union has taken '31 December 2002' as the date up to which wages ought to be calculated. That was presumably on the footing that the substratum of the Company no longer subsisted after the sale of its assets under orders of the Court. (The consent order for sale of all movable and immovable assets of the Company at Mumbai and Bangalore was passed by this Court in Writ Petition No. 1512 of 2002 on 20 December 2012.) On the other hand, the dissenting workmen root for '24 October 2008' as the relevant date, contending that the contract of employment between a company and its workmen subsists till the date of the winding up order and that is the date up to which the wages ought to be computed. (The Company Court ordered the company to be wound up on 24 October 2008.) It is only those workers, who became members of the workers' cooperative by fulfilling the terms of the scheme such as conversion into equity of 50 per cent wages due from the year 1991 and waiver of balance 50 per cent and payment of amounts of Rs.20, 000/- (for the Mumbai unit) and Rs.15, 000/- (for the Bangalore unit), who are entitled to wages under the scheme. The others, who did not become such members and who did not work, cannot claim to have continued as workmen of the Company. A scheme sanctioned by BIFR under SICA has the effect of altering contracts of the Sick Industrial Company with its shareholders, creditors, guarantors and employees. Under Section 18(8) of SICA, such scheme is binding on the shareholders, creditors, guarantors and employees. The Company in the present case offered to provide employment to those workmen who agreed to join the Workers' co-operative on the terms of the sanctioned scheme. Those who did not so join must be treated as having refused to offer themselves for service and accordingly, ceased to be workmen. They cannot now demand wages after 20 September 1991, i.e. the date of closure of the factory.
Q3	**Whether they are entitled to any (i) notice pay, (ii) leave wages, (iii) bonus or (iv) gratuity and (v) any interest on these dues?**
Reply	**(a) <u>They are not entitled to get NOTICE PAY:</u>** There is **NO** question of the workmen getting **any notice pay** under Section 25-N of the Industrial Disputes Act by virtue of Section 25-O introduced by the Maharashtra amendment. **(b) <u>They are entitled to get LEAVE WAGES subject to the maximum of 30 days:</u>** ➢ The leave that can, thus, be encashed under Section 79 of the Factories Act is only the earned or accumulated leave during the calendar year up to a maximum of 30 days under conditions of Sub-section (3). ➢ The rate of such wages has to be as per Section 80 of the Factories Act. **(c) <u>They are not entitled to get BONUS:</u>** ➢ Bonus is **NOT** included in the category of wages under Sections 529 and 529A of the Companies Act and **cannot be accorded any priority**. ➢ The dissenting workmen in the present case accept this position, though they would like to keep their **option to claim bonus in the event of availability of surplus funds so as to satisfy non-priority debts** of the Company (in liquidation). **(d) <u>They are entitled to get GRATUITY:</u>** ➢ All parties including the Official Liquidator agree that gratuity would be payable. The consent terms provide for such gratuity. Therefore, the dissenting workmen would accordingly have to be paid gratuity in accordance with law. **(e) <u>No question arises to award interest on the aforesaid dues:</u>** ➢ There is no question of awarding any interest on gratuity, in the premises, as preferential payment under Sections 529 and 529A of the Companies Act.

	➢ If and when there is a surplus, a claim for interest on gratuity can be considered, but not otherwise. The same reasoning would apply to other items such as notice pay and leave wages.
Decision	☞ The Court held the abovementioned principles regarding the various questions involved. ☞ The Court decided upon a number of principles in favour of different parties.

19. SHRI GOPAL PAPER MILLS CO. LTD. v. COMMISSIONER OF INCOME TAX [SC]

Hint: The question arose in this case that Bonus shares become the property of the shareholders on the date of resolution passed at GM of the company or date of actual allotment of bonus shares. **Supreme Court decided the decision in favour of the appellant** and held that the date of issue of bonus share is considered as the date of resolution passed by the company to convert accumulated undivided profit into capital to distribute among the ordinary shareholders by way of issue of bonus shares.

Fact of the Case	☞ The Appellant company (Shri Gopal) at a GM on 30/12/1954passed a resolution to the effect that accumulated **undivided profits be capitalised and distributed amongst the holders of the ordinary shares** in the company as Bonus shares. ☞ The said resolution **authorised and directed the directors** of the company to **issue, allot and distribute** the new shares, **credited as fully paid up amongst the persons whose names are registered** as such in the books of the company on 01/01/1955.The shareholders were entitled to get dividends on those shares only as from 1st January 1955. ☞ For the assessment year 1956-57 the relevant accounting period ending on 31/12/1954, the ITO determined the total income of the company and in computing the Corporation tax due in respect of the income **REDUCED THE REBATE** to which the appellant company was entitled on two counts **(a)** Rs.50,07,500 **WAS NOT** included in the paid-up capital as on 31/12/1954 and **(b)** the said **bonus shares were NOT issued** to the shareholders in the accounting year ended 31/12/1954. ☞ The company contested this on the ground that the ownership of bonus shares vested in the shareholders on the day on which resolution was passed i.e., on 30/12/1954. Thus, the amount for which the bonus shares were issued should not be added to the profits of the company and should rather be added to its equity. ☞ **The question arose in this case that** Bonus shares become the property of the shareholders on the date of resolution passed at GM of the company or date of actual allotment of bonus shares.
Legal Principles held –	☞ In pursuance of AOA of the company, it was not open to the ordinary shareholder to refuse or accept those shares when allotted. Moreover, the company had full powers convert its accumulated undivided profits into bonus shares. ☞ The resolution passed at the GM specifically says that those accumulated undivided profits of the company standing to the credit of the general reserve as on June 30, 1954 "be capitalised and distributed amongst the holders of the ordinary shares in the Company as dividend by way of bonus shares. ☞ From this part of the resolution, it is clear that the ordinary shareholders became owners of the bonus shares to which they were entitled under the resolution as from the date of the resolution. **The expression "be capitalised and distributed" in the resolution means "is hereby capitalised and distributed".**

	☞ In fact, the whole tenor of the resolution shows that the distribution of the bonus shares became effective as from 30th December, 1954. ☞ If the ordinary shareholders became the owners of the bonus share on January 1, 1955 or on some later date, **the statement in the resolution "save and except that the holders thereof will not participate in any dividend in respect of any period ending on or before 31st December, 1954" becomes meaningless**.
Supreme Court Interpretation with respect to the word "Allotment"	✫ The Supreme Court held that the word "Allotment" is not defined under the Companies Act. The Supreme Court considered the meaning of word "allotment" defined in Sri Gopal Jalan &Co. v. Calcutta Stock Exchange Association Ltd. In this case, Court referred to the observations of Chitty J. in" Re Florence Land and Public Works Company": *"To my mind there is no magic whatever in the term 'allotment' as used in these circumstances.* ***It is said that the allotment is an appropriation of a specific number of shares****. It is an appropriation, not of specific shares, but of a certain number of shares"* ✫ **<u>In Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd</u>** ☞ The words 'creation', 'issue' and 'allotment' are used' with the three different meanings familiar to business people as well as to lawyers. ☞ There are three steps with regard to new capital; **(a)** **first, it is created**; till it is created the capital does not exist at all. When it is created it may remain unissued for years, as indeed it, was here; the market did not allow of a favourable opportunity of placing it. **(b)** **When it is issued** it may be issued on such terms as appear for the moment expedient. **(c)** **Next comes allotment.** To take the words of Stirling J. in Spitzel v. Chinese Corporation, 80 L.T. 347, 35 1, he says: '**What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person'**."
Supreme Court Interpretation with respect to the word "Distribution"	✫ The word "**DISTRIBUTE**" found in cl. (b) of the resolution in the context means to record the distribution of the shares in the books of the company. ✫ If the resolution passed at the GM of the company on December 30, 1954 is read as a whole, there is no doubt that on that day a portion of the accumulated undivided profits were converted into capital; that capital was divided into bonus shares and allotted to the ordinary shareholders on the basis of their shareholdings. ✫ The shares so allotted 'became the property of the shareholders as from that date subject to the qualification that they are entitled to get, dividends on those shares only as from 1st January 1955. ✫ Under cl. (b) and (c) of the resolution, certain directions were given to the Directors in the matter of implementation of that resolution.
Decision	✫ Finally, based on the aforesaid discussion The Supreme Court held **there is no justification in reducing the rebate** ☞ Firstly, under sub-cl. (a) of cl. (1) of the second proviso to Section D of Part II of the Finance Act, 1956 (i.e. on the ground that bonus shares were not part of the paid-up capital in the accounting year ended 31/12/1954) and ☞ Secondly under sub-cl. (b) of cl. (1) of the second proviso to Section D of Part 11 of the Finance Act, 1956 (i.e. on the ground that bonus shares were not issued in the accounting year ended 31/12/1954. ✫ The Court held that the date of issue of bonus shares is considered as date of resolution passed at GM of the Company and the decision decided in favour of the Appellant (Shri Gopal).

20. CHIEF CONTROLLING REVENUE AUTH. & ANR V. RELIANCE INDUSTRIES LTD & ANR [BOM-FB]

Hint: RIL paid stamp duty Rs. 10 Crores in the state of Gujrat in pursuance of order passed by Gujarat HC and RIL make a request to State of Maharashtra for remission or set-off the stamp duty paid in State Gujarat with respect to stamp duty payable Rs. 25 Crores on account amalgamation scheme approved by the Bombay High Court. State of Maharashtra rejected the request for remission or set-off.

Decision: The Court held that the company has to pay separate Stamp Duties in both the states. The case decided in favour revenue (i.e. Appellant)

Fact of the Case	☞ Reliance Petroleum Limited, Jamnagar Gujarat ("RPL/respondent No.2") amalgamated with Reliance Industries Limited ("RIL/respondent No.1"). ☞ The transferee company RIL filed the petition in the Bombay HC, which was sanctioned on 7.6.2002. ☞ Similarly, the transferor company RPL filed the petition in the Gujarat High Court, which was sanctioned on 13.9.2002. ☞ RIL submitted the above two orders with respect to sanctioning the scheme of amalgamation **for adjudication of stamp duty** in the office of Superintendent of Stamp, Mumbai (the applicant No. 02). ☞ Respondent no.1 requested the applicant no.2 **to adjudicate the stamp duty**, if any, payable on the order dated 7.6.2002 passed by the Bombay HC. ☞ RIL had paid stamp duty of Rs.10 Crores in the State of Gujarat on the order dated 13.9.2002 passed by the Gujarat HC and **requested for the remission/deduction/ setoff this sum in the stamp duty payable in the State of Maharashtra**. ☞ The applicant No. 02 **REJECTED** the submissions of respondent No.1 and **direct respondent no.1 to pay the entire amount of Rs.25 Crores as stamp duty**. Against this, various appeals were preferred by RIL and **ultimately the issues were referred to the High Court for determination**.
Decision	☞ The High Court decided in favour of the Appellant (Revenue) and held that the company has to pay separate Stamp Duties in both the states.

Q1.	Whether a scheme sanctioned between the two companies under Sections 391 and 394 of the Companies Act is one and the same document chargeable to stamp duty regardless of the fact that order sanctioning the scheme may have been passed by two different HCs by virtue of the fact that the RO of the two companies are situated in different States? **Answer:** **A scheme settled by two companies is not a document chargeable to stamp duty.** An order passed by the Court sanctioning such a Scheme under Section 394 of the said Act, **which effects transfer is a document chargeable to stamp duty.** In case if the **ROs of the two Companies are situated in two different States**, requiring such Orders, sanctioning the Scheme to be passed under Section 394 of the Companies Act **by two different HCs**, then in that event, the order of this HC which sanctions the Scheme passed under Section 394 of the Companies Act will be the instrument chargeable to stamp duty.
Q2.	Whether the instrument in respect of amalgamation or compromise or scheme between the two Companies is such a scheme, compromise or arrangement and **the orders sanctioning the same are incidental as the computation of stamp duty and valuation is solely based on the scheme and scheme alone**? **Answer:** The orders of the court, sanctioning a Scheme of amalgamation **are not just incidental orders** even in accordance with the Scheme of the Companies Act laid down by Section 391 read with, Section

	394. **Only after the orders are passed by the Court, sanctioning the Scheme of Amalgamation, such a scheme becomes operational and effective**. Computation of stamp duty and valuation **does not make Scheme of Amalgamation alone chargeable to stamp duty**. The order is the instrument.
Q3.	Whether in a scheme, compromise or arrangement sanctioned under Sections 391 and 394 of the Companies Act where ROs of the two Companies are situated in two different States, **the Company in State of Maharashtra is entitled for rebate under Section 19 in respect of the stamp duty paid on the said scheme in another State**? **Answer:** The answer to this question **will be in the negative for the reasons set out in detail herein above**.
Q4.	Whether for the purposes of Section 19 of the Act, the scheme/compromise/arrangement between the two Companies must be construed as document executed outside the state on which the stamp duty is legally levied, demanded and paid in another State? **Answer:** Basically, a scheme/compromise/arrangement **between the two companies is never a document chargeable to stamp duty**, whether **such a document is executed in the State or outside the State of Maharashtra**. Moreover, in view of our conclusions above, Section 19 of the Act in any event, **has no application** whatsoever.

21. MESSER HOLDINGS LTD. v. SHYAM MADANMOHAN RUIA & ORS [SC]

Hint: SC imposes **heavy exemplary cost to each litigating parties**, amounting to Rs. 25 Lakhs. Companies entering into **shareholders/share purchase agreements**. Later on, **<u>indulging in vicious litigation for over 18 years</u>**.

Fact of the Case	☞ Messer Griesham GmbH, a German Company (hereinafter referred to as "MGG") had **entered into a Share Purchase and Cooperation Agreement** (hereinafter referred to as AGREEMENT-I) with the **shareholders of an Indian company called Goyal Gases Ltd.** (hereinafter referred to as "GGL") on 12.5.1995 ☞ The Agreement-I **contained a non-compete clause by which both parties are prohibited** to enter into competitive business. ☞ Thereafter, w.r.t. a **company known as Bombay Oxygen Corporation Limited (hereinafter referred to as the 'BOCL**'), MCG entered into another Share Purchase Agreement (hereinafter referred to as "AGREEMENT-II") dated 23/06/1997 with **RUIAS**. Through this Agreement, MGG agreed **(a)** To purchase 45001 shares of BOCL from **RUIAS** and also **(b)** Acquire 30000 additional shares of BOCL from the open market. As a result, **MGG become a major shareholder of BOCL** (**creating a controlling interest**). ☞ Subsequently, GGL protested (in writing) against the attempt of MGG to independently acquire shares of BOCL saying that **it would amount to breach of Clause 9 of the AGREEMENT-I**. ☞ As a result of breach of Agreement-I, some correspondence took place between both the Companies in this regard. Eventually, **both the Companies entered into AGREEMENT-III** on 8.11.1997 **where under it was agreed that out of 75001 shares of BOCL to be acquired by MGG under AGREEMENT-II**, 50000 shares will be acquired in the name of GGL and only 25001 will be acquired in the name of MGG.

	☞ However, when RUIAS came to know of the AGREEMENT-III. RUIAS send letter dated 5.5.1998 to MGG and they informed MGG that **they were not agreeable for the proposal of MGG and GGL jointly purchasing the shares of the BOCL**. ☞ In this background all the three parties i.e. MGG, GGL and Ruias instituted various suits and applications **against each other and have been fighting for the past 18 years**. ☞ **Several interlocutory orders passed in these proceedings were challenged** before the SC.
Legal Principles held—	☞ That the parties involved themselves in a legal battle that stretched over 18 years. This ***was a classic example of the abuse of the judicial process by unscrupulous litigants with money power***, all in the name of legal rights by resorting to half-truths, misleading representations and suppression of facts.
Decision	☞ The Court held that the parties had indulged in acts that resulted on abuse of the judicial processed and wastage of the time of the court. Therefore, exemplary costs were imposed. Thus, **exemplary cost to the tune of Rs. 25 Lakhs each was imposed on MCG, CCL and Ruias as compensation for the loss of judicial time**. The said amount paid to **National Legal Services Authority as compensation for the loss of judicial time of this country and the same may be utilized by the National Legal Services Authority to fund poor litigants to pursue their claims before this Court in deserving cases**. ☞ The Court disposed the appeal by imposing Exemplary Costs.

22. KISHINCHAND CHELLARAM V. COMMISSIONER OF INCOME TAX [SC]

Hint: The question arose in this case before SC "whether **liability to pay Income-tax on dividend if not arise**, in case of subsequent resolution of the company whereby payments made to the shareholders **as dividend are to be treated as loans?**

Reply: The SC decided the case in favour of revenue and held that the Appellant was liable to pay tax on the amount paid to them as dividend.

Fact of the Case	☞ The Appellants Kishinchand Chellaram, Shewakram Kishinchand, Lokumal Kishinchand and Murli Tabilram were the shareholders of the company Chellsons Pvt Ltd at the material time. The company **declared dividend** for the year 1941-42, 1942-43 and 1943-44 and also **credited the dividend amount** to the shareholders account. ☞ On December 4, 1947, at an EGM another resolution purporting to reverse the earlier resolutions that declared dividends was passed by the company. ☞ The ITO considered the dividends as the income of the shareholders and assessed as such. ☞ However, the appellants **contended that the dividends were NOT their income** as it was reversed by the company. ☞ The question arose in this case is that the dividend is declared and the amount is credited or paid to **the share-holders as dividend can the character of the credit or payment be altered by a subsequent resolution so as to alter the incidence of tax which attaches to that amount**?
Legal Principles held—	☞ The Court held that it is not necessary to consider in this case whether the **shareholders may be compelled by the company to refund the amount improperly paid** as dividend out of capital. Even if the **shareholders agree to refund the amounts received by them as dividend the original character of the receipt as dividend is not thereby altered**. ☞ In ascertaining whether **liability to pay Income-tax on dividend arose**, a resolution of the company whereby payments made to the shareholders **as**

	dividend are to be treated as loans cannot retrospectively alter the character of the payment and thereby exempt it from liability which has already attached thereto. ☞ We are of the opinion that payment made as dividend by a company to its shareholders does **not lose that character merely because it is paid out of capital**. Under the Income Tax Act, **liability to pay tax attaches as soon as dividend is paid, credited or distributed or is so declared**. ☞ The Act **does not contemplate an enquiry** whether the dividend is properly paid credited or distributed before liability to pay Tax attaches thereto.
Decision	The SC decided the case in favour of revenue and held that the Appellant was liable to pay tax on the amount paid to them as dividend.

23. JABAL C.LASHKARI & ORS v. OFFICIAL LIQUIDATOR & ORS [SC]

Hint: Appellant leased the property to the Company which is in liquidation and **the secured creditor of the company is willing to pay lease rent to the appellant**. In consideration of the said facts, **whether it is tenable to the landlord to approach the court to evict the company from leased property a**nd return the said property to the appellant.

Decision:

SC decided the case in favour of respondent (i.e. Official Liquidator) and held that we affirm the filing of the HC the landlord is not entitled to seek eviction on the ground of non-payment of rent under Section 12 of the Bombay Rent Act cannot be said to be so inherently infirm so as to require the interference of this Court. Further, SC held the Secured Creditor pay rent to the appellant.

Fact of the Case	☞ One Durgaprasad Lashkari (predecessor of the appellants) had leased out land admeasuring 35,772 sq. mtrs. in favour of one Bechardas Spinning and Weaving Mills Ltd. (subsequently known as Prasad Mills Ltd.) for a period of 199 years by a lease deed dated 10.12.1916. ☞ A secured creditor of Prasad Mills Ltd. had in the year 1984 **filed a company petition seeking the winding up of the aforesaid Prasad Mills Ltd before Gujarat HC.** ☞ **Gujarat HC passed order directing the winding up of** Prasad Mills Ltd and the appointment of an OL. The OL was directed to take charge and possession of all the assets of the company. Accordingly, the OL advertise the sale of said lease property. ☞ **In pursuance advertisement,** Appellant filed a suit in the Small Causes Court seeking permanent injunction against the sale of assets of company more particularly the sale of the leased property. However, appellant application has been rejected by Small Cause Court. ☞ Appellant further appeal to Divisional Bench of HC. The divisional bench also rejected the application.
Legal Principles held –	☞ Section 12 of the Rent Act confers protection on a tenant who is regularly paying or is ready and willing to pay the rent. In the present case while there is **no doubt that rent has not been paid**, equally, there is no doubt that the secured creditors including the SBI had **all along been ready and willing to pay the rent** and the **reasons for non-payment appears to be (para 43 of the impugned order of the High Court) lack of communication by the OL to the SBI of the precise amount of rent due**. ☞ While there can be no doubt that mere readiness and willingness to pay without actual payment cannot enure to the benefit of the tenant in perpetuity. ☞ What is required under Section 12(2) is **a notice in writing by the landlord raising a demand of rent** and only on the failure of the tenant **to comply with such notice within a period of one month that the filing of a suit for**

	recovery of possession is contemplated. The service of notice giving an opportunity to the tenant to pay the unpaid rent is the first chance/opportunity that the Rent Act contemplates as a legal necessity incumbent on the landlord to afford to the tenant. ☞ However, in the present case, **NO such notice as contemplated by Section 12 (2) has been issued by the landlord**; at least none has been brought to our notice. ☞ In such a situation, the readiness and willingness of the tenant to pay the rent, though may have continued for a fairly long time without actual payment, will not deprive the tenant of the protection under the Rent Act.
Decision	☞ Finally, SC decides the case against the Appellant. ☞ The **SC held that** mere fact that the company has been ordered to be wound up cannot be a ground to direct the official liquidator to handover possession of the land to the owners inasmuch as the company in liquidation continues to maintain its corporate existence until it stands dissolved upon completion of the liquidation proceedings in the manner contemplated by the Companies Act. ☞ In the present case, **revival of Prasad Mills is a live issue pending** before the High Court, **a fact which cannot be ignored by this Court in deciding the above issue against the appellants**. ☞ SC direct the OL to let the SBI know the precise amount that is required to be paid on account of rent and, thereafter, to pay the same to the official liquidator where after it has been left open for the lessor to **withdraw the said amount from the OL**.

24. RAM PRSHAD v. COMMISSIONER OF INCOME-TAX, NEW DELHI [SC]

Hint: SC held in the case MD is considered as servant (i.e. employee) and whatever he is received from the company is taxable in his hands as Salary.

Fact of the Case	☞ The Appellant (Ram Prashad) become the **FIRST** MD on terms and conditions agreed to and embodied in an agreement between himself and the company. ☞ According to the said agreement, he was entitled to get 10% of the gross profits of the company **besides monthly fixed salary**. ☞ For the AY 1956-57, the Appellant **was assessed in respect of Rs. 53,913/- payable to him as 10% of the gross profits** of the company. However, he gave up soon after the accounts were finalised but before they were passed by the GM of the shareholders. The above amount **was given up by him** because the company would **not be making net profits** if the stipulated commission was paid to him. ☞ Income Tax Authorities sought to **add the abovementioned amount to the total income of the appellant as SALARY**. ☞ The appellant denied this and contends that the amount never accrued to him and hence, **it should NOT be added to his total income**. ☞ The appellant further contended that he was an agent of the company and **to tax such income as salary it is necessary to establish the relationship of master and servant** between the company and the assessee.
Applicable Law	☞ Under s. 17(2) of the Indian Companies Act 1913 Regulation No. 71 of Table A which enjoins that the business of the company shall be managed by the directors is deemed to be continued in the AOA of the company in identical term or to the same effect. ☞ Since the BOD(s) are to manage the business of the Company they have every right to control and supervise the assessee's work whenever they deem it necessary.

	Every power which is given to the MD therefore emanates from the AOA which prescribes the limits of the exercise of that power. ☞ The powers of the assessee have to be exercised within the terms and limitations prescribed thereunder and subject to the control and supervision of the Directors which in our view is indicative of his being employed as a servant of the company.
Legal Principles held—	☞ For such a relationship to exist, **it must be shown that the employee must be subject to the supervision and control of the employer in respect of the work that the employee has to do**. However, where there is no such supervision or control it will be a relationship of principal and agent or an independent contractor. By applying this principle, **it is submitted that the appointment of the assessee as a MD is not that of a servant but as an agent of the company** and accordingly the commission payable to him is income from business and **NOT** salary. ☞ A servant acts under the direct control and supervision of his master. On the other hand, **an agent in the exercise of his work is not subject to the direct control or supervision of the principal, though he is bound to exercise his authority in accordance with all lawful orders and instructions which may be given to him, from time to time by his principal**. ☞ However, **this test is NOT universal in its application** and does not determine in every case, having regard to the nature of employment, that he is a servant. **(a)** **A doctor may be employed as a medical officer and though no control is exercised over him in respect of the manner he should do the work nor in respect of the day to day work**, he is required to do, he may nonetheless be a servant if his employment creates a relationship of master and servant. **(b)** Similar is the case of a **chauffeur who is employed to drive the car** for his employer. If he is to take the employer or any other person at his request from place 'A' to place 'B' the employer does **NOT** supervise the manner in which he drives between those places. **Such examples can be multiplied**. ☞ Therefore, a person who is engaged **to manage a business may be a servant or an agent according to the nature of his service and the authority of his employment**. *Generally it may be possible to say that the greater the amount of direct control over the person employed, the stronger the conclusion in favour of his being a servant. Similarly the greater the degree of independence the greater, the possibility of the services rendered being in the nature of principal and agent*. ☞ It is **NOT** possible to lay down any **precise rule of law** to **distinguish** one kind of employment from the other. ☞ The nature of the particular business and the nature of the duties of the employee **will require to be considered in each case** in order to arrive at a conclusion as to whether the person employed is a servant or an agent. In each case **the principle for ascertainment remains the same**. ☞ MD may have a **dual capacity**. He may both be a Director as well as employee. Therefore, it is evident that in the capacity of a MD he may be regarded as having **NOT** only the capacity as persona of a director but also has the persona of an employee or an agent depending upon **the nature of his work and the terms of his employment**. Where he is so employed, the relationship between him as the MD and the Company may be similar to a person who is employed as a servant or an agent for the term 'employee' is facile enough to cover any of these relationships. ☞ The nature of his employment may be determined by the **AOA** of a company and/or the agreement if any, under which a **contractual relationship** between the

	Director and the company has been brought about, **where under the Director is constituted an employee of the company, if such be the case, his remuneration will be assessable as salary under section 7**. ☞ The real question in this case is one of construction of the AOA and the relevant agreement which was entered into between the company and the assessee. If the company is itself carrying on the business and the assessee is employed to manage its affairs in terms of its articles and the agreement, **he could be dismissed or his employment can be terminated by the company if his work is not satisfactory**, it could hardly be said that he is **NOT** a servant of the company.
Decision	☞ The SC held that the Remuneration paid to director is considered as SALARY appellant is liable to pay tax on it. ☞ The Court decided in favour of the Respondents (Revenue).

25. AIR FRANCE GROUND HANDLING PVT. LTD (IN LIQUIDATION) [DEL]

Delhi HC disposed off the petition held that Company is **wound up** and the **dissolution** of the company shall take effect **from the date of filing the petition**. [Satisfaction of the Court w.r.t. concurrent order of winding up and dissolution of the company].

OL	**Official Liquidator**
VL	**Voluntarily Liquidator**

Fact of the Case	☞ The Petitioner (Air France) had passed a special Resolution in its EGM held on 09.11.2009 for voluntary winding up of the Company. Accordingly, Mr. Manoj Kumar was appointed as **VL** of the company. ☞ The Appellant informed the ROC regarding the Voluntarily Winding Up Proceeding and **VL**. ☞ **Notices** under Rule 315 of the Company (Court) Rules, 1959 were issued and requisite forms were filed with the ROC. ☞ The **declaration of solvency was executed and approved** by the BOD in their meeting held on 09.11.2009, and the same **has been filed with the office of the ROC** in **Form 149 as prescribed under Rule 488** of the Companies (Court) Rules, 1959. ☞ The **VL** has **filed the requisite forms, and notices were published** in the Official Gazette on 12.12.2009 **as well as in two newspapers** namely "The Financial Express" (English) on 18.11.2009 and "Jansatta" (Hindi) dated 19.11.2009 **along with the MOA and AOA with the Office of the OL**. ☞ Pursuant to Section 497 of the Companies Act, 1956, final EGM was held on 02.05.2011 and the **VL** filed the final accounts of the Company in Forms No.156 and 157, as prescribed under Rules 329 and 331 of the Companies (Court) Rules, 1959, before the ROC and to the **OL**. ☞ The **OL** has received **'No Objection Certificates'** from the ROC and the Income Tax Department. The **VL** of Air France Ground Handling Pvt Ltd. **has filed an affidavit** with the **OL** to declare that **NO** outstanding amount stands against the Company **as on winding up date**. ☞ The **OL** has scrutinized the records submitted by the V**L** and has recorded satisfaction that necessary compliances of Section 497 of the Companies Act, 1956 and the other relevant provisions of the Companies Act, 1956 have been made and that the affairs of the Company have not been conducted in a manner prejudicial to the interest of its members or to the public. ☞ In these circumstances, The **OL** has sought winding up and final dissolution of the Company from the date of filing of the petition, i.e., 07.04.2016.

Legal Principles held –	The Court observed the following points in deciding the Petition – **(a)** That the final EGM was held and the **VL** filed the final accounts of the Company, as prescribed under the Rules 329 and 331 before the ROC and to the **OL**. **(b)** The **OL** had received "No Objection Certificates" from the ROC and the Income Tax Department. **(c)** That an affidavit was filed with the Official Liquidator to declare that **NO outstanding amount** stands against the Company. **(d)** That the necessary compliances of the Companies Act, 1956 had been made e. That the affairs of the Company had not been conducted in a manner prejudicial to the interest of its members or to the public
Decision	The Court held that company is wound up and shall be deemed to be dissolved w.e.f. the date of filing of the petition i.e. 07.04.2016.

26. BANDHU SYSTEMATIX PVT LTD. v. REGISTRAR OF COMPANIES [DEL]

Hint: Respondent struck the name of the company from the register of Company on account non-filing of financials in last 17 years and not carrying on the business. However, Petitioner file the application for restoration within the stipulated time period as given in Section 560 of the Companies Act, 1956.

Decision: Delhi HC decide the case in favour of Petitioner on the ground that complete all document filing with ROC along with payment all statutory fees and directed the ROC to restore back the name of the Petitioner company in the register of the company.

Fact of the Case	✰ The petitioner was **incorporated with the ROC**, NCT of Delhi & Haryana (hereinafter called the "respondent") as a company limited by shares on 17.07.1984. At the same time, **ROC issued Certificate of Incorporation** No. 18703 of 1984-85 with the object of carrying on the business as manufacturers and/or dealers in all types of machinery, plant equipment accessories and spores required for and used for printing, binding, perforating, folding, stitching or manufacture of other stationery used for such purposes. Presently, **the RO of the petitioner is stated to be situated at 8-B, Bahadur Shah Jafar Marg, New Delhi- 110002**. ✰ The respondent initiated the proceedings under Section 560 of the Companies Act, 1956 **to strike the name of the petitioner off the register due to defaults in statutory compliances**, namely, **NON-FILING** of Annual Returns from 2000 to 2015, and Balance Sheets from 1998 to 2015. Respondent **contends that procedure under Section 560 was duly followed**, with notices/letter as required under Section 560(1) and Section 560(3) sent at the RO address of the petitioner. It is further submitted that **notification under Section 560(5) was issued and published in the Official Gazette** on 23.06.2007 mentioning the petitioner-company's name at Serial no.1503. ✰ On the other hand, petitioner argued that it did **NOT** receive any notices/ letters/show-cause notices as required under Section 560(1) and Section 560(2) of the Companies Act, 1956, **NOR** was it **afforded any opportunity of being heard before action under Section 560(5) was taken by the respondent**. ☞ The petitioner also averred that **upon inspection of official records** of the petitioner-company **carried out by its authorised representative**, **NO documents pertaining to Section 560 were found**. ☞ It is further averred that **no documents evidencing the basis on which** the respondent **came to the conclusion** that the petitioner-company was **NOT** carrying on its business was **either** provided to the petitioner or was available on the records maintained with the respondent. The petitioner further contended that it has **all through since its incorporation has been a working concern** and at

	no point of time the petitioner has ever stopped carrying on the business or stopped its business operations. ☞ The petitioner avers that the **accounts of the company** were **prepared and audited** every year, and the same is **reflected by the annexures attached to the petition**. The directors of the company **signed** the annual accounts of the company **but because of lack of legal knowledge**, inadvertence and unawareness regarding the annual filing with the ROC did not ever question or took steps to carry the statutory compliance. ☞ The Counsel of the Petitioner **stated that the present petition is within the period of limitation** as stipulated under **Section 560(1)** of the Companies Act, 1956.
Legal Principles held—	**Delhi HC Consider the decisions t**aken by Bombay HC in Purushottamdass and ANR. (Bulakidas Mohta Co. P. Ltd.) v. Registrar of Companies, Maharashtra, & Ors. **Bombay HC held that** *"**The object of section 560(6)**of the Companies Act is to give a chance to the company, its members and creditors to revive the company which has been struck off by the Registrar of Companies, **within a period of 20 years**, and to give them an opportunity of carrying on the business only after the company judge is satisfied that such restoration is necessary in the interests of justice."*
Decision	✰ **The Delhi HC** decide the case in favour of the Petitioner and direct the ROC to restore backed the name of the petitioner Company on the following grounds: **(a)** **Petitioner** is a running company and filed petition **within the limitation as stipulated in Section 560** of the companies Act, 1956. **(b)** The Accounts of the Petitioner Company has been properly maintained and audited but due to lack of knowledge of filing of documents with the ROC, they are unable to do. The primary responsibility remain with the management to ensure that proper returns and other statutory documents are filed in terms of the statute and the rules. **(c)** **Liberty granted to the** Respondent (i.e. ROC) to take penal action for completion of statutory formalities including payment of late fees or any other charges which are leviable by the respondent for the late deposit of statutory documents within 8 weeks.

27. MIHEER H. MAFATLAL v. MAFATLAL INDUSTRIES LTD [SC]

Hint: In this Case, SC examines the limited scope of the jurisdiction of the Company Court which is called upon to sanction the Scheme of Amalgamation as per the provisions of Section 391 read with Section 393 of the Act.

Fact of the Case	☛ The transferor-company Mafatlal Fine Spinning and Manufacturing Co. Ltd [MFL'] amalgamated with the transferee company Mafatlal Industries Limited ('MIL') under a scheme of amalgamation. The learned Single Judge granted requisite sanction to the applicant transferee-company MIL to amalgamate in it the transferor company MFL under Section 391(2) of the Companies Act, 1956 (hereinafter referred to as 'the Act'). Bombay HC sanctioned the scheme presented by MFL. ☛ Overruling the objections raised by the appellant the single judge sanctioned the scheme which was confirmed by the Division bench on appeal. The appellant challenged the judgement of the Division Bench on various grounds before the SC, which rejected all the objections. ☛ On account of objections raised by the appellant, SC examine the limited scope of the jurisdiction of the Company Court which is called upon to sanction the Scheme of Amalgamation as per the provisions of Section 391 read with Section 393 of the Act.

Applicable Law	☞ In the present proceedings we will be concerned with the Sections 391 and 393 of the Act. The aforesaid provisions of the Act show that compromise or arrangement can be proposed between a company and its creditors or any class of them or between a company and its members or any class of them. Such a compromise would also take in its sweep any scheme of amalgamation/merger or one company with another. ☞ When such a scheme is put forward by a company for the sanction of the Court in the first instance the Court has to direct holding of meetings of creditors or class of creditors or members or class of members **who are concerned with such a scheme and once the majority in number representing 3/4th in value of creditors or class of creditors or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting accord their approval to any compromise or arrangement thus put to vote, and once binding to all creditors or class of creditors or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme even though approved by a majority of the concerned creditors or members the Court has to be satisfied that the company or any other person moving such an application for sanction under Section 391(2) has disclosed all the relevant matters mentioned in the provision to subsection (2) of that Section**. ☞ So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391(1) (a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the concerned voters so that the parties concerned before whom the scheme is placed for voting can take an informed and objective decision whether to vote for the scheme or against it. ☞ On a conjoint **reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court** which is called upon to sanction such a scheme has **NOT** merely to go by the **ipse dixit** of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has **to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy**. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. ☞ **NO** court of law would ever countenance any scheme of compromise or arrangement arrived **at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust** to the class of shareholders or creditors for whom it is meant. ☞ Consequently, it **cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got requisite majority support** of the creditors or members or any class of them for whom the scheme is mooted by the concerned company, **has to act merely as rubber stamp and must almost automatically put its seal of approval on such a scheme.** ☞ It is **trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors**. Therefore, the

fairness of the scheme qua them also has to be kept in view by the Company Court its sanction.

- It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged **subject to the rider that a scheme sanctioned by majority will remain binding to a dissenting minority of creditors or members as the case may be, even though they have NOT consented to such scheme and to that extent absence of their consent will have to effect the scheme**.
- It can be postulated that even in case of such a Scheme of Compromise and Arrangement **put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair** to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote. However, further question remains **whether the Court has jurisdiction like an appellate authority to minutely scrutinise the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes** have approved this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view.
- It is the **commercial wisdom of the parties to the scheme who have taken an informed decision** about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court.
- The Court certainly would **not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom** of the concerned parties.
- The Court has neither the expertise nor the jurisdiction to **delve deep into the commercial wisdom exercised by the creditors and members** of the company who have ratified the Scheme by the requisite majority. Consequently, the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate.
- The Court **acts like an umpire in a game of cricket** who has to see that both the teams play their according to the rules and do not overstep the limits. **But subject to that how best the game is to be played is left to the players and not to the umpire**.
- **The supervisory jurisdiction of the Company Court can also be called out from the provisions of Section 392 of the Act. Of course, this Section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the Scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement**.
- **Therefore,** the Court **cannot undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties**. This exercise remains **ONLY for the parties and is in the realm of commercial democracy permeating**

	the activities of the concerned creditors and members of the company who in their **best commercial economic interest by majority agree to give green signal to such a compromise or arrangement**.
Legal Principles held—	SC refers various decisions to summed up the broad contours of company court's jurisdiction as under: 1. The sanctioning court has to see that all the requisite statutory procedure for supporting such a scheme has been complied with and that **the requisite meeting as contemplated by Section 391(1) (a) have been held**. 2. That the scheme put up for sanction of the Court is **backed up by the requisite majority vote** as required by Section 391(2). 3. That the concerned meetings of the creditors or members or any class of them had the relevant material to **enable the voters to arrive at an informed decision for approving the scheme in question**. That the majority decision of the concerned class of voters is just fair to the class as whole so as to legitimately blind even the dissenting members of that class. 4. That all the necessary material indicated by Section 393(1) (a) **is placed before the voters at the concerned meetings** as contemplated by Section 391 (1). 5. That all the requisite material contemplated by the provision of Section 391(2) of **the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme** and the Court gets satisfied about the same. 6. That the proposed scheme of compromise and arrangement is **not found to be violative of any provision of law and is not contrary to public policy**. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, **can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same**. 7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors as the case may be, **were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse** to that of the latter comprising of the same class whom they purported to represent. 8. That the scheme as a whole is also found to be **just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class** represented by them for whom the scheme is meant. 9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no **further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court** there would be a better scheme for the company and its members or creditors for whom the scheme is framed The Court ***cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction***.
Decision	The SC decides the case in favour of the Respondent and held that the Respondents could go ahead with the scheme of amalgamation.

28. MADURA COATS LTD v. MODI RUBBER LTD & ANR [SC]

Hint: SC held that Winding up proceeding cannot be continued after a reference has been registered by the BIFR and an enquiry initiated under section 16 of the SICA. **[SICA is prevailed over the winding proceedings]**

Fact of the Case	☞ Mudra Coats filed an application before Allahabad HC for winding up Modi Rubber Ltd on the on the allegation that Modi Rubber **was unable to pay its huge undisputed debts**. ☞ Allahabad HC passed order on 12.03.2004 for winding up and held that it was just and **equitable that the company be wound up**. An OL was appointed **to take charge of the assets of the company and to submit a report along with the inventory**. ☞ Feeling aggrieved by the winding up order, **Modi Rubber preferred an appeal before the Division Bench of the HC. Before the Division Bench it was brought out for the first time that a reference to the BIFR** had been made on 03.02.2004 which was received by the BIFR on 04.02.2004. ☞ It will be seen that while the application **for making a reference was sent to the BIFR before the winding up order was passed by the Company Cour**t; the reference was actually registered after the winding up order was passed by the Company Court. ☞ The Division bench **allowed the appeal and passed the impugned judgement** which is under challenge before the SC.
Applicable Law	<u>**Real Value Appliances Ltd. v. Canara Bank (1998)**</u> ☞ In this case, Court concluded that once a reference is registered after scrutiny, it is mandatory for the BIFR to conduct an enquiry. ☞ It was also held that the SICA is intended to **revive and rehabilitate a sick industry before it can be wound up under the Companies Act**. The legislative intention is to **ensure that no proceedings against the assets of the company are taken before any decision is taken by the BIFR because if the assets are sold or the company is wound up, it may become difficult to later restore the status quo ante**. ☞ It was held that it is for this reason that the enquiry under the SICA must be treated to have commenced as soon as the registration of the reference is completed after scrutiny and **that action against the company's assets must remain stayed in view of Section 22 of the SICA till a final decision is taken by the BIFR.** <u>**Tata Motors Ltd v. Pharmaceutical Products of India Ltd. (2008)**</u>: ☞ In this case it was held that the provisions of SICA would prevail over the provisions of the Companies Act, 1956. <u>**Rishabh Agro Industries Ltd. v. P.N.B. Capital Service Ltd. (2000):**</u> ☞ In this case, it was held the company was ordered to be wound up but this order was stayed by the Division Bench of the concerned High Court. Thereafter, the company made a reference to the BIFR under the SICA.
Decision	☞ The SC held that the liquidation proceedings have to be stopped and the proceedings under SICA be continued. ☞ The SC decide the case in favour of the Respondent (Modi Rubber).

29. CANARA BANK v. NUCLEAR POWER CORPORATION OF INDIA & ORS [SC]

Hint: Question arise before the SC "whether to deal with the share market scam (i.e. transfer of share by notified person) is come in the jurisdiction of the CLB constituted under section 10E of the Companies Act, 1956 or come in the jurisdiction of the Special Court under section 9A of the Special Court Act.

Decision:

- ☆ **The SC decide the case in favour of the Appellant.**
- ☆ The SC held that the application of the Canara Bank **pending before the CLB shall stand transferred to the Special Court** constituted under the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

Fact of the Case	☆ Canara Bank (the appellant) had made an application before the CLB seeking relief against the Nuclear Power Corporation of India Ltd. (the first respondent), which **had refused to register the name of the Canara Bank in its books in respect of the bonds of the Nuclear Power Corporation purchased by the Canara Bank**. ☆ The Standard Chartered Bank (the fourth respondent) **had also claimed ownership of the said bonds**. ☆ The Canara Bank alleged that **it had acquired the said bonds from the Andhra Bank Financial Services Ltd. (the third respondent) through one Hiten P. Dalal, (the second respondent) who had acted as a broker**. ☆ Hiten P. Dalal is a person **notified under the provisions of Section 3(2) of the Special Court Act** and was **involved as a broker** in the transaction relating to the said bonds as showed in the application of the Canara Bank before the CLB. ☆ The **application of the Canara Bank was pending before the CLB for disposal**, when, the Special Court Act was amended by the Special Court (Trial of Offences Relating to Transactions in Securities) Amendment Ordinance, 1994, and **Section 9-A was introduced on 25th January, 1994**. ☆ Canara Bank and the Nuclear Power Corporation **took the stand that the application of the Canara Bank stood transferred to the Special Court by virtue of the provisions of Section 9-A(2) of the Special Court Act**. ☆ The Standard Chartered Bank (Stanchart) **contended that the CLB retained the jurisdiction to deal with the application**. ☆ The CLB held that **it was NOT a court within the meaning of the Companies Act nor was it a civil court**. Therefore, **its jurisdiction was unaffected by the provisions of Section 9-A(2) of the Special Court Act**. ☆ The Appellant filed appeal before the SC against the order of the CLB.
Legal Principles held—	☆ In the case of Harinagar Sugar Mills case (supra), the SC was called upon to decide whether an order of the CG under Section 111 of the Companies Act was appealable under Article 136 of the Constitution. ☞ **Article 136 empowers this court to grant special leave to appeal from any judgment, decree determination, sentence or order in any cause or matter passed or made by "any court or tribunal" in the territory of India**. ☞ **The connotation of the words "court" and "tribunal" was determined in the judgment in the context of Article 136**. **(a)** The argument was that the CG acting under Section 111 of the Companies Act **was exercising administrative authority**. The court held that it was exercising judicial authority. **(b)** It was held **that "all tribunals were not courts though all courts were tribunals. The word "courts" was used to designate the tribunals that a State established to administer justice**. **They were fixed and permanent and could try any suit or cause within their jurisdiction.** They went under the compendious name of "Courts" of Civil Judicature". **(c)** A **large number of administrative tribunals had come into existence with the growth of civilisation and the problems of modem life**. They

	acted in a judicial manner but **they were NOT part of the ordinary courts of civil judicature**. **(d)** When the Constitution spoke of "courts" in Article 136 and other Articles, **it contemplated courts of civil judicature but not tribunals other than such courts**. This was the reason both expressions were used in Articles 136 and 226. **(e)** Therefore, the judgment is **determinative in deciding whether a tribunal is subject to the jurisdiction of this court under Article 136 or of the High Court under Article 227, but it does not hold that a "Court" is only a court of civil judicature in the ordinary hierarchy of courts**. **(f)** In our view, the word "court" must be-read in the context in which it is used in a statute. It is permissible to read it as comprehending the courts of civil judicature and courts or some tribunals exercising curial, or judicial, powers. **(g)** In the context in which the word "court" is used in Section 9A of the Special Court Act, **it is intended to encompass all curial or judicial bodies**, which **have the jurisdiction to decide matters or claims arising out of transactions in securities entered into between the stated dates in which a person notified is involved**. **(h)** Having regard to the **enormity of the "scam" and its vast ramifications**, Parliament thought it was necessary that **all the matters of claims arising out of transactions in securities entered into between the stated dates in which a person notified was involved** should be brought before and tried by the same forum. **(i)** That forum had been invested with the jurisdiction to try persons accused of offences relating to transactions in securities entered into between the stated dates. **(j)** It was also required to give directions to the Custodian in regard to property belonging to persons notified which stood attached under the provisions of the Special Court Act. **(k)** The object of amending the Special Court Act **invest the Special Court with the power and authority to decide civil claims arising out of transactions in securities entered** into between the stated dates in which a person notified was involved has already been stated. **(l)** In these circumstances, **it is proper to attribute to the word "court" in Section 9A (1) of the Special Court Act, not the narrower meaning of a court of civil judicature which is part of the ordinary hierarchy of courts**, but the broader meaning of a curial body, **a body acting judicially to deal with matters and claims arising out of transactions in securities entered into between the stated dates in which a person** notified is involved. **(m)** Section 111 of the Companies Act as amended with effect from 31st May, 1991, the CLB performs the functions that were therefore performed by courts of civil judicature under Section 155. **CLB is empowered to make orders directing rectification of the company register, as to damages, costs and incidental and consequential orders**. CLB may decide any question relating to **the title of any person who is a party before it to have his name entered upon the company's register**; and any question which it is necessary or expedient to decide. CLB may make interim orders. **Failure to comply with any order visits the company with a fine**.

	(n) In regard to all these matters it has exclusive jurisdiction (except under the provisions of the Special Court Act, which is the issue before us). **(o)** In exercising its function under Section 111, **the CLB must, and does, act judicially**. Its orders **are appealable**. Further, **the CLB is a permanent body constituted under a statute**. It is difficult to see **how it can be said to be anything other than a court, particularly for the purposes of Section 9A of the Special Act**. **(p)** We shall assume that a shareholder whose name **the company has refused to enter in its register would be put to some difficulty in deciding whether he should approach the Special Court or the CLB, but that is no reason to interpret the provisions of Section 9A in a manner that would defeat its intendment (i.e. the sense in which the laws understand) and adversely affect the public interest**. **(q)** As has been pointed out, ☞ Sections 111(2) and Section 111(3) of the Companies Act term the pleading that the person aggrieved has to file before the CLB an 'appeal', ☞ Section 111(4) requires the person aggrieved to apply, ☞ Section 111(5) speaks of it as an 'appeal' or an 'application', ☞ Section 111(7) as an 'application ' and ☞ Section 111(10) as an 'appeal or application' which shall be made by a "petition in writing". **(r)** Therefore, the words "appeal" and "application" in the context of the provisions of Section 111 have the same meaning and it is, plainly, an original application that is made. The **shareholder does NOT resort to a superior court** to review the decision of an inferior court or tribunal. **(s)** Therefore, the fact that Section 9A(2) of the Special Court Act speaks of the transfer of 'every suit', claim or other legal proceeding (other than an appeal) does not exclude the "application' or "appeal" made under the provisions of Section 111 of the Companies Act from the purview of Section 9A(1) of the Special Court Act.
Decision	✫ **The SC decide the case in favour of the Appellant.** ✫ The SC held that the application of the Canara Bank **pending before the CLB shall stand transferred to the Special Court** constituted under the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

30. SINGER INDIA LTD. v. CHANDER MOHAN CHADHA & ORS [SC]

Hint: In the given case, Respondent let out its premises to the American Company. However, **American Company reduce its share capital to 40 % in order to carry on business in India in view of Section 29 of Foreign Exchange Regulation Act, 1973.** Accordingly, Company Court sanctioned the scheme of amalgamation whereby **the undertaking in India of the American Company was amalgamated with the Indian Company**. **It was submitted that the Indian Company is NO other entity EXCEPT the legal substitute of the American Company and in substance there is no case of sub-tenancy**. Respondent Landlord initiated eviction proceedings on the ground of subletting against the Appellant. Appellant contends that the transfer of premises was due to merger which is by operation of law. **Whether Appellant is liable for eviction?**

Decision:

☞ The SC decide the case in favour of the Respondent (Chander).

☞ The SC passed eviction order against the Appellant.

Fact of the Case	☞ Respondent landlord **LET OUT** one Shop to M/s. Singer Sewing Machine Company, **incorporated under the laws of the State of New Jersey**, USA,

	(hereinafter referred to as 'American Company'), vide a registered lease deed dated 11.7.1966. ☞ In the year 1982, the American Company, **without obtaining any written consent from the landlord**, had parted with the possession of the premises in dispute in favour of Indian Sewing Machine Company Limited. ☞ It was the said company which was in exclusive possession of the premises and thereby it was liable for eviction in view of Section 14(1)(b) of the Delhi Rent Control Act (hereinafter referred to as the 'Act'). ☞ The eviction petition was contested by the appellant on the ground that **a direction was issued to the American Company to reduce its share capital to 40 % in order to carry on business in India in view of Section 29 of Foreign Exchange Regulation Act, 1973** (hereinafter referred to as 'FERA'). Accordingly, Company Court under which a scheme of amalgamation was sanctioned whereby **the undertaking in India of the American Company was amalgamated with the Indian Company**. ☞ **It was submitted that the Indian Company is NO other entity except the legal substitute of the American Company and in substance there is no case of sub-tenancy**. ☞ The Additional Rent Controller, Delhi dismissed the eviction petition. However, the Rent Control Tribunal reversed the order of the Additional Rent Controller in the appeal preferred by the landlord and eviction petition was allowed. ☞ During the pendency of the appeal before the Rent Control Tribunal, **the name of M/s. Indian Sewing Machine Company was changed as Singer India Limited which is the appellant herein**. ☞ The Appellant file appeal before the SC against the eviction order.
Legal Principles held –	The SC consider the following facts/laws before passing the final order: **(a)** The **effect of parting of possession of the tenanted premises as a result of sanction of scheme of amalgamation of companies** under Section 394 of the Companies Act by the High Court has also been considered in two decisions of this Court. ✫ **M/s. General Radio and Appliances Co. Ltd and others v. M.A. Khader 1986:** ☞ In this case, the premises had been let out to M/s. General Radio and Appliances Co. Ltd. ☞ On account of a scheme of amalgamation sanctioned by the High Court, **all property, rights and powers of every description including tenancy right, held by M/s. General Radio and Appliances Co. Ltd. had been blended** with M/s. National Ekco Radio & Engineering Co. Ltd. ☞ Thereafter, the landlord instituted proceedings for eviction on the ground of unauthorized sub-letting. ☞ It was held that the order of amalgamation was made by the High Court on the basis of the petition filed by the transferor company in the company petition. Therefore, it cannot be said that this is an involuntary transfer effected by the order of the Court. ☞ It was further held that appellant No. 1 Company was no longer in existence in the eyes of law and it had effaced itself for all practical purposes. **The appellant No. 2 Company i.e., the Transferee Company, was not a tenant in respect of the suit premises and it was appellant No. 1 Company which had transferred possession of the suit premises in favour of the appellant No. 2 Company**. ☞ The Court further took the view that under the relevant Act, **there was NO express provision that in case of any involuntary transfer or transfer**

of the tenancy right by virtue of a scheme of amalgamation sanctioned by the High Court, such a transfer will not come within the purview of Section 10(ii) (a) of Andhra Pradesh Building (Lease, Rent and Eviction) Control Act.

- On this finding, **it was held that the appellant was liable for eviction**.

☆ **Cox & Kings Ltd. & Anr v. Chander Malhotra 1997:**

- The premises were given on lease to Cox & Kings (AGENTS) Limited, a company incorporated under the United Kingdom Companies Act (for short, "Foreign Company").
- A petition for evictions was filed on several grounds and **one of the ground was of sub-letting to Cox & Kings Limited**, a company registered under the Indian Companies Act (for short an "Indian Company").
- It was urged that the transfer of leasehold interest from the Foreign Company to the Indian Company **was by compulsion**, it was an **involuntary one** and, therefore, **it was not a case of sub-letting within the meaning of Section 14(1) (b) of the Act**.
- It was held that under FERA, **there was no compulsion** that the premises demised to the Foreign Company should be continued or given to the Indian Company.
- On the other hand, under the agreement executed between the Foreign Company and the Indian Company, **incidental to the assignment of the business as a growing concern**, the Foreign Company **also assigned the monthly and other tenancies and all rented premises** of the assignor in India to the Indian Company.
- Accordingly, the Court concluded that though by operation of FERA, the Foreign Company had wound up its business, but under the agreement it had assigned the leasehold interest in the demised premises to the Indian Company which was carrying on the same **business in the tenanted premises without obtaining the written consent of the landlord** and, therefore, **it was a clear case of sub-letting**.
- These cases clearly hold that even if there is an order of a Court sanctioning the scheme of amalgamation under the Companies Act **where under the leases, rights of tenancy or occupancy of the Transferor Company get vested in and become the property of the Transferee Company**, it would make **NO difference in so far as the applicability** of Section 14(1)(b) is concerned, as the Act **does not make any exception in favour of a lessee who may have adopted such a course of action in order to secure compliance of law**.

(b) It was next contended that on amalgamation Singer Sewing Machine Company (American Company) merged into Indian Sewing Machine Company (Indian Company) shedding its corporate shell, but **for all practical purposes remained alive and thriving as part of the larger whole**.

(c) It was submitted that this Court **should lift the corporate veil and see who are the directors and shareholders** of the Transferee Company and who are in real control of the affairs of the said company and **if it is done it will be evident there has been no sub-letting or parting with possession** by the American Company.

(d) This is **not the case of the appellant nor could** it possibly be that the corporate character is employed **for the purpose of committing illegality or defrauding others**.

	(e) Appellant contends that for the purpose of FERA, **the American Company has effaced itself and has ceased to exist** but for the purpose of Delhi Rent Control Act, **it is still in existence**. **(f)** Therefore, **it is not possible to hold that it is the American Company which is still in existence and is in possession of the premises in question**.
Decision	☞ The SC decide the case in favour of the Respondent (Chander). ☞ The SC passed eviction order against the Appellant.

31. SARASWATI INDUSTRIAL SYNDICATE LTD v. C.I.T. [SC]

Hint: Amalgamating Company claimed expenditures in earlier assessment year but the amalgamating company had shown the aforesaid amount as a trading liability and the said trading liability was taken over by the Amalgamated Company (i.e. appellant company). However, the such trading liability was written back by the amalgamated company in his books (It referred to as "remission of liability"). Accordingly, ITO make additions of such remission of trade liability in the income of the amalgamated company by virtue of section 41(1) of the Income Tax Act, 1961. The appellant company contends that **the expenditure had been allowed to the erstwhile Indian Sugar Company which was a different entity from the amalgamated company**.

Decision: SC decide case in favour of Appellant and held that **the allowance made to Indian Sugar Company, which was a different assessee**, could **NOT** be held to be the income of the amalgamated company for purposes of Section 41(1) of the Income Tax Act.

Fact of the Case	☞ Indian Sugar and General Engineering Corporation (hereinafter referred to as 'the Indian Sugar Company') amalgamated with the appellant Saraswati Industrial Syndicate Ltd. ☞ Prior to the amalgamation, the Indian Sugar Company had claimed expenditure to the extent of Rs.58,735 on accrual basis in its earlier assessment. ☞ The company had shown the aforesaid amount as a trading liability and the said trading liability was taken over by the appellant company. ☞ After amalgamation, the appellant company claimed exemption on the amount of Rs.58,735 from income tax for the assessment year 1965-66 **on the ground that the amalgamated company was not liable to pay tax under Section 41(1) of the Income Tax Act 1961 as the expenditure had been allowed to the erstwhile Indian Sugar Company which was a different entity from the amalgamated company**.
Applicable Law	☞ The amalgamation is a blending of 2 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 undertakings. ☞ There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. **Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition**. ☞ See: Halsbury's Laws of England, 4th Edition Vol. 7 Para 1539. *Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third*

	company or one is absorbed into one or blended with another, the amalgamating company loses its entity.
Legal Principles held –	**<u>M/s. General Radio and Appliances Co. Ltd. & Ors. v. M.A. Khader (dead) by Lrs., [1986] 2 S.C.C. 656</u>** ☞ In this case the effect of amalgamation of two companies was considered. ☞ This Court in appeal held that under the order of amalgamation made on the basis of the High Court's order, **the transferor company ceased to be in existence in the eye of law and it effaced itself for all practical purposes**. ☞ This decision lays down that after the amalgamation of the two companies, the transferor company ceased to have any entity and the amalgamated company acquired **a new status and it was not possible** to treat the two companies as partners or jointly liable in respect of their liabilities and assets.
Decision	☞ In the instant case the Tribunal rightly held that the appellant company was a separate entity and a different assessee, therefore, **the allowance made to Indian Sugar Company, which was a different assessee**, could **NOT** be held to be the income of the amalgamated company for purposes of Section 41(1) of the Act. ☞ The SC decide **the case in favour appellant and the amalgamating company ceased to exist in the eye of law**, therefore the appellant was not liable to pay tax on the amount of Rs.58,735.

32. TIN PLATE DEALERS ASSN. P. LTD. & ORS v. SATISH CHANDRA SANWALKA & ORS [SC]

Hint: Various acts of oppression and Suppression, SC upheld the CLB order.

Fact of the Case	✰ The appellant company consisted of two groups viz. "Gupta Group" appellants in CA 589/2010 and "Sanwalka Group" who are the appellants in CA 599/2010. These two appeals are cross appeals. ✰ The **dispute relate to the management control** of the company. Both the appeals being against the common judgment and order of the Calcutta HC. ✰ Sanwalka group filed a petition before the CLB **alleging that Gupta group had come into the power of the company** by actions of commission and omission such as ☛ Forfeiture of preference shares issued to Sanwalka group, ☛ Increasing the authorised capital, ☛ Issuing bonus shares without notice to Sanwalka group, ☛ Removing two members of the Sanwalka group from the BOD(s). ✰ The eventual reliefs prayed by Sanwalka group in the Company Petition in the light of the averments (i.e. allegation) made in the said petition: **(a)** **Restoration of the names of the members** of the Sanwalka Group in the register of members of the company; **(b)** Cancellation of the allotment of bonus shares; **(c)** Cancellation of the issue and allotment of 25000 partly paid up ordinary equity shares to the Gupta Group; **(d)** Cancellation of 3065 equity shares to the holders of the 3065 preference shares; **(e)** Cancellation of the lease agreement in respect of the industrial plot and restoration of the names of the concerned members of the Sanwalka Group as Directors of the Company.

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✫ The CLB by its order dated 01.03.2001 disposed of the petition by granting majority of the reliefs to Sanwalka group.

✫ Aggrieved by the aforesaid order of the CLB with regard to **the maintainability of the company petition**, **issue of bonus shares and 25,000 ordinary equity shares and also the re-induction of the members of the Sanwalka Group in the Board of Directors**, the Gupta Group appealed to the HC.

✫ Apart from these, **Sanwalka Group filed a separate appeal before the HC challenging the decision of the CLB** insofar as the issue of 3065 preference shares and the lease in respect of the industrial plot is concerned.
✫ However, **the High Court dismissed both sets of appeal**. Therefore, it leads to the institution of the present appeals before the SC.

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Legal Principles held—

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Q. Forfeiture of shares of members of Sanwalka on account of non-payment of final call?

The certificates **DO NOT contain any stipulation or condition that the same are being held either on account of a third person or as beneficiaries on behalf of any third person**. The shares in question were allotted on payment of Rs.35 being the application money (Rs.25) and allotment money (Rs.10). A further amount of Rs.10/- per share was paid against the first call made on 7.8.1986.

Therefore, the share certificates, ex facie, **DO NOT support any of the contentions advanced on behalf of Gupta Group**, details of which have been noticed herein above.

If the shares were held by the members of the Sanwalka Group in their own right **without any connection to the erstwhile/forfeited shares** held by M/s. Gupta Brothers, **the second question arising i.e. failure to respond to the call notice dated 5.1.1991 really does NOT ARISE**. The said notice **required the members** of the Sanwalka Group **to pay the unpaid value of the forfeited shares** (which coincidentally was also Rs.55/- per share i.e. same as the unpaid amount of the shares at the time of forfeiture when held by M/s. Gupta Brothers) **along with interest.**

In this regard, both the CLB as well as the High Court finds that:
(a) Issue of notice of the call in terms of Section 53 of the Act had **NOT been proved** by the Gupta Group.
(b) Not only the call notice dated 5.1.1991 **had NOT been proved to have been issued in the matter** required under Section 53 of the Act, **the notice also does NOT mention the consequences of non-payment i.e. forfeiture**.

Also the **fastening of the liability on the Sanwalka Group to pay the unpaid amount of the forfeited shares** along with interest is plainly contrary to the provisions of Article 18 of the AOA.

Besides, **the date of the forfeiture also is not clear** though it appears that in a Board Meeting held on 2.8.1995 **a decision was taken to restore the said shares** to M/s. Gupta Brothers. **The reason for the said decision appears to be to comply with an order of attachment of the shares passed earlier by the Civil Court**.

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All these would **demonstrate the apparent falsity of the claim now made that the forfeiture was due to failure of the Sanwalka Group to comply with the terms of the call notice** dated 5.1.1991. So, **it was held that restored back the shares to the members of Sanwalka Group**.

Q. Notice of E.O.G.M. is mandatory?
There is **no denial of the fact** that **NOTICE of the E.O.G.M. dated 5.7.1994 was NOT given to the members** of the Sanwalka Group though they, admittedly, continued to be members of the company on the date of the meeting. It is pursuant said E.O.G.M., the following decision is taken:
(a) To raise the share capital of the company from Rs. 10 Lakhs to Rs. 5 Crores;
(b) Issue bonus shares (i.e. the issue of 25,000 ordinary equity shares) and
(c) The conversion of preference shares to equity shares were made subsequently.

Such **notice is mandatory** under Section 172(2) read with Section 41 of the Act.
Q. Bonus share is permitted to issue by utilisation of reserves arising from revaluation of assets?
Specifically, so far as the issue of bonus shares is concerned, the arguments laid down before us whether Section 205(3) of the Act, particularly, the proviso thereto **permits issue of bonus shares out of revaluation reserves** of a company. So far as the **ISSUE with regard to utilization of reserves arising from revaluation of assets for the purpose of issuing fully paid bonus shares is permitted** in Bhagwati Developers v. Peerless General Finance & Investment Co. & Ors. (2005). However, it has to be noticed that in Bhagwati Developers (supra) the AOA (Article 182) **specifically permitted/contemplated such a course of action**.

In the present case, the AOA of the Company **DO NOT** empower the Directors to so act. **No such situation i.e. issue of bonus shares out of revaluation reserve is contemplated**.

When the **Articles of the Company DO NOT confer any such power in the Board exercise thereof on the basis that the Act so provides would be impermissible**. Enabling provisions under the Act would require incorporation in the Articles of a company.

Besides these, the Board resolution dated 5.7.1994 pursuant to which bonus shares were issued **indicates that the real purpose for issue of the bonus shares is to raise funds which were badly needed by the company at that point of time**.

On the very face of it, **the purpose indicated in the resolution is a sham and a pretence inasmuch as revaluation of the existing assets of the company and issuance of bonus shares against such revaluation could not and did not generate any additional funds as the additional capital available is purely fictional or notional**.

Therefore, a self-serving interest of the Gupta Group (who received all the bonus shares issued) in issuing the bonus shares is evident.

The power of the Board of Directors of the Company to issue fresh shares must always be viewed as an adjunct (i.e. assistance) of its extensive powers under the Act and **the bona fides of such an exercise cannot be called into question by construing**

	the power to issue fresh shares to be limited by any particular purpose or purposes. However, the same would **NOT detract (i.e. reduced) from the fundamental principle of fair play that is to be expected from the BOD(s) in making a fair and proportionate distribution/allotment of such fresh shares**. The direction of the Company Law Board upheld by the High Court, namely, that allotment from the aforesaid **25,000 newly issued ordinary equity shares should be proportionate to the shareholding of the two groups taking the members of the Sanwalka Group as having continued to be members of the company, will not require any interference**. **<u>Conversion of Preference shares into equity shares:</u>** Insofar the issue of 3065 ordinary equity shares in lieu of 3065 preference shares is concerned, **the Sanwalka Group contending that the said shares had ceased to exist in the year 1967** and **therefore no equity shares could have been issued** in lieu of the said preference shares as has been done. In such circumstances, **the apprehension of the Sanwalka group** is that if the equity shares issued against the said preference shares **are allowed to remain alive and valid the balance would still tilt in favour of the Gupta Group**. The Gupta Group has sought to contend that the above apprehension of the Sanwalka Group is unfounded. It is claimed that it is not correct that **by virtue of the conversion of the 3065 preference shares into equity shares the Gupta Group has emerged in the majority for the first time**. Even prior to such conversion, **the Gupta Group was in a majority inasmuch as the preference shares always carried a right to vote**. Therefore, **even on the basis of the original shareholding, the Gupta Group was in majority**. The aforesaid Articles must necessarily have to be understood in the light of the provisions of Section 87 particularly those contained in sub- Section (2). The meaning sought to be given to Articles 20, 21 and 22, extracted above, namely, that every share holder including the holder of a preference share has a right to vote cannot be readily accepted. **Q: Conversion of Preference shares into equity shares in lieu of dividend in respect of the 3065 shares has not been paid:** The resolution of the Board dated 5.7.1994 relating to the **conversion of preference shares into equity shares proceeds on the basis that dividends in respect of the 3065 shares have not been paid and in lieu** thereof the shareholders had agreed to receive an equivalent number of equity shares. **The above statement of fact is difficult to accept**. Neither is the period during which dividends had not been paid is specified, nor is the amount due indicated. **No material has been laid to show that the 3065 equity shares represent a fair value of the dividends claimed to be unpaid**. A number of self-serving decisions by the Gupta Group and its conduct of the business of the company in a manner detrimental to the interest of the company **would make**

	it extremely perilous (i.e. hazardous) to rely on the version available in the Board resolution for allotment of 3065 equity shares in place of the preference shares in question. In the above circumstances, **it would be just and proper to strike down the conversion of the 3065 preference shares into equity shares and revert the preference shares to its earlier status to be dealt with in the future in accordance with law**. **No Question of winding up arises.** The argument that having regard to the conduct of the Gupta Group in managing the affairs of the Company and all decisions taken being in the best interest of the Company, **no case for winding up is made out so as to justify the exercise of powers under Section 397/398 of the Act by the CLB**. **Q. Industrial plot taken on lease by the company should be cancelled.** Company has no subsisting business and that the terms of the lease entered into by the Gupta Group in respect of the **said industrial plot are wholly adverse to the Company's interest**. The question whether a single act of oppression would enable the CLB to intervene or oppression must be the cumulative result of continuous acts should not require any debate in the facts of the present case which demonstrate a series of unacceptable decisions and actions on the part of the Gupta Group. In the last resort, satisfaction that oppression has been committed has to be reached in the facts of each case.

33. MORGAN STANLEY MUTUAL FUND v. KARTICK DAS [SC]

Hint: The SC held that complaint made by the respondent could not be maintained on account of shares before allotment is not goods, respondent is not covered in the definition of the consumer, complaint is not covered under clause (iii) and (iv) of the section 2(c) of the Consumer Protection Act, 1985 and company is not engaged in unfair trade practices.

Fact of the Case	☞ The Appellant (Morgan Stanley) made a **public issue inviting subscription from the public to its mutual fund** scheme "Morgan Stanley Growth Fund". ☞ The Respondent (Kartick) brought a complaint under the Consumer Protection Act, 1986 seeking to restrain the public issue **from being floated on the grounds** that the **Appellant's Offering Circular was not approved by SEBI**, that there were several irregularities in the same, that the **basis of allotment was arbitrary and unfair** and that the **appellant was seeking to collect money by misleading the public**. ☞ The Appellant contended that the aforesaid complaint under the Consumer Protection Act could not be maintained. **To maintain a complaint under COPRA, there has to be some defect in goods or some deficiency in the services being offered. In the instant case, shares had not been allotted as yet and hence, they had not attained the status of being "goods**".
Applicable Law	✫ **Sale of Goods Act, 1930:** ☞ Section 2(7) states 'Goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops,

	grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. ☞ Section 2(6) states 'Future goods' means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale." ☆ **Consumer Protection Act, 1985** Section 2(c) states 'complaint' means any allegation in writing made by a complainant that – **(i)** as a result of any unfair trade practice adopted by any trader, the complainant has suffered loss or damage; **(ii)** the goods mentioned in the complaint suffer from one or more defects; **(iii)** the services mentioned in the complaint suffer from deficiency in any respect; **(iv)** a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods, with a view to obtaining any relief provided by or under this Act."
Legal Principles held—	☞ The consumer as the term **implies is one who Consumes**. As per the definition given in the Consumer Protection Act, 1985, consumer is the one who purchases goods for private use or Consumption. The meaning of the word 'Consumer' is broadly stated in the above definition so as to **include anyone who consumes goods or services at the end of the chain of production**. The comprehensive definition aims at covering **every man who pays money as the price or cost of goods and services**. ☞ The consumer deserves to get what he pays for in real quantity and true quality. In every society, **consumer remains the centre of gravity of all business and industrial activity**. He needs protection from the manufacturer, producer, supplier, wholesaler and retailer. ☞ In the light of this, **we will have to examine whether the 'shares' for which an application is made for allotment** would be goods. That **till the allotment of shares takes place, "the shares do not exist"**. **Therefore, at the stage of application, shares will not be goods**. It is only after allotment that rights may arise as per the AOA of Company. at the stage of application, **an applicant is just a prospective investor**. ☞ Since **the shares could NOT be termed as "goods" as long as they are at the stage of application**, the **prospective investors could also not attain the status of being "consumers"**. Thus, no complaint can lie against the issue under the Consumer Protection Act. Certainly, clauses (iii) and (iv) of Section (c) of the **Act DO NOT arise in this case**. ☞ Therefore, what requires to be examined is, **whether any unfair trade practice has been adopted**. The expression 'unfair trade practice' as per rules shall have the same meaning as defined under Section 36-A of Monopolies and Restrictive Trade Practices Act, 1969. **That again cannot apply because the company is not trading in shares**. The **share means a share in the capital**. The object of **issuing the same is for building up capital**. ☞ To raise capital, means making arrangements for carrying on the trade. It is not a practice relating to the carrying of any trade. ☞ **Creation of share capital without allotment of shares does not bring shares into existence.** ☞ Therefore, our answer is that a prospective investor like the respondent or the association is not a consumer under the Act
Decision	☞ The SC held that the complaint made by the Respondent could not be maintained. ☞ The SC decide the case in favour of the Appellant (Morgan Stanley).

34. PRESIDENT/SECRETARY J.K. SYNTHETICS MAZDOOR UNION (CITU), KOTA v. ARFAT PETROCHEMICALS PVT.LTD & ORS [SC]

Hint: In the given case, the Respondent No. 2 is a sick industrial company, which sell of its Kota Units to the Respondent No. 1 Company (i.e. profit making company). BIFR issue directions to the Respondent No. 1 Company in pursuance of Section 22A of the SICA Act, 1985. However, the Respondent No. 1 Company contends that BIFR has not competence to issue direction under section 22A of the said Act, because, Respondent No. 1 Company is not sick company. **Whether the contention of the Respondent No. 1 is tenable in law?**

Decision:

- ✰ **The SC decide the case in favour of the Respondent (i.e. Arfat Petrochemicals Pvt. Ltd.)**
- ✰ **The SC held that BIFR does not have competence to issue direction to a Respondent company No. 1 which is not a sick company.**

Fact of the Case	✰ J.K. Synthetics Limited (now Jay Kay Enterprises Ltd.), who is the Second Respondent **was declared a sick industrial company** and the Rehabilitation Scheme recommending the de-merger of cement units was accepted. ✰ In the meanwhile, **the Second Respondent entered into a Memorandum of Understanding (MoU) with M/s Arafat Petrochemicals Pvt. Ltd. (APPL), the First Respondent herein**. ✰ According to the said MoU, **the assets of the Kota Units of Respondent No. 2 were to be sold to Respondent No.1 for a total consideration of Rs. 15 Crores**. ✰ The liability towards payment to the workmen was to be borne by APPL. on 07.01.2005, **the AAIFR sanctioned a Scheme for transfer of the Kota units to the First Respondent in terms of the MoU dated 19.10.2001**. ✰ On 24.03.2008 **a sale deed was executed by the Second Respondent in favour of the First Respondent for sale of the assets of the Kota units**. ✰ In the review meeting held on 05.05.2008, **the BIFR took note of the complaints that the sale of assets of the Kota units as waste/scrap by the First Respondent**. ☝ The BIFR held that the **interest of the workmen** have to be **safeguarded in accordance with the Sanctioned Scheme of 2005**. ☝ The BIFR also held that the **Second Respondent cannot escape responsibility towards the rehabilitation** of the Kota unit on the ground that there is change in management. ☝ The First Respondent participated in the next review meeting held by the BIFR and informed the BIFR that i**t is NOT a sick company and NO directions can therefore be issued to it.** The BIFR held that the First Respondent was **not right in contending so**. ✰ The orders dated 05.05.2008 and 30.06.2008 of the BIFR were assailed by the First and Second Respondents before the AAIFR. ✰ The AAIFR by its order dated 11.12.2008 **dismissed the Appeals filed by the First Respondent and directed the BIFR to re-examine the exact position relating to the payment of dues to the workmen**. ☝ The BIFR was also directed to continue the monitoring of the Scheme and **review the efforts made by the First Respondent towards revival of the Kota units**. ☝ The contention of the First Respondent that the BIFR has **no jurisdiction over a company which is not a sick company was rejected**.

	☆ The First Respondent filed a Writ Petition in the Rajasthan HC against the order of the AAIFR. The High Court allowed the Writ Petition **by holding that the BIFR and the AAIFR do NOT have jurisdiction to issue directions to a company which is not a sick industrial company under Section 22 A of the Act**. ☆ The Labour Unions filed Civil Appeal No. 8597 and 8598 of 2010. ☆ Civil Appeal No. 8599 of 2010 is filed by JK Synthetics Limited aggrieved by the judgment in so far as it set aside the findings in its favour which were not challenged in the Writ Petition.
Applicable Law	**Section 22A of the SICA "Direction not to dispose of assets".—** The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets— **(a)** during the period of preparation or consideration of the scheme under section 18; and **(b)** during the period beginning with the recording of opinion by the Board for winding up of the company under section 20(1) and up to commencement of the proceedings relating to the winding up before the concerned High Court
Legal Principles held—	The SC consider the following facts before passing the final order: **(a)** It is clear from a plain reading of Section 22 A of the Act that the Board can issue a direction **NOT to dispose of assets only to a sick industrial company**. **(b)** There is **NO dispute that the First Respondent is not a sick industrial company** and that **it purchased the assets from a sick industrial company in accordance with the Sanctioned Scheme**. **(c)** The BIFR was not correct in passing an order of status quo and **directing the First Respondent NOT to alienate/transfer the assets** by its orders dated 05.05.2008 and 30.06.2008. **(d)** We agree with the findings of the High Court **that the BIFR does NOT have competence to issue directions to a company which is NOT a sick industrial company** under Section 22 A of the Act. **(e)** Relying of the decision held by the SC in U.P. State Sugar Corporation Ltd. v. U.P. State Sugar Corporation Karamchari Association & Anr reported in (1995) wherein it was held as follows: **"It runs counter to the express terms of Section 22 A of the Act which confers a limited power on the Board to pass an order prohibiting a sick industrial company from disposing of its assets only during the period specified in Clause (a) and (b)."** **(f)** It is open to the BIFR to review the implementation of the Sanctioned Scheme and pass suitable directions. **(g)** As stated supra, the AAIFR held that the Second Respondent has no liability in respect of Kota units which have been sold to the First Respondent.
Decision	☆ **The SC decide the case in favour of the Respondent (i.e. Arfat Petrochemicals Pvt. Ltd.)** ☆ **The SC held that BIFR does not have competence to issue direction to a Respondent company No. 1 which is not a sick company.**

35. THE STATE TRADING CORPORATION OF INDIA LTD & ORS v. THE COMMERCIAL TAX OFFICER & ORS [SC]

Hint: The Sales-tax Authorities **sought to assess** the Corporation to sales tax under their respective Sales Tax Acts and **issued notices of demand**. The Corporation claiming to be an Indian citizen filed petitions under Article 32 of the Constitution **for quashing the said proceedings on the ground that they**

infringed its fundamental rights under Art. 19(1) (f) and (g) of the Constitution. **Whether company is a citizen entitled to invoke fundamental rights under Article 32?**

Decision:

- ☞ The SC held that the Petitioner Company is not consider as Citizen. Therefore, the Petitioner company did not have any rights under Article 19 of the Constitution.
- ☞ The SC decide the case in favour of the Respondent (Commercial Tax Officer).

Fact of the Case	☞ The Sales-tax Authorities of the States of Andhra Pradesh and Bihar **sought to assess** the Corporation to sales tax under their respective Sales Tax Acts and **issued notices of demand**. ☞ The Corporation claiming to be an Indian citizen filed petitions under Article 32 of the Constitution **for quashing the said proceedings on the ground that they infringed** its fundamental rights under Art. 19(1) (f) and (g) of the Constitution. ☞ The following two questions raised before the SC: **(1)** whether the State Trading Corporation, a company registered under the Indian Companies Act, 1956, **is a citizen within the meaning of Art. 19 of the Constitution and can ask for the enforcement of fundamental rights granted to citizens under the said article**; and **(2)** whether the State Trading Corporation is, notwithstanding the formality of incorporation under the Indian Companies Act, 1956, in substance, **a department, organ of the GOI with the entirety of its capital contributed by Government; and can it claim to enforce fundamental rights under Part III of the Constitution against the State as defined in Article 12 thereof**."
Applicable Law	**Article 19(1) Protection of certain rights regarding freedom of speech etc.:** All citizens shall have the right **(a)** to freedom of speech and expression; **(b)** to assemble peaceably and without arms; **(c)** to form associations or unions; **(d)** to move freely throughout the territory of India; **(e)** to reside and settle in any part of the territory of India; and **(f)** omitted **(g)** to practise any profession, or to carry on any occupation, trade or business
Legal Principles held—	The SC consider the followings facts/law before making final order: **1.** It is clear on a consideration of the provisions of Part III of the Constitution **that the makers of the Constitution deliberately and advisedly** made a clear distinction **between fundamental rights available to 'any person' and those guaranteed to 'all citizens'**. In other words, **all citizens are persons but all persons are not citizens, under the Constitution**. **2.** In our opinion, the expression "citizen" in Article 5 is **NOT as wide as the same expression used in Article 19 of the Constitution**. **3.** Both the Constitution and the Citizenship Act have **NOT dealt with juristic persons at all**. However, **it is more difficult to accept the argument that the expression "citizen" in Part II of the Constitution is not coterminous (i.e. have the same boundary) with the same expression in Part III of the Constitution**. **4.** Part II of the Constitution, supplemented by the provisions of the Citizenship Act, 1955 deals with "citizens" and **it is NOT correct to say that citizenship in relation to juristic persons was deliberately left out** of account so far as the Constitution and the Citizenship Act were concerned.

5. On the other hand, the more reasonable view was that **whenever any particular right was to be enjoyed by a citizen of India**, the Constitution takes care to use the expression "any citizen" or "all citizens", i**n clear contradistinction to those rights which were to be enjoyed by all**, irrespective of **whether they were citizens or aliens, or whether they were natural persons or juristic persons**.
6. On the analogy of the Constitution of the United States of America (USA), the equality clause in **Article 14 was made available to "any person".** On the other hand, **the protection against discrimination on denominational grounds** (Article 15) and the **equality of opportunity in matters of public employment** (Article 16) were deliberately made available **only to citizens**.
7. In this connection, reference may be made to the Constitution of the USA:
   - ✰ "**Corporations Citizens of the United States within the meaning of this article must be natural and not artificial persons**;
   - ✰ **a corporate body is NOT a citizen of the United States**.
8. As to the **natural persons protected by the due process clause**, these include **all human beings regardless, of race, colour or citizenship**."
9. **Provisions of the Constitution, Part III, which guarantee certain rights to "all persons" and the other provisions of the same part of the Constitution relating to fundamental rights available to 'citizens' only.** Therefore, **it is NOT necessary to recount all those provisions**.
10. It is enough to say that the **makers of the Constitution were fully alive to the distinction between the expressions "any person" and "any citizen"**, and when the Constitution laid down the freedoms contained in Art. 19(1) (a)-(g), as **available to "all citizens", it deliberately kept out all non-citizens**. In that context, **non-citizens would include aliens and artificial persons**.
11. The question may be looked at from another point of view. Art. 19 **lays down that "all citizens" shall have the right to freedoms enumerated in clauses (a) to (g). Those freedoms, each and all of them, are available to "all citizens**".
    If the Court were to hold that a corporation is a citizen within the meaning of Art. 19, then all the rights contained in clauses (a) to (g) should be available to a corporation. But clearly some of them, **particularly those contained in clauses (b), (d) and (e) cannot possibly have any application to a corporation**. Thus, it is clear that the Rights of citizenship envisaged in Art. 19 **are not wholly appropriate to a corporate body**. In other words, **the rights of citizenship and the rights flowing from the nationality or domicile of a corporation are not coterminous**.

12. Part III which proclaims **fundamental rights was very accurately drafted, delimiting those rights like freedoms of speech and expression, the right to assemble peaceably, the right to practise any profession, etc., as belonging to "citizens" only and those more general rights like the right to equality** before the law, as belonging to "all persons".

13. There is also no doubt in our mind that Part II of the Constitution when it deals with citizenship refers to natural persons only. **This is further made absolutely clear by the Citizenship Act which deals with citizenship after the Constitution came into force and confines it only to natural persons.**

14. We **cannot accept the argument that there can be citizens of this country who are neither to be found**

	☞ within the four corners of Part II of the Constitution or ☞ within the four corners of the Citizenship Act. **15.** We are of opinion that these two provisions must be exhaustive of the citizens of this country, **Part II dealing with citizens on the date the Constitution came into force and the Citizenship Act dealing with citizens thereafter**. Therefore, **we must hold that these two provisions are completely exhaustive of the citizens of this country and these citizens can only be natural persons**. **16.** The fact that **corporations may be nationals of the country for purposes of international law will NOT make them citizens** of this country for purposes of municipal law or the Constitution. **17.** There can be no discrimination, no taxation without authority of law, no curbs involving freedom of trade, commerce or intercourse and no compulsory acquisition of property. **18.** There is sufficient guarantee there and if more is needed then any member (if citizen) is free to invoke Art. 19(1) (f) and (g) and **there is no doubt that the corporation in most cases will share the benefit**. We need not be apprehensive that corporations are at the mercy of State Governments.
Decision	☞ The SC held that the **Petitioner Company is not consider as Citizen. Therefore, the Petitioner company did not have any rights under Article 19 of the Constitution**. ☞ The SC **decide the case in favour of the Respondent (Commercial Tax Officer).**

36. STATE OF ANDHRA PRADESH & ANR v. ANDHRA PROVINCIAL POTTERIES LTD & ORS [SC]

Hint: In the present case, Section 220 of the Companies Act, 1956 read with section 134 of the Companies Act, 1913, **the company did not hold AGM, and annual accounts of the company had not been laid before GM**. Therefore, **company default in file the annual account with the ROC**. Whether directors are liable to be punished for the default?

Decision:

☞ The SC decided the case in favour of the Respondent (AAPL).

☞ The SC held that no offence was committed by the directors in this case under section 134. They might have been guilty of offences under Sections 76 and 133 but not under Section 134.

Fact of the Case	☞ A complaint was filed against the Respondent (APPL) and its directors for failure to file the balance sheet and profit and loss account of the company **with the ROC as required under Section 220(1)** of the Companies Act, 1956 which is punishable under section 220(3) of the Act. ☞ The directors of the Respondent Company alleged that **the section requires the company to file with the ROC documents after they have been approved in a duly convened GM. Since no general body meeting had been held and the documents had not been laid before a GM, the said section did NOT apply to them**. ☞ The ROC contended that a **person charged with an offence cannot rely on his default as an answer to the charge**. If the directors were responsible for not calling the GM, they cannot say in defence that because the GM had not been called, the balance sheet and profit and loss account could not be laid before it and hence, the section did not apply to them.

Legal Principles held—	The SC consider the following facts before passing the final order: **(a) SC relying on the decision held in case** State of Bombay v. Bandhan Ram Bhandani & Ors. (1961). ☞ In this case, a company or its directors in a prosecution under section 32 and section 133 of the 1913 Act c**ould not in defence to such prosecution rely upon their own failure to call the general body meeting**, applies with equal force to a prosecution under section 134 of the Act. ☞ However, it appears to us that there is a very clear distinction between Sections 32 and 133 on the one hand and Section 134 on the other. ☞ Section 32 relates to the **preparation of a list of members of the company and of persons who have ceased to be members as well as a summary**, and also provides that it shall be completed within 21 days after the day of the first or only ordinary GM in the year. It **also provides that the company shall forthwith file with the registrar a copy of the list and summary, and any default in complying with the requirements of the section is made punishable**. ☞ Section 131 the laying of a balance-sheet and profit and loss account before the company in the GM is made obligatory. ☞ Section 133 the failure to comply with section 131 is made punishable. ☞ However, the section 134 lays down that **after balance-sheet and profit and loss account or the income and expenditure account have been laid** before the company at the GM three copies thereof shall be filed with the registrar, and **a failure to do so is made punishable under sub-section (4)** of that section. ☞ The difference in language is very clear and pointed. **(b)** It is possible to consider the law providing that the balance sheet and profit and loss account shall be sent to the registrar **even without the necessity of their being laid before the GM of the company**. In that case, any failure to do so would be punishable and the question whether a GM had been held and the balance-sheet and profit and loss account have been laid **before it will not arise**. Therefore, **the condition precedent or the essential prerequisite of the balance-sheet and the profit and loss account being laid before the general meeting of the company NOT being fulfilled, the requirement of section 134 cannot be complied with**. **(c)** However, Section 134 of the 1913 Act **states that the obligation to send a copy of the balance-sheet and profit and loss account is dependent completely on its being laid before a general meeting**.
Decision	☞ The SC decided the case in favour of the Respondent (AAPL). ☞ The SC held that no offence was committed by the directors in this case under section 134. They might have been guilty of offences under Sections 76 and 133 but not under Section 134.

37. INDIAN CHEMICAL PRODUCTS LTD. v. STATE OF ORISSA & ANR [SC]

Hint: In the present case, appellant company refused to register the transmission of shares by operation of law, shares of the Maharaja of Mayurbhanj in the name of Secretary to state of Orissa. However, the AOA of the company the BOD(s) had **no power to refuse registration of a transfer where the transfer was by operation of law**. **Whether the action of BOD of the Appellant Company is tenable in law?**

Decision:

- ✫ **The SC decide the case in favour of the Respondent.**
- ✫ The SC held that

- ☞ The title to the shares vested in the State of Orissa by operation of law;
- ☞ The, refusal of the BOD(s) to register the transfer was mala fide;
- ☞ The State of Orissa was entitled to rectification of the share register and a proper case for the exercise of the Court's jurisdiction under section 38 of the Indian Companies Act, 1913 had been made out;
- ☞ The petition was not liable to be dismissed on the ground that the State had asked the company to register the name of the Secretary to the Government of Orissa, as the shareholder in place of the Maharaja.

✫ The SC also held that under the AOA of the company the BOD(s) had **no power to refuse registration of a transfer where the transfer was by operation of law**.

Fact of the Case	✫ Indian Chemical Products, Ltd had seven share-holders. ✫ The Maharaja of Mayurbhanj subscribed and paid for 7,500 shares. **The remaining six shareholders hold 150 shares only**. All the shareholders are signatories to the MOA of the company. ✫ The State of Orissa claimed that by reason of the constitutional changes since the declaration of independence, **all the shares held by the Maharaja of Mayurbhanj have now vested in it by operation of law**. The State claim these shares **based on a formal instrument of transfer executed by the Maharaja**. ✫ On March 16, 1950, the Government of Orissa lodged the share scrip and the transfer deed with the company, and **requested it to make the necessary changes in the share register**. ✫ The Government as also the Maharaja, through his agent, the Imperial Bank of India, **repeatedly requested the company to register the Secretary to the Government of Orissa**, Finance Department **as the holder of the shares in place of the Maharaja**. ✫ There was protracted correspondence in the matter for over three years and eventually on May 16, 1953, t**he BOD(s) of the company refused to register the transfer**. ✫ On February 9, 1955, the State of Orissa filed an application under section 38 of the Indian Companies Act, 1913 in the HC of Orissa asking **for rectification of the share register by inserting its name as the holder of the shares in place of the Maharaja**. The company and the Maharaja were impleaded as respondents. The application was contested by the company only. ✫ On September 13, 1957, HC **passed a supplemental order** directing the filing of the **notice of rectification with the Registrar within a fortnight**. ✫ The Appellant company file appeals before the SC against the certificate granted by the HC.
Legal Principles held –	The SC consider the following facts before passing the final order: **1.** The State of Mayurbhanj **was one of the feudatory States of Orissa** under the suzerainty of the British Crown. As from August 15, 1947, **with the declaration of independence the paramountly of the British Crown lapsed**. Thereafter, **steps were taken for the integration of the State with the Dominion of India**. On October 17, 1948, the Maharaja of Mayurbhanj **signed an agreement for the merger of the State with the Dominion**. By this agreement, **the Maharaja completely ceded to the Dominion his sovereignty over the State of Mayurbhanj as from November 9, 1948**.

Article 4 of the agreement allowed the Maharaja **to retain the ownership of his private properties only as distinct from the State properties**.

On and from November 9, 1948, **as a necessary consequence of the cesser of sovereignty all the public properties of the State including the 7,500 shares in the company vested in the Dominion**.

By operation of law in consequence of the change of sovereignty, **all the public properties of the State which were vested in the Maharaja as the sovereign ruler devolved on the Dominion as the succeeding sovereign**.

As from January 1, 1949, the GOI in **exercise of its powers under section 3(2) of the Extra Provincial Jurisdiction Act delegated to the Government of Orissa the power to administer the territories of the merged State**.

2. On August 1, 1949, the States Merger (Governors' Provinces) Order, 1949 came into force, and in consequence of section 5(1) of the Order, **all property vested in the Dominion Government for purposes of governance of the merged State became from that date vested in the Government of Orissa**, unless the purposes for which the property was held were central purposes.

3. By a certificate dated November 10, 1953, **the GOI declared that the 7,500 shares were not held for central purposes**. Under the Constitution, which came into force on January 26, 1950, **the territories of the merged State were included in the State of Orissa**. By reason of **these successive constitutional changes, the shares became vested in the State of Orissa**.

4. The **State is now the legal owner of the shares and the directors of the company are bound to enter its name in the register of members, unless there is one restrictive provision in the articles authorising them to refuse the registration. The company contends that under its articles, the directors have the power to refuse the registration**. It relies on Article 11, which reads:-

   > "The BODs shall have full right to refuse to register the transfer of any share or shares to any person without showing any cause or sending any notice to the transferee or transferor, The Board may refuse to register any transfer of shares on which the Company has lien."

5. Article 1-A attracts the regulations in Table A of the First Schedule to the Indian Companies Act, 1913 **so far as they are applicable to private companies and are not inconsistent with the articles**. The regulations in Table A **make a distinction between transfer and transmission** of shares. In respect of a transfer, they require that the instrument of transfer shall be executed both by the transferor and the transferee. A transmission by operation of law in not such transfer.

6. In Re. Bentham Mills Spinning Company (1), James, L.J. said "In Table A the word 'transmission' is put in contradistinction to the word 'transfer'. **One means a transfer by the act of the parties, the other means transmission by devolution of law."**

7. **Article 11 refers to transfers**. **A devolution of title by operation of law is not within its purview**. Being a restrictive provision, the article must be strictly construed.

   In the instant case, **the title to the shares vested in the State of Orissa by operation of law, and the State did not require an instrument of transfer from the Maharaja to complete its title, Article 11 does not confer upon the board of directors a power to refuse recognition of such a devolution of title**.

8. Clause 22 of the regulations in Table A read with art. 1-A confers power upon **the BOD(s) to decline registration of transmission of title in consequence of the death or insolvency of a member**.

   In the instant case, **there is no transmission of title in consequence of death or insolvency, and clause 22 has no application**.

   Therefore, the directors had therefore no power to refuse registration of the devolution of title on the State of Orissa by operation of law in consequence of the constitutional changes in terms of these articles. The **transfer deed was duly stamped and complied with all the formalities required by la**w. The claim of the State of Orissa based upon the transfer deed was within the purview of Art. 11. Even with regard to this claim, **the Courts below concurrently held that the BOD(s) acted mala fide in refusing to register the transfer**.

   In spite of the fact that the State had filed with the company a certificate of the Collector of Stamp Revenue, West Bengal, that **NO stamp duty was payable on the transfer**, the company raised the objection that the transfer deed must be stamped. To avoid this objection, the Government stamped the deed and again lodged it with the company.

9. For over three years, the directors delayed registration of the transfer on frivolous pretexts. On May 16, 1953, the directors without assigning any reason declined to register the transfer. Before the High Court, **the company asserted that the registration was refused because the Maharaja of Mayurbhanj was under an obligation to execute an agreement conferring valuable rights on the company and the State of Orissa had failed to honour this obligation**. Reliance was placed on clause 6 of the company's MOA, **which stated that the company and the Maharaja proposed to enter into an agreement and a copy of the proposed agreement was annexed**. Clause 6 shows that there was a proposal between the parties to enter into an agreement, but **there was NO concluded agreement** between them, **NOR was there any binding obligation on the Maharaja to execute an agreement**. The **directors could not use their power of declining to register the transfer under Art. 11 for the purpose of forcing the State of Orissa to enter into the proposed agreement.**

10. The **Imperial Bank of India representing the Maharaja** was pressing for registration of the transfer. By its letter dated March 17, 1953, **the company assured the Bank that the registration would be effected shortly**. Nevertheless, on May 16, 1953 **the directors capriciously refused to register the**

	transfer. The power under Article 11 **to refuse registration of the transfer is a discretionary power**. **The directors must exercise this power reasonably and in good faith**. The Court can control their discretion if they act capriciously or in bad faith. **11.** The Maharaja of Mayurbhanj has ceased to be the owner of the shares. The **State of Orissa, is now their owner, and has the legal right to be a member of the company and is entitled to say that the company should recognise its membership and make an entry on the register of the fact of its becoming a member and its predecessor in-title having ceased to be a member**.
Decision	✩ **The SC decide the case in favour of the Respondent.** ✩ The SC held that **1.** The title to the shares vested in the State of Orissa by operation of law; **2.** The, refusal of the BOD(s) to register the transfer was mala fide; **3.** The State of Orissa was entitled to rectification of the share register and a proper case for the exercise of the Court's jurisdiction under section 38 of the Indian Companies Act, 1913 had been made out; **4.** The petition was not liable to be dismissed on the ground that the State had asked the company to register the name of the Secretary to the Government of Orissa, as the shareholder in place of the Maharaja. ✩ The SC also held that under the AOA of the company the BOD(s) had **no power to refuse registration of a transfer where the transfer was by operation of law**.

38. SHANTA GENEVIENVE POMMERAT & ANR v. SAKAL PAPERS PVT LTD & ORS [SC]

Hint: Petition alleging oppression and suppression under section Sections 397 and 398 Companies Act, 1956 dismissed by the single Judge. However, when Appellant filed Appeal to Division bench of the same court in pursuance of Section 483 of the Companies Act, 1956, appeal posted for admission and later dismissed in limine (i.e. in beginning). Whether the appeal dismissed in limine is tenable in law i.e. under section 483 of the Companies Act, 1956.

Decision:

✩ The SC decide the case in favour of the Appellant.

✩ The SC set aside the order dismissing the appeal preferred by the present appellants in limine by the Division Bench of Bombay HC.

Fact of the Case	✩ Petitioners filed Company Petition before Bombay HC complaining about the oppression by the **respondents in their management of the affairs to the 1st respondent-Company Sakal Papers Pvt, Ltd**. ✩ The Bombay HC **dismissed the petition in limine and directed the petitioners to pay Rs. 10,000/- as and by way of costs to the respondents**. ✩ Petitioners preferred an special leave before the SC against the decision of a Division Bench of the Bombay HC.
Legal Principles held –	The SC consider the following facts/judicial decision before passing final order: **(a)** The company petition filed by the appellants was under Sections 397, 398 and 483 of the Companies Act. This group of Sections are included in Chapter VI headed "Prevention of Oppression and Mismanagement" which in turn falls within Part VI bearing the heading "Management & Administration". **(b)** Provisions for winding-up are grouped together under Part VII. Section 483 is placed in chapter II of Part VII. **(c)** Therefore, at the first blush it would appear that **Section 483 provided for appeals from any order made, or decision given, in the matter of winding up of the company by the Court**.

	(d) Expression Court is defined to mean **with respect to any matter relating to a Company (other than any offence against this Act), the Court having jurisdiction under the Act with respect to that matter relating to that Company as provides in Section 10**. **(e)** Section 483 confers **the right to appeal and forum for the same in respect of any order made or decision given, in the matter of the winding up of a Company by the High Court having jurisdiction in the matter**. The appeal **shall lie to the same Court to which, in the same manner in which, and subject to the same conditions under which**, appeals lie from any order or decision of the Court in cases **within its ordinary jurisdiction**. **(f)** Now an Order under Sections 397, 398 and 483 of the Companies Act, on the face of it, **cannot be said to be an Order made or decision given, in the matter of the winding up of a company. Relief, undoubtedly under Section 397 and/or 398 is in fact an alternative to winding up**. **(g)** No doubt, an order under Section 397, or 398 could be an order made or decision given by the High Court having jurisdiction under the Companies Act and therefore, an appeal will lie to the Division Bench of the same High Court. **(h)** Chapter XLII of the Bombay HC Rules **provides for appeals to appellate court. The Rules make provision for certain type of appeals to be placed in the first instance, for admission before a bench of the HC** to be appointed by the Chief Justice. **(i)** It is not in dispute that the **appeal preferred by the present appellants was NOT one such appeal which can be placed for admission under Rule 966 A and it follows from this Rule that the appeal other than those mentioned in that Rule** are not to be placed for admission. **(j)** This point is no more res integra in view of the decision of this Court in M/s. Golcha Investment (P) Ltd. v. Shanti Chandra Bafna, wherein after considering the provision contained in Rule 966-A, **it was held that appeals, other than those set out in the Rule are not to be placed for admission and they were entitled to be admitted as a matter of course**. This Court accordingly **quashed the order dismissing the appeal in limine observing that the appellate court erred in summarily dismissing the appeal because it was bound to entertain the same and dispose it of on merits**. **This observation will mutatis mutandis apply to the present appeal**.
Decision	✰ The SC decide the case in favour of the Appellant. ✰ The SC set aside the order dismissing the appeal preferred by the present appellants in limine by the Division Bench of Bombay HC.

39. BANK OF NEW YORK MELLON LONDON BRANCH v. ZENITH INFOTECH LTD [SC]

Hint: In the present case, the Respondent file reference to BIFR was rejected by the registrar, secretary and the chairman of the Board **on the ground that the Respondent was not an industrial company. M**eanwhile Bombay HC wound up the respondent company.

Question in dispute:

(a) Whether **the action of the Rejection** by the registrar, secretary and chairman of the Board **is tenable or not.**

(b) Whether the **respondent company can approach the NCLT under IBC.**

Decision:

✰ The SC decide the case in favour of the Respondent Company.

- The SC held that
  - **(a)** HC was correct in coming to the conclusion **that the refusal of registration of the reference sought by the respondent Company by the Registrar, Secretary/ Chairman of the Board was non-est in law**.
  - **(b) The respondent Company to seek its remedies under the provisions of Section 252 of the Code read with what is laid down in Sections 13, 14, 20 and 25**.

Fact of the Case	☆ In the present case, on 23.07.2013, Zenith Infotech Ltd (referred to as "Respondent No. 1") **filed a Reference before the BIFR under Section 15 of the SICA**. The **said application was REFUSED registration by the Registrar** of the Board on the ground that Respondent No.1 **is NOT an industrial company** within the meaning of the SICA. ☆ Later on, Respondent No. 1 filed **further appeal** before the Secretary of the Board against the order of Registrar which was dismissed on 13.09.2013. ☆ Respondent No. 1 further **appeal to the Chairman of the BIFR against the order of the Secretary**. The Chairman of the BIFR **also dismissed the second appeal filed** by the Respondent No. 1 by order on 03.04.2014. ☆ It appears that on 30.07.2013 **a petition for winding up of the Respondent No. 1 was admitted by the Bombay HC and the order of admission was affirmed by the Division Bench in appeal**. ☆ The appeal to the SC also dismissed on 30.09.2013. ☆ Thereafter, it appears that on 13.12.2013, **the Bombay HC passed orders for winding up of the Respondent No. 1 which was upheld in appeal by the Division Bench of the HC on 23.04.2014**. Thereafter, **the Official Liquidator came to be appointed by the HC** on 02.09.2014. ☆ The orders of the Secretary and Chairman of the BIFR rejecting the application **for reference filed by the Respondent No.1 Company were subjected to a challenge in a writ petition filed** by the respondent-company before the Delhi HC out of which the present proceedings have arisen. ☆ The Delhi HC took the view that under the provisions of the SICA read with the Regulations, the Registrar and the other authorities like the Secretary and the Chairman of the **Board have not been conferred any power of adjudication which would necessarily be involved in determining the question as to whether the Respondent No.1 company is an industrial company within the meaning of Section 3(e) and 3(f) of the SICA**. ☆ Regarding the second question, the Delhi HC **relying on the decisions of this Court in Real Value Appliances Ltd. Vs. Canara Bank and Others [1] and Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd. (1998)** came to the **conclusion that the winding up order passed by the Company Court would not foreclose the proceedings under the SICA and registration of a Reference under Section 15 and the inquiry under Section 16 can still be made**. ☆ Appellant file appeal against the order of Delhi HC before the SC. The question that was agitated in the present appeal is **the application of Section 22 of SICA to bar further steps in the winding up proceeding before the HC**. ☆ The above question would no longer survive in the context of the provisions of the now repealed Act but would still require an answer from the stand point of the provisions of the IBC in force with effect from 1.12.2016.
Legal Principles held –	**Q1. Power and jurisdiction of the Registrar and Secretary to refuse registration of the application for reference made by the respondent company.**

	☆ From the provisions of Regulation 19(5) it would appear that on receipt of a Reference under Regulation 19(4) the Secretary or the Registrar, as may be, **after making an endorsement of the date on which the same has been received in the office of the Board is required to make a scrutiny and, thereafter, if found to be in order, to register the same; assign a serial number thereto and place the same before the Chairman for being assigned to a Bench**. ☆ When the Regulations framed under the statute **vests in the Registrar or the Secretary of the Board the power to "scrutinize" an application prior to registration thereof. Thereafter, register and place the same before the Bench. We do not see how such power of scrutiny can be understood to be vesting** in any of the said authorities the **power to adjudicate the question as to whether a company is an industrial company within the meaning of Section 3(e) read with 3(f) and 3(n) of the SICA**. ☆ A claim to come within the ambit of the aforesaid provisions of the SICA i.e. **to be an industrial company, more often than not, would be a contentious issue**. ☆ Surely, the rejection of the above stand **could have been made only by a process of adjudication which power and jurisdiction clearly and undoubtedly is vested by the SICA and the Regulations framed thereunder in a Bench of the Board and NOT in authorities like the Registrar and the Secretary**. ☆ The HC was correct in coming to the conclusion **that the refusal of registration of the reference sought by the respondent Company by the Registrar, Secretary/ Chairman of the Board was non-est in law**. ☆ Therefore, the reference must understood to be pending before the Board on the relevant date attracting the provisions of Section 252 of the IBC. **Q2. Whether the reference before the Board stood foreclosed by the order of winding up of the respondent Company?** ☆ Official liquidator was answered in the negative relying on Real Value Appliances Ltd. (supra) and Rishab Agro Industries Ltd. (supra). The core principles laid down by the Court in this case, that immediately on registration of a reference under Section 15 of the erstwhile SICA, **the enquiry under Section 16 is deemed to have commenced and that the winding up proceedings against a company stood terminated only after orders under Section 481of the Companies Act, 1956, are passed, will have to be noticed to adjudge the correctness of the said view of the High Court**. ☆ In any event, the **aforesaid question becomes redundant in view of our conclusion that the reference sought by the respondent Company must be deemed to have been pending on the date of commencement of the IBC**. ☆ Therefore, we dispose of the appeal by holding that **it would still be open to the respondent Company to seek its remedies under the provisions of Section 252 of the Code read with what is laid down in Sections 13, 14, 20 and 25**.
Decision	☆ The SC decide the case in favour of the Respondent.

40. LUXMI TEA COMPANY LTD v. PRADIP KUMAR SARKAR [SC]

Hint: The respondent made an application under section 155 of the Companies Act, 1956 ("the Act") **for rectification of the share register of the appellant company** by inserting his name therein as a reg**istered shareholder of certain shares transferred in his favour**. These shares were fully paid up and **the company had no lien over them**. **The BODs of the Appellant company refuse to register the shares in favour of the Respondent.**

Question: Whether directors of the Appellant Company have inherent powers to refuse transfer of shares?

Decision:

- ✰ The SC decide the case in favour of the Respondent.
- ✰ The SC held that directors have no inherent powers to refuse transfer of shares even if power is given under Companies Act or AOA **because company cannot use this power arbitrarily or for any collateral purpose**. This means **power to refusal the register of member should be made in the interest of company as well as general interest of the shareholder**.
- ✰ **The SC affirm the decision of the HC and held that the transfer deeds could not be termed as unduly stamped and power to refuse the registration of the transfer of shares contemplated by section 108 of the Act would not be invoked**.

Fact of the Case	✰ The respondent made an application under section 155 of the Companies Act, 1956 ("the Act") **for rectification of the share register of the appellant company** by inserting his name therein as a reg**istered shareholder of certain shares transferred in his favour**. These shares were fully paid up and **the company had no lien over them**. ✰ According to the respondent, **the BODs of the Company disapproved the registration of the shares even if the shares being duly lodged with the Company along with the transfer deeds and requisite fees for registration being paid**. ✰ This disapproval led **the respondent to make the application under section 155 of the Act for rectification of the share register**. ✰ Respondent file **compliant against the refusal of rectification of the share register before the HC**. The HC **overruled the objections raised by the Company i.e. allowed the application of the respondent**. ✰ Finally, Appellant filed appeal before the SC against the order of the HC.
Legal Principles held—	✰ The following arguments raised by the learned Counsel for the appellant: **(a)** We observed that the AOA **do not make any specific provision** in this behalf but the Company had **residuary inherent power to refuse registration of the transfer of the shares for the benefit of the Company and its existing shareholders**. **(b)** Power of refusal to register the transfer of shares **was also sought to be derived from the words "or otherwise"** used in Article 42 of the AOA and section 111(2) of the Act. **(c)** The **transferor not being made a party to the application under section 155** of the Act was also **pleaded in justification of the submission** that the said application deserved to be dismissed. **(d)** It was also **urged that in view of section 108 of the Act** the Company was entitled to go into the question as to whether the consideration for **transfer of shares as shown in the transfer deeds was real consideration** for purposes of finding **out as to whether the transfer deeds were duly stamped** and **refuse registration** of the transfer of the shares if the Company was of the view that the transfer deeds were not duly stamped. ✰ On the other hand, Respondent has raised the argument that Article 39 of the AOA **does not give any residuary powers whatsoever having been conferred on the Company or its Directors to refuse registration of the transfer of shares it**.
Decision	The SC after considering the facts in the said case, passed the following order:

	(a) **unless there is any impediment** in the transfer of a share of a public limited company, such as the **appellant, a shareholder has the right to transfer his share**. Correspondingly, **in the absence of any impediment** in this behalf the transferee of a share, **in order to enable him to exercise the rights** of a shareholder as against the Company and third parties, **which is not possible until the transfer is registered in the company's register**, is entitled to have a rectification of the share register of the company **by inserting his name therein as a registered shareholder of the share transferred to him**. **(b)** It is the right of the transferee to carried out such rectification in the register of member. But **it can be defeated by the company or its Directors only in pursuance of some power vested in them in this behalf**. Such **power has to be specified and provided for**. Even it may be residuary, but ***in that case, it should be provided for and traceable either in the Act or the AOA***. **(c)** **Even if the power of refusal is so specified and provided for the registration of a transferred share cannot be re- fused arbitrarily or for any collateral purpose, and can be refused only for a bona fide reason in the interest of the company and the general interest of the shareholders**. **(d)** **If neither a specific nor residuary power of refusal has been so provided, such power cannot be exercised on the basis of the so-called undeclared inherent power (i.e. deemed power) to refuse registration on the ground that the company or its Directors take the view that in the interest of the company and the general interest of the shareholders, registration of the transfer of shares should be refused**. **(e)** Indeed, making a provision in the Act or the AOA etc. conferring power of refusal would **become futile (i.e. pointless) if existence of an inherent power such as claimed by the company in the instant case is assumed**. **(f)** **Assumption of such a power would result in leaving the matter of transfer of share and its registration at the mercy and sweet will of the company or its Directors**. In the absence of any valid and compelling reason it is difficult to comprehend such a proposition. **(g)** **Even the submission based on the words "or otherwise" in Section 111(2) of the Act and in Article 42 of the AOA to the effect that these words recognise the existence of an inherent power to refuse registration of the transfer of the share does not commend itself to us**. **Section 111(2) does not confer any right but only casts a duty to give notice of refusal to register the transfer of a share** and provides for punishment in case of default in doing so. **Giving of notice is necessary to facilitate the exercise of the right of appeal conferred by Section 111(3) and Section 111(4)**. **(h)** To **introduce a concept of either conferment or recognition of a right to refuse registration of the transfer of a share in sub-section (2) militates against and runs counter to the very texture and purpose of this sub-section**. **(i)** Consequently, if the opening part of sub-section (2) is read as **"If a Company refuses, whether in pursuance of any power conferred by law or otherwise" it would be incongruous to suggest that the legislature in using the words "or otherwise" intended to give recognition to a power to refuse registration of the transfer of a share even otherwise than in accordance with law**. **(j)** For these reasons, we are of the view that in the context in which the words "or otherwise" have been used in section 111(2), **they only purport to cast a duty or**

	impose an obligation of giving notice of refusal to register the transfer of a share irrespective of the fact whether such refusal is under the AOA of the Company or de hors the Articles, which would include even a case where such refusal has been made arbitrarily or for any collateral purpose. **(k)** A fortiorari, this would be the interpretation of even Article 42 of the AOA of the Company inasmuch as on its plain language which, **except for the provision for punishment, is in pari materia with Section 11(2) of the Act, the purpose of this Article is the same as of the said sub-section (2)**. **(l)** Even the marginal note of Article 42 lends support to this interpretation. At this place, we may point out that **it has not been disputed before us by learned counsel for the appellant that the shares in question having been fully paid up and the Company having no lien over them, Article 39 of the AOA could NOT be invoked to refuse registration of the transfer of these shares**. **(m)** Suffice it to say in regard to residuary, implied or incidental powers **is calculated to accomplish the objects, the corporate purpose or corporate existence of the corporation**. **(n)** **The SC affirm the decision of the HC and held that the transfer deeds could not be termed as unduly stamped and power to refuse the registration of the transfer of shares contemplated by section 108 of the Act would not be invoked**.

41. TATA ENGINEERING AND LOCOMOTIVE CO LTD. v. STATE OF BIHAR & ORS [SC]

Hint: The petitioner Company file writ petition under Article 32 before the SC **to enforce the fundamental rights under Article 19 of the Indian Constitution**. The question raised before the SC "whether the veil of the Corporation can be lifted and **the rights of the shareholders of the said Corporation could be recognised under Art. 19 or not".**

Decision:

- ☆ The SC decide the case in favour of the Respondent (State).
- ☆ The SC held that the corporate veil could **NOT be lifted** in the instant case. Therefore, **shareholders of the petitioner company is not eligible to file writ petition under Article 32 of the Indian Constitution to enforce the FRs given in Article 19**.

Fact of the Case	☆ Though these writ petitions raise a common question of law in regard to the **validity of the demand for sales tax which has been made against the respective petitioners by the Sales-tax Officers for different areas**. ☆ However, we are concerned with that part of the judgement **where the issue of 'lifting the corporate veil' was raised and dealt with by the Court**. ☆ The petitioner Company file writ petition under Article 32 before the SC **to enforce the fundamental rights under Article 19 of the Indian Constitution**. ☆ The question raised before the SC "whether the veil of the Corporation can be lifted and **the rights of the shareholders of the said Corporation could be recognised under Art. 19 or not".**
Legal Principles held—	☆ The SC held that the doctrine of the lifting of the corporate veil can be applied in five categories of cases: **(a)** where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies; **(b)** where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business 6 months after the number of its members was reduced below the legal minimum;

	(c) in certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue; **(d)** in the law relating to exchange control; **(e)** and in the law relating to trading with the enemy where the test of control is adopted. ✰ **If the company is not fall in any of the aforesaid category, the SC cannot lift the corporate veil.** ✰ **The SC held that FRs guaranteed in Article 19 is given to Citizen only. Therefore, Petitioner Company is not entitled to enforced FRs given in Article 19 in view of the decision held in the case of State Trading Corporation of India Ltd. v. The Commercial Tax Officer & Ors (1963), wherein it was held that State Trading Corporation of India is not a citizen.**
Decision	✰ The SC decide the case in favour of the Respondent (State). ✰ The SC held that the corporate veil could **NOT be lifted** in the instant case. Therefore, **shareholders of the petitioner company is not eligible to file writ petition under Article 32 of the Indian Constitution to enforce the FRs given in Article 19**.

42. J.K. (BOMBAY) LTD. v. BHARU MATHA MISHRA & ORS [SC]

Hint: Mata Harsh Mishra, who is the husband of Respondent No. 1 and **father** of Respondent No. 2, joined the employment of the Appellant-company **as Trainee Supervisor in its plant**. He **was allotted Flat No. 8** in Anil Co-operative Housing Society Ltd. After resigning from the job, **he refused to vacate the flat on the pretext that as he had not been paid his dues, he had a right to remain in occupation**. Company filed a complaint under Section 630 of the Act against Mishra, its ex-employee and the respondents 1 and 2 herein before the Trial Court.

Question before the SC: Whether the **family members of an employee or an ex-employee of a company can be proceeded with in a criminal court, convicted and sent**enced for the commission of offence under Section 630 of the Companies Act?

Decision:

✰ The SC held that **all the family members of an alive 'officer' or 'employee' of a company cannot be proceeded with and prosecuted under Section 630 of the Act**.

✰ The SC decide the case in favour of the Respondent (Bharu Mishra).

Fact of the Case	✰ **Mata Harsh Mishra, who is the husband** of Respondent No. 1 and **father** of Respondent No. 2, joined the employment of the Appellant-company **as Trainee Supervisor in its plant**. He **was allotted Flat No. 8** in Anil Co-operative Housing Society Ltd. ✰ After resigning from the job, **he refused to vacate the flat on the pretext that as he had not been paid his dues, he had a right to remain in occupation**. ✰ Company filed a complaint under Section 630 of the Act against Mishra, its ex-employee and the respondents 1 and 2 herein before the Trial Court. ✰ The recall application of respondents herein **was rejected by the Trial Court**. ✰ Respondent file writ petition before the HC against the order of the Trial Court. ✰ High court allowed the writ petition and quashed the process against the respondents herein. ✰ Appellant Company challenged the order of the HC before the SC.
Question in Issue before the SC	Whether the family members of an employee or an ex-employee of a company can be proceeded with in a criminal court, convicted and sentenced for the commission of offence under Section 630 of the Companies Act? ("the Act")

Legal Principles held –	The SC **consider the following facts or judicial decision to pass the final order**: **1.** Appellant Company relying upon the judgment of this Court in Abhilash Vinod Kumar Jain (Smt.) v. Cox & Kings (India) Ltd. & Ors., [1995], **it has been argued on behalf of the company that the expression "officer or employee" appearing in Section 630 of the Act would include all his family members**. **2.** In view of interpretation of the expression "an officer or employee of a company" appearing in Section 630(1) of the Act, the SC relying on the decision held in Baldev Krishna Sahi v. Shipping Corporation of India, [1987] **holding that the expression "officer or employee of a company" applies not only to existing officer or employee but also includes past officers or employees where such officer or employee**; either **(a)** wrongfully obtains possession of any property, or **(b)** wrongfully withholds the same after the termination of his employment. **3.** Section 630 of the Act which **makes the wrongful withholding of any property of a company by an officer or employee of the company a penal offence**, is typical of the economy of language which is characteristic of the draughtsman of the Act. The Section is in two parts. Sub-section (l) by clauses (a) and (b) creates two distinct and separate offences. **(a)** First of these is the one contemplated by clause (a), namely, **where an officer or employee of a company wrongfully obtains possession of any property of the company during the course of his employment, to which he is NOT entitled**. Normally, it is **only the present officers and employees who can secure possession of any property of a company**. It is also **possible for such an officer or employee after termination of his employment to wrongfully take away** possession of any such property. This is the function of clause (a). Although it primarily refers to the existing officers and employees, **it may also take in past officers and employees**. **(b)** In contrast, clause (b) contemplates a case **where an officer or employee of a company having any property of a company in his possession wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by the Act**. It may well be that **an officer or employee may have lawfully obtained possession of any such property during the course of his employment but wrongfully withholds it after the termination of his employment**. That appears to be one of the functions of clause (b). **(c)** It would be noticed that clause (b) **also makes it an offence in any officer or employee of a company having any property of the company in his possession knowingly applies it to purposes other than those expressed or directed in the articles and authorised by the Act**. **(d)** That would primarily apply to the present officers and employees and may also include past officers and employees. Therefore, **there is no warrant to give a restrictive meaning to the term 'officer or employee' appearing in Section 630(1) of the Act**. **(e)** It is quite evident that clauses (a) and (b) are separated by the word 'or' and therefore are clearly disjunctive." **(f)** In Abhilash Vinod Kumar Jain's case (supra) this Court was concerned with the prosecution of the legal representatives of the deceased employee and in that context, it held; "Thus**, our answer to the question posed in the earlier part of this judgment is in the affirmative and we hold that a petition under Section 630 of the Act is maintainable against the legal heirs of the**

	deceased officer/employee for retrieval of the Company's property wrongfully withheld by them after the demise of the employee concerned." **4.** Stretching further the verdict of the Court in Abhilash Vinod Kumar Jain's case, the **appellant has submitted that as legal heirs of the erstwhile employee can be prosecuted, the other family members** of such employee, living with him **cannot escape their liability of prosecution**. **5.** The penal law **cannot be interpreted in a manner to cover within its ambit such persons who are left out by the legislature. The position of the legal heirs of the deceased employee cannot be equated with the family members of an erstwhile employee against whom, admittedly, the criminal prosecution is launched and pending.** **6.** Accepting the contention of the appellant **would amount to the violation of fundamental right of personal liberty as enshrined under Article 21 of the Constitution which declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law**. **7.** Personal liberty envisaged under this Article **means freedom from physical restraint of a person by incarceration or otherwise**. **8.** Agreeing with the plea of the appellant would also be against the public policy, inasmuch as **under similar circumstances the companies would be authorised to resort to harassment tactics by having recourse of arraigning minors and old members of the family of its officer or employee in office or even past**.
Decision	☆ The SC held that **all the family members of an alive 'officer' or 'employee' of a company cannot be proceeded with and prosecuted under Section 630 of the Act**. ☆ The SC decide the case in favour of the Respondent (Bharu Mishra).

43. MADANLAL FAKIRCHAND DUDHEDIYA v. SHREE CHANGDEO SUGAR MILLS LTD [SC]

Hint: In the present case, Respondent Company entered into promoters' agreement at the time of original incorporation whereby the **Company agreed to pay a sum equal to 12.5% of its net profits to the four promoters (i.e. 3.125% each).** In 1941, **this agreement was modified and the said commission payable to the promoters was reduced to 6-1/4%**. This payment of commission was authorised by Article 3 of the AOA. After the Act came into force on the 1st of April, 1956, the respondent company informed the appellant that as from the date of the commencement of the Act, **the agreement between the parties as to the payment of the promoters' commission had become illegal and void. Therefore,** it would not pay any more commission. So, Company sought to **pass a resolution for deleting Article 3 from its AOA**.

Question before the SC:

(a) Promoters Agreement to pay commission was entered into before the commencement of the companies Act, 1956. Whether the said agreement is hit by the provision of Section 76 deals with restriction/prohibition to pay commission.: YES

(b) Whether commission paid out of profits hit by the restriction/prohibition. : YES

Decision:

☆ **The SC decide the case in favour of the Respondent.**

- ☆ The SC **held that Promoters Agreement to pay commission was entered into before the commencement of the companies Act, 1956 is hit** by the provision of Section 76 deals with restriction/prohibition to pay commission.
- ☆ **The SC held that** commission paid out of profits **hit** by the provision of Section 76 deals with restriction/prohibition to pay commission,

Fact of the Case	☆ The principal question which arises in this appeal relates to the construction of Section 76(1) and (2) of the Companies Act, 1956 (hereinafter called the Act) before the amendment of sub-section (2) in 1960. That question arises in this way. ☆ The Appellant was one of the promoters of the respondent Company, which was incorporated in 1939 as a Private Limited Company and later converted into a Public Ltd Company in 1944. ☆ At the time of the original incorporation of the Company, a Promoter's Agreement was arrived at whereby the **Company agreed to pay a sum equal to 12.5% of its net profits to the four promoters (i.e. 3.125% each)**. ☆ In 1941, **this agreement was modified and the said commission payable to the promoters was reduced to 6-1/4%**. ☆ This payment of commission was authorised by Article 3 of the AOA. ☆ After the Act came into force on the 1st of April, 1956, the respondent company informed the appellant that as from the date of the commencement of the Act, **the agreement between the parties as to the payment of the promoters' commission had become illegal and void.** ☆ **Therefore,** it would not pay any more commission and sought to pass a resolution for deleting Article 3 from its AOA. ☆ The appellants filed a suit ☞ To restrain the company from passing any resolution deleting Article 3 of the AOA or ☞ from taking any action on the basis that the said agreement had become illegal and void.
Legal Principles held—	The SC consider the following facts before passing the final order: **(a)** In construing section 76 (1) and (2), **it would be necessary to bear in mind the relevant rules of construction**. The first rule of construction which is elementary, **is that the words used in the section must be given their plain grammatical meaning**. **(b)** Since we are dealing with two sub- sections of Section 76, **it is necessary that the said two sub- sections must be construed as a whole "each portion throwing light, if need be, on the rest."** The two sub-sections must be read as parts of an integral whole and as being inter- dependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. **If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail**. But that question can arise only if repugnancy cannot be avoided. **(c)** The important part in section 76(1) that **provides that the commission paid or agreed to be paid does not exceed the limit therein prescribed**. One of the conditions which has to be satisfied in the matter of payment of commission to a person subscribing for any shares is' that the said commission shall not exceed ☞ 5% of the price at which the shares are issued or the amount or ☞ rate authorised by the articles, whichever is less.

It is significant **that this provision seeks to place an absolute ceiling on the payment of commission**. It does not refer to the commission paid either out of capital or out of profits. So that Section 76(1) read by itself **unambiguously and clearly prescribes a ceiling on the payment of commission whatever may be the source from which the said commission may be paid**. So there can be no doubt that the **ceiling placed on the payment of commission is intended to act as a prohibition against the payment of any commission beyond the said ceiling**.

(d) Since the payment of commission, which is referred to in this clause is commission payable either for the shares or for the debentures, **it may be relevant to consider whether the commission here referred to can be commission only out of capital**. Ordinarily, commission paid for debentures would be commission out of debenture money or profit. Though **it is conceivable that the commission on debenture may also be paid out of capital**.

But if commission on debentures can be paid out of profits. **Then it would not be unreasonable to assume that the said provision refers to commission payable not only out of capital but out of profits as well**.

On a reasonable construction, **the inclusion of debentures within the scope section 76 suggests that the commission mentioned scope 76(1)(c)(i) would NOT be confined to a commission payable out of capital alone**.

(e) Clause (iii) of Section 76(1)(b) seems to suggest the same conclusion. Under this clause, the condition imposed is that the amount or rate per cent of the commission paid or agreed to be paid is in the case of shares or debentures **not offered to the public for subscription** disclosed in the statement in lieu of prospectus or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and **filed before the payment of the commission with the Registrar**.

(f) The prohibition imposed by section 76(1) is in general terms and **it includes payments from any source or fund**.

(g) The Legislature knew that payment of commission may be made by adopting several devices and what sub-section (2) **intends to achieve is to prohibit the adoption of such devices by making it clear that whatever be the nature of the device adopted, if the object of the device is to pay commission, then it must conform to the limit prescribed by section 76(1).**

(h) It is well-known that sometimes shares or debentures are allotted or capital money **is applied in payment of commission**.

(i) **Therefore, in our opinion, far from there being any conflict or repugnancy between section 76(1) and section 76(2) they constitute one integrated provision, one of the objects of which is to impose a limit on the payment of commission either in respect of shares or in respect of debentures.** The **anxiety to save the profits of the company is as much in evidence in section 76(1) as it is in other sections to which we have already referred**.

(j) Therefore, in our opinion, **High Court were right when they held that a claim for commission out of the profits of the company which the appellant seeks**

	to make in the present suit is hit by section 76(1) and cannot be entertained. That leaves one minor point-still to be considered. **(k)** It was urged in the Courts below that the **provisions of section 76 cannot be invoked against the appellant because the agreement on which the appellant rests his claim was made prior to the 1st April, 1956** when the Act came into force. The contention appears to have been that in' invoking the provisions of section 76, **respondent No. 1 was seeking to make the said provision retrospective which it is not**. In our opinion, **there is no substance in this argument**. Section 9 of the Act is a clear answer to this contention. ☞ Section 9(a) states that any agreement executed by the company **cannot prevail if it is inconsistent with the provisions of the Act** and ☞ Section 9(b) states that **the articles shall likewise not prevail if they are inconsistent with the provisions of the Act**.
Decision	☆ **The SC decide the case in favour of the Respondent.** ☆ The SC **held that Promoters Agreement to pay commission was entered into before the commencement of the companies Act, 1956 is hit** by the provision of Section 76 deals with restriction/prohibition to pay commission. ☆ **The SC held that** commission paid out of profits **hit** by the provision of Section 76 deals with restriction/prohibition to pay commission,

44. S. V. KONDASKAR, OFF. LIQUIDATOR v. V. M. DESHPANDE, ITO & ANR [SC]

Hint: SC held that ITO does **NOT** require to obtain leave from Liquidation court to assess or re-assess tax liability of the company which is being wound up. The SC found two main ground in his decisions:

(a) **Liquidation court would have full power to scrutinise the claim of the revenue** after income-tax has been determined and its payment demanded from the liquidator.

(b) The orders made by the ITO in the course of assessment or reassessment proceedings **are subject to appeal to the higher hierarchy** under the Income-tax Act.

Fact of the Case	☆ Colaba Land & Mills Co., Ltd. (in liquidation) was ordered to be wound up and the Official Liquidator (Appellant) was appointed. The Income-tax Officer (Respondent) issued six different notices proposing to reopen the assessment of the Company and to re-assess it. ☆ The Official Liquidator filed an application with the Company Court contending that the income tax officer had no jurisdiction to issue the said notices or to proceed with the reassessment of the Company without the leave of the court. ☆ The Court accepted this contention and **stayed the proceedings initiated by the Respondent**. ☆ Respondent file appeal before the Division Bench against the stay order of the Company Court. The Division Bench reversed the stay order. ☆ **In view of this,** Appellant filed appeal before SC against the order of Division Bench. ☆ The question arose in this case is that the ITO is necessary to obtain the leave of the company court, while re-assess the company for escaped income in respect of past years.
Applicable Law	Section 148 occurs in Chapter XIV which beginning with Section 139 prescribes the procedure for assessment and Section 147provides for assessment or re-assessment of income escaping assessment. This **section empowers** the Income-tax Officer (ITO) concerned subject to the provisions of Sections 148 to 153to assess or re-assess escaped income.
Legal Principles held—	☆ Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446 read as a whole, it appears to us that the

	expression **"other legal proceeding"** in Sub-section (1) and the expression **"legal proceeding"** in Subsection (2) convey the same sense and the proceedings in **both the sub-sections must be such as can appropriately be dealt with by the winding up court.** ☆ In our opinion, the Income-tax Act is a **complete code** and it is particularly so with respect to the assessment and reassessment of income-tax **with which alone we are concerned in the present case**. ☆ In our view, while holding these assessment proceedings the ITO **does not perform the functions of a court as contemplated by Section 446(2)** of the Companies Act, 1956. ☆ In Our Opinion, the liquidation court **CANNOT** perform the functions of ITOs while assessing the amount of tax payable by the assessees **even if the assessee be the company which is being wound up by the court**. ☆ Moreover, the orders made by the ITO in the course of assessment or reassessment proceedings **are subject to appeal to the higher hierarchy** under the Income-tax Act. ☆ It would lead to **anomalous consequences** if the winding up court were to be held empowered to transfer the assessment proceedings to itself and **assess income tax liability** of the company. ☆ The argument **on behalf of the appellant that the winding up court is empowered to decline** to transfer the assessment proceedings but the power given under Section 446 of the Act must be exercised **only if considered expedient**.
Decision	☆ The Court held that the argument of the appellant w.r.t. proceedings for assessment or reassessment of a company which is being wound up can **only be started or continued with the leave of the liquidation court** is **unacceptable**. Even, the **liquidation court would have full power to scrutinise the claim of the revenue** after income-tax has been determined and its payment demanded from the liquidator. ☆ The SC decided in favour of the Respondent (Income Tax Department).

45. RAMCHAND & SONS SUGAR MILLS PVT. LTD. v. KANHAYA LAL BHARGAVA & ORS [SC]

Hint: SC decided the case in favour of the Appellant. Striking of defence is not tenable on the ground of non-appearance by the director before the Court. But, Company is liable to the extent of such act of the director which is done within the power conferred by the Company.

Fact of the Case	☆ The Respondent (Kanhaya Lal Bhargava) filed a suit against the Appellant Company for the recovery of a certain amount. ☆ The respondent **filed an application** ☞ for striking off the defence or ☞ for directing Jugal Kishore, a director of the Appellant-company, to appear in court (as an alternative). ☆ Inspite the court issuing summons on the director and giving many opportunity, he did **NOTAPPEAR**. Therefore, the court **struck off the defence of the Appellant Company**. ☆ The HC also confirmed the same. ☆ **The Appellant** filed appeal before the SC against the order of HC.
Legal Principles held—	☆ There is nothing in O.XXIX of the Code which, **expressly or by necessary implication**, does **NOT** preclude the exercise of the inherent power of the court under Section 151 of the Code.

	✫ Therefore, we are of the opinion that in a case of default made by a director who failed to appear in court when he was so required under O.XXIX, Rule 3 of the Code, the court can **make a suitable consequential order under Section 151 of the Code** as may be **necessary for the ends of justice or to prevent abuse of the process of the court**. ✫ The question raised before the **SC that whether court can strike off the defence of the appellant for the default made by its director to appear in Court**. **Learned counsel for the respondent** contended that the courts found director was guilty of a **recalcitrant attitude** and that he had **abused the process** of the court and, therefore, the **Subordinate Judge had rightly exercised his inherent power in striking off the defence** of the appellant. ✫ It cannot be disputed a company and the directors of the Company are different legal personalities. The **Company derives its powers from the MOA**. Some of the **powers are delegated to the directors**. For certain purposes, they are said to be trustees and for some others purpose, they are said to be the agents or managers of the company. ✫ It is **NOT** necessary in this case to define the exact relationship of a **director qua the company**. The Court held that the **acts of the directors within the powers conferred on them** by the Constitutional Documents of the company and their employment contract may be binding on the company, **but their acts outside the said powers will not bind the company**. ✫ That unless there is a finding of collusion between the company and the director in that the former prevented the latter from appearing in court, **we find it difficult to make the company constructively liable for the default of one of its directors.** Many situations may be visualized when one of the directors **MAY NOT** obey the directions of the company or its board of directors or may be even working against its interests. ✫ It is not possible to hold that the director in refusing to respond to the notice given by the court **was acting within the scope of the powers conferred on him**. He is only liable for his acts and not the company. If it was established **that the company was guilty of abuse of the process of the court by preventing the director** from attending the court, the court would have been justified in striking off the defence. But **no such finding was given by the courts below**.
Decision	✫ The Court held that the court could not prohibit the company from filing defence. ✫ The Court decided in favour of the Appellant (Ram Chand Sugar Mills Pvt. Ltd.).

46. SHAILESH PRABHUDAS MEHTA v. CALICO DYEING & PRINTING MILLS [SC]

Hint: SC decided the case in favour of Respondent Company on the ground that decision of the Directors was a commercial decision made in the interest of the Management of the Company. It is also significant to note that the appellants have only 100 shares which are **only insignificant as compared to the total shares and the contention that the relevant articles were amended only to defeat the rights of the appellants in respect of those 100 shares, is wholly untenable**.

Fact of the Case	✫ Late Shri Prabhudas V. Mehta **who was holding 100 equity shares** of the respondent Company of the face value of Rs 100 each. ✫ Shri Prabhudas V. Mehta **DIED** on August 26, 1974 without leaving any will. ✫ The appellants are the **ONLY** legal heirs and representatives of Shri Prabhudas Mehta and they filed a company petition **for rectification of the register of members** of the Company **by deleting** the name of Shri Prabhudas V. Mehta and **substituting in its place** the names of the appellants in respect of those 100 shares in the Company bearing Distinctive Nos. 9101 to 9200.

	☆ Prior to his death, the deceased Shri Prabhudas V. Mehta was holding these shares and **was working as an employee** of the Company. It appears that **there were certain disputes** between Shri Prabhudas V. Mehta and the Directors of the Company **who made efforts to purchase the said shares**. The negotiations in this regard could **not be completed in view of the sudden death** of Shri Prabhudas V. Mehta. ☆ It is also alleged that the **appellants entered into negotiations for sale of shares** which were carried on for several years. ☆ Extensive correspondence ensued between the appellants and the Company. However, as **NO positive reply was forthcoming** for the transmission of shares, the appellants sent a letter to the Company on May 28, 1977 **for transmission of shares and for the notice of the AGM** stating that they were entitled to the same even in the absence of their names being taken on the register of members **by virtue of AOA and the provisions of the Companies Act.** ☆ On June 27, 1977 a reminder was sent to the Company. On July 9, 1977 a reply was given by the Company stating that the **appellants were not entitled to exercise any voting right** in any of the meetings of the Company. ☆ **On September 21, 1977the then existing AOA were replaced by a new set of AOA wherein new articles were introduced conferring power on the Company to reject any application for transfer or transmission without assigning any reason** in that behalf. ☆ Appellant contends that this was done **mainly with an intention of defeating the appellants' rights** as shareholders-cum-beneficiaries of the said shares. ☆ Appellant send intimation of transmission of shares along with relevant document to the company. However, the appellant not received any reply from the respondent company. ☆ Appellant filed a petition before the Bombay HC praying for rectification of the register of the members. The Respondent filed an affidavit stated that Director of the company **decided to refuse to register the appellants as members of the Company in exercise** of the powers conferred under the AOA of the Company. ☆ The learned single judge of HC dismissed the appeal **on the ground that alternative remedy was available under Section 111** of the Companies Act.
Applicable Law	☆ **Whether the action of the Board of Directors was mala fide?** ☆ In **Bajaj Auto Ltd. v. N.K. Firodia (1970) 2 SCC 550**, it was laid down that the Court can consider whether the Directors acted in the interest of the Company. This case was cited in **Life Insurance Corporation of India. v. Escorts Ltd (1986) 1 SCC 264; (1986) 59 Comp Cas 548** with approval and in that case the nature of the power of the Directors and scope of scrutiny by the court were explained and it was observed as under: "Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion the Directors will act for the paramount interest of the company and for the general interest of the shareholders because the Directors are in a fiduciary position both towards the company and towards every shareholder. The Directors are therefore required to act bona fide and not arbitrarily and not for any collateral motive."
Legal Principles held—	☆ That the registration and transmission of shares was sought after the AOA was amended and the Board was given the power to refuse registration or transmission. Therefore, **there was no irregularity or lack of bona fide action on the part of the company in bringing about those amendments**. ☆ That there exists animosity (strong hostility) between the parties and the decision of the Management in **NOT registering the transmission of shares was a proper and commercial decision keeping in view the interest of the Management**

	of the Company. Therefore, it cannot be said that there was dishonest intention. In any event this **is a concurrent finding of fact based on the affidavits and records in which we need NOT interfere**.
Decision	✫ The Court held that the decision of the Directors **was a commercial decision made in the interest of the Management** of the Company. It is also significant to note that the appellants have only 100 shares **which are only insignificant as compared to the total shares** and the contention that the relevant articles were amended **only to defeat the rights of the appellants** in respect of those 100 shares, is **wholly untenable**. ✫ The Court decided in favour of the Respondent (Calico Dyeing).

47. OFFICIAL LIQUIDATOR OF HIGH COURT OF KARNATAKA v. SMT. V. LAKSHMIKUTTY [SC]

Hint: Claim raised by the Appellant **on behalf of the company is in liquidation against the Respondent and at the same time claim raised by the Respondent against the company is in liquidation** is valid. **[YES]**The SC decided the case in favour of respondent and held that the **Respondent is liable to balance due at the foot of mutual account** between her and the company is in liquidation.

Fact of the Case	✫ The Appellant applied on behalf of the company to the HC and **requested to direct the respondent to pay the balance due under a Chit Fund Account.** ✫ The respondent claimed that since there **were mutual dealings between her and the company in liquidation** an account should be taken in respect of such mutual dealings and **ONLY** that amount should be payable or receivable by her **which is due at the FOOT of such account** ✫ The Respondent contends **that she was entitled to the benefit of the rule enacted in section 46 of the Provincial Insolvency Act**. ✫ HC upheld her contention. ✫ The Appellant filed a petition before the SC against the order of HC.
Applicable Law	✫ **Section 46 of the Provincial Insolvency Act:** *"Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."*
Legal Principles held—	✫ **The SC held that** the rule enacted in Section 46 of the Provincial Insolvency Act should apply and **ONLY that amount which is ultimately found due from him at the foot of the account** in respect of mutual dealings should be recoverable from him and **NOT** that the amount due from him should be recovered fully while the amount due to him from the company in liquidation should **rank in payment after the preferential claims provided under Section 530 of the Act**. ✫ Therefore, this rule enacted in section 46 of the Provincial Insolvency Act with regard to the debts provable by a creditor against the insolvent must likewise apply in regard to debts provable against a company in winding up. Consequently, when the respondent in the present case claimed to prove her debt against the company in liquidation, **she was entitled to the benefit of the rule enacted in Section 46 of the Provincial Insolvency Act** and **she could legitimately claim that since there were admittedly mutual dealings between her and the company in liquidation**, an account should be taken in respect of such mutual dealings and only that amount should be payable or receivable by her which is due at the foot of such account.

	☆ The SC held that the **same view has been taken by the English Courts** on the **interpretation of the corresponding provisions** of the English Companies Act, 1948 and since our Companies Act is **modelled largely on the English Companies Act 1948**, **we DO NOT see any reason why we should take a different view,** particularly when that **view appears to be fair and just**. We may, point out that Gore Browne in his book on Company Law, 43rd Ed at page 34-14 also confirms this view: *"Indeed, all claims provable in the winding up may be the subject of set-off, provided that there is mutuality."* ☆ Moreover, we find that the observations of the **House of Lords in National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd**, (1972) are also to the same effect. **We may also usefully refer** to the observations of **Sir Ernest Pollock, M. R. In Re. City Life Assurance Co. Ltd (1926)** where the learned Master of the Rolls after referring to section 207 of the Companies Act, 1908 (Section 317 of the Companies Act, 1948) which corresponds to section 529 of Companies Act, 1956 and section 31 of the Bankruptcy Act, 1914 **which corresponds to section 46 of the Provincial Insolvency Act**, says: *"It is to be observed that s. 31 of Bankruptcy Act, 1914, is definite in its terms that where there is a mutual credit, mutual debt or other mutual dealings, **the sums are to be set off and the balance of the account and no more shall be claimed or paid on either side respectively**. It is not merely permissive; it is a direct statutory enactment that the balance only is to be claimed in bankruptcy."*
Decision	☆ **The SC decided the case** in favour of Respondent. ☆ **The SC held** that Respondent is liable to pay balance due at the foot of such account.

48. A.P. STATE FINANCIAL CORPORATION v. OFFICIAL LIQUIDATOR [SC]

Hint: Appellant filed an application to HC for staying outside the liquidation proceeding in pursuance of Section 29 of the State Financial Corporation Act, 1951. However, HC permitted the appellant to stay outside the proceeding subject to imposition of three conditions.

QUESTION RAISED:

Whether Section 29 of the Act of 1951 can override above provisions of the proviso to Subsection (1) of Section 529 and Section 529A of the Companies Act. In other words, whether the Corporation can exercise its rights under above Section 29 ignoring a pari passu charge of the workmen.

Decision

The SC decide the case in favour of Respondent and held that the Court was justified in imposing the above conditions to enable the Official Liquidator to discharge his function properly. Hence, the provisions of Proviso to Section 529 and 529A prevails over the Section 29 of the State Financial Corporation Act, 1951.

Fact of the Case	☆ Two companies named M/S Nagarjuna Paper Mills and M/S Chandra Pharmaceuticals Limited had gone into liquidation and the liquidation proceedings were pending before the High Court. ☆ These two companies obtained loans from the Appellant (AP State Financial Corp). For the realisation of dues, the Appellant invoked the provisions of Section 29 of the State Financial Corporations Act, 1951. ☆ As both the companies were under liquidation, the Appellant filed **TWO separate** applications under section 446(1) of the Companies Act, 1956 read with Sections 29 and 46 of Act of 1951 with before the HC **for staying outside the liquidation proceedings**. The learned Judge **granted permission to the Appellant subject to certain conditions** as prescribed under the Companies Act, 1956.

	☆ The Appellants challenged the above conditions imposed by the HC contending that the State Financial Corporation Act, 1951 is a special legislation and shall prevail over the Companies Act, 1956.
Applicable Law	**<u>Proviso to Section 529(1) of the Companies Act, 1956</u>** The security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen' s portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,- **(a)** the liquidator shall be entitled to represent the workmen and enforce such charge; **(b)** any amount realised by the liquidator by way of enforcement of such charge shall be applied ratably for the discharge of workmen' s dues; and **(c)** so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen' s portion in his security, whichever is less, shall rank pari passu with the workmen' s dues for the purposes of section 529A.
Legal Principles held—	☆ **Appellant** Contend that State Financial Corporation Act, 1951 is a special Act and the power of the appellant corporation **to invoke provisions** of Section 29 of the Act of 1951 is absolute and **cannot be restricted**. ☆ That State Financial Corporation Act, 1951 is a special Act **for grant of financial assistance to industrial concerns with a view to boost up industrialisation** and also recovery of such financial assistance if it becomes bad. ☆ Both Section 29 of Act of 1951 and Section 529A of the Companies Act have **competing non obstante provisions** but the proviso to section 529(1) and Section 529Abeing a subsequent enactment, **the non obstante clause in Section 529A PREVAILS over the non obstante clause found in Section 29**of the Act of 1951 **in view of the settled position of law**.
Decision	☆ The Supreme Court held that we are of the opinion that that the above proviso to Section 529(1) and Section 529A **will control** Section 29 of the Act of 1951. ☆ The statutory right to sell the property under Section 29 of the Act of 1951 has to be exercised **with the rights of pari passu charge** to the workmen created by the proviso to Section 529(1) of the Companies Act, 1956. In pursuance of Proviso to Section 529(1) of the Companies Act, the liquidator shall be entitled to represent the workmen and force the above pari passu charge ☆ The Court decided in favour of the Appellant (AP State Financial Corporation). ☆ The Court held that the Court was justified in imposing the above conditions to enable the Official Liquidator to discharge his function properly.

49. 63, MOONS TECHNOLOGIES LTD (FORMERLY FINANCIAL TECHNOLOGIES (INDIA) LTD. v. UNION OF INDIA & ORS [BOM]

Fact of the Case	☆ The CG **passed amalgamating order** (referred to as impugned order) under section 396 of the Companies Act, 1956 to amalgamate National Spot Exchange Limited (NSEL) and 63 Moons Technologies Limited, formerly known as Financial Technologies (India) Limited (FTIL). ☆ The petitioners challenged the impugned order on the following four grounds: **(a)** It is in **gross breach of the principles of natural justice and fair play**. Because, **NO** opportunity of personal hearing was granted to any of the affected parties **EXCEPT** FTIL and NSEL, **despite specific directions issued** by this Court in its order dated 4th February 2015.

	(b) The CG has **NOT even properly considered the objections and suggestions made by the affected parties** and such **non-consideration** constitutes **BREACH** of the principles of natural justice and fair play. **(c)** The CG **has relied upon adverse material in the form of proposals** from FMC, without granting any opportunity to the affected parties to explain why such proposals were **flawed**. **(d)** There **is a variation between** the grounds stated in the draft order and the final order. ✰ Petitioner submit that considering **the drastic nature of the impugned order, prejudice is inherent**, particularly to NSEL whose **corporate existence stands wiped out** and to the shareholders of FTIL the **economic value of whose shares, and stands drastically diminished**.

The Bombay HC have considered and evaluate the submissions made by the learned counsel for the parties and to determine the issues which arise in these petitions"

Issue No. "1"	**Whether the impugned order is in violation of the principles of natural justice and fair play?**

- ✰ This not a case where there **is failure of natural justice** because the objections and suggestions made by FTIL, NSEL, and several other interested parties have been properly considered by the CG before making the impugned order.
- ✰ The record indicates that the CG constituted a Committee headed by the Additional Secretary assisted by the Legal Adviser **to facilitate the consideration of such objections and suggestions**.
- ✰ This Committee with **the help of specially created computer software, tabulated and collated various objections and suggestions, as received**.
- ✰ After that such objections and suggestions were analysed and properly addressed to. Moreover, such analysis and address **are reflected to a substantial extent** in the impugned order.
- ✰ Merely because the suggestions or objection **may not have been accepted by the CG**, **does not mean or imply that the same have not** at all been considered before making the impugned order or does not mean that CG violate the principles of natural justice

Issue No. "2"	**Whether, taking into consideration the provisions in Section 396(3) of the Companies Act, the CG was at all empowered to order compulsory amalgamation of loss making wholly owned subsidiary (NSEL) with its profit-making holding company (FTIL) under Section 396 of the Companies Act?**

- ✰ On the basis of sufficient material on record, the CG **has subjectively satisfied itself** that the **amalgamation is essential in public interest to facilitate recoveries** of dues from defaulters from pooling human and financial resources of FTIL and NSEL.
- ✰ NSEL contend that they have rigorously pursuing recoveries, but the fact remains that the position of recoveries **is not very promising** and it may **further deteriorate** if only NSEL has to **FEND** for itself. In such matters, **it is not sufficient that some decrees or attachment orders are obtained**.
- ✰ The Court held that this is also **NOT** an issue of mere recoveries but **this is an issue** of investor **CONFIDENCE in the very functioning of stock and commodity exchanges**. **If the CG, were not to act in a situation of this nature**, investor confidence would certainly be a casualty. Such a situation then, **has a cascading effect**, which is by **NO means conducive to the national economy**.
- ✰ The CG, in **MAKING** the impugned order **has balanced the interests of the two companies, its shareholders, creditors and employees on one hand and the interests**, **NOT ONLY** of the investors who may have claims, but also, **of the investing public,** which is required to be given the confidence that the **CG will act to see that a holding company does not take shelter behind its wholly owned subsidiary** and thereby shirk (evade) responsibility in the wake of such an unprecedented payment crisis.

- ☆ The Court held that the three grounds or reasons stated in the impugned order, in our opinion, **were sufficient to arrive at the subjective satisfaction that it was essential in public interest to order the amalgamation of the two companies**. This is **not a case of exercise of powers for any extraneous considerations or alien purposes**.

Issue No. "3"	**(i) Whether the impugned order is based on only one ground or reason, i.e., facilitating NSEL in recovering dues from defaulters, and therefore, applying Mohinder Singh Gill principle, the CG is barred from adding or supplementing reasons by way of affidavits?** **(ii) Whether the impugned order stands vitiated because there is no material whatsoever on record in support of the aforesaid solitary ground or reason?**

- ☆ In Ion Exchange (India) Ltd. (supra), this Court has held that though,
  - ☞ as a matter of law, the transferee companies are independent corporate entities, equally,
  - ☞ as a matter of business reality, the Court cannot ignore the plea of the Transferee Company **that the health and the wellbeing of its wholly owned subsidiaries was a matter which was legitimately entitled to be taken into account** by the Transferee Company in **coming out with the decision to amalgamate its wholly owned subsidiaries with itself**.
- ☆ In the circumstances, the plea that the scheme of Amalgamation **is an attempt to reduce the business and operational losses, inclusive of manpower and machinery costs ought to be accepted**.
- ☆ Similarly, the **FOUNDATION OF THE SCHEME** for Amalgamation is that the amalgamation **will enable the three Companies to pool together human, material and financial resources**. This consideration particularly in a case where the two Transferor Companies are wholly owned subsidiaries cannot be regarded as extraneous or irrelevant.
- ☆ This Court, **taking into consideration the business** reality noted that the holding company seeks to emerge from the economic difficulty which face its subsidiaries which have become loss making entities. The **effort is to POOL together** human, financial and material resources and to **DEPLOY** them, upon amalgamation in a manner that would enhance profitability.
- ☆ This is a **permissible object and nothing in the proposed scheme in the present case militates against commercial morality, the public interest** or a view which a reasonable body or shareholders or creditors would adopt.
- ☆ In such circumstances, **the impugned order cannot be held to be irrational or based on any extraneous or irrelevant considerations**.
- ☆ For all the aforesaid reasons, The Court held that
  - **(a)** We are **UNABLE to accept the contention** that the **impugned order is based on ONLY one ground or reason**.
  - **(b)** We are also **UNABLE** to accept the contention that there was **no material on record in support of such ground or reason** and **FURTHER**, such ground or reason was **not sufficient to prompt any reasonable man or authority to order the compulsory amalgamation of NSEL with FTIL**.

Issue No. "4"	**Whether the impugned order can be said to be unreasonable, applying Wednesbury principles?**

- ☆ The material on record indicates that NSEL, offered and promoted contracts which were in breach of the conditions in exemption notification dated 5th June 2007. Further, NSEL offered and promoted paired contracts, which were found to be nothing but financing transactions distinct from genuine sale and purchase transactions in commodities.
- ☆ There is material on record **which indicates that NSEL went to the extent of assuring fixed returns** to the investors and by the year 2013, **almost 99% of the turnover** of the exchange comprised such paired contracts.

☆ Ultimately, on 31st July 2013, **NSEL, suspended the operations at the exchange**. At this stage, the **commodities sellers defaulted on their outstanding payments obligations to the Trading Clients to the extent of almost Rs.5600 crores**. The NSEL also sought to wriggle itself out of its obligations by contending that the counter guarantee was to apply only in relation to specified commodities and since none had been specified, ***the counter guarantee was in effective***. ☆ The **settlement guarantee fund to be maintained by NSEL** and which was stated to be Rs.738.55 crores as on 1st August 2013 but, on 4th August 2013 it was found to be only Rs.62 crores. ☆ Even though the transactions at the spot exchange were to be backed by commodities **supposedly checked and stored in warehouses owned and controlled by NSEL**, SGS India Limited, which was appointed to inspect and audit the position, reported that stock worth only Rs.358 crores was available, even though, NSEL, had solemnly stated that it has stocked valued at Rs.2389.36 crores. ☆ This means that there was hardly any stock in the warehouses with which deliveries could be effected. All this, left the Trading Clients in a **LURCH**. ☆ In the context of the crisis, **the impugned order details the nexus between NSEL and FTIL which led to the COLLAPSE of the spot exchange**. ☆ For all these reasons, the Court held that **we are unable to fault the impugned order** applying the test of Wednesbury unreasonableness.

Issue No. "5"	**Whether the impugned order defies the doctrine of proportionality?**
☆ Even applying the proportionality test, we are quite satisfied that the impugned order warrants no interference in the facts and circumstances of the present case. ☆ **The impugned order amalgamates NSEL with FTIL for the three broad reasons set out in the impugned order**. ☆ In the context of the **three reasons**, we have already held that neither of them could be regarded as extraneous or irrelevant to the purpose for enactment of section If exchanges such as these are permitted to be subverted or fail without honouring their obligations and commitments, the confidence in national economic institutions is bound to suffer and the repercussion to the national economy will be severe. ☆ In such situations, a negative perception about the business environment of the country is created, which has grave repercussions on the national economy. ☆ The CG, quite conscious of all such factors, has taken a balanced decision in the facts and circumstances of the present case. For all the aforesaid reasons, **we dismiss these petitions**.	
Decision	The Court held that the amalgamation order passed by the Respondent (i.e. Union of India) was good in Law.

50. DIVYA MANUFACTURING CO PVT LTD. v. UNION BANK OF INDIA & ORS [SC]

Hint: Appellant offered to acquire the assets and properties of company, which is in liquidation, at a price which is abnormally below the current market price. **Appellant offer has been accepted and confirmed by the order of Court**. However, subsequently another purchaser offered to acquire the assets and properties of the said company equivalent to the market price. Due to intervention of court, Appellant increase bid many times. This indicates that **correct market value** of the assets **was not properly known** to the Court and the sale was confirmed **at grossly inadequate price.**

Decision: The Supreme Court held that neither the possession of the property **nor** the sale deed was executed in favour of the appellant. The offer of Rs. 1.30 Crores is **totally inadequate in comparison to the offer of Rs. 2 Crores** and in case where such higher price is offered, it would be **in the interest of the Company and its creditors to set aside the sale**. The Supreme Court Dismissed the appeal.

Fact of the Case	☆ Tirupati Woolen Mills Limited (Tirupati Mills for short) is in under liquidation process and official liquidator was appointed for the Tirupati Mills who initiate sale of the assets and properties of Tirupati Mills.

	✫ The Appellant (i.e. Divya Manufacturing Co.) has offered to purchase the properties of Tirupati Mills **at Rs. 37 Lakhs Only**. That means, the appellant wanted to purchase **at a throw away price** (i.e. at a very low price). ✫ At the **intervention of the learned Single Judge**, the bid was increased to Rs.85 lakhs. **Subsequently**, before the Division Bench, **the appellant increased it to Rs.1.30 crores**. ✫ This indicates that appellant **was keen (ready)** to purchase the property by **paying only the bare minimal amount** and to **take advantage of sale** by the liquidator in the hope that **if there are no other purchasers**, it would purchase the Company at a price **which is abnormally below the market price**. ✫ It is also true that on 2nd July 1998, **the offer made by the appellant was accepted** and it was **ordered that sale in its favour be confirmed.** ✫ But, at the same time, **before possession of the property could be handed over**, or **before the sale deed could be executed in its favour**, Respondent Nos.7 and Respondent No. 8 pointed out that the assets and properties **could be sold at Rs.2 Crores**. ✫ For showing their bona fides, the Court directed **to deposit Rs.40 Lakhs each and also to pay Rs.70 thousand each as damages to the appellant**. ✫ Further, the application for **setting aside the sale was filed** within a few days of the order accepting the bid of the appellant. ✫ In these set of circumstances, when **correct market value** of the assets **was not properly known** to the Court and the sale was confirmed **at grossly inadequate price**, it was open to the Court to set it at naught in the interest of the company, its secured and unsecured creditors and the employees. ✫ Appellant is also **duly compensated by payment of Rs.70 thousand each** by Respondent Nos.7 &Respondent No. 8.
Applicable Law	**(1) <u>Navalkha & Sons v. Sri Ramanya Das & Ors (1969) 3 SCC 537</u>:** ✫ After appellants offer was accepted, a fresh offer from one Gopaldas Darak for higher amount was received by stating that he could not offer in time because he came to know of the **sale only 2 days prior to the date of the application** and **there was possibility of higher bids**. ✫ **Instead of directing a fresh auction or calling for fresh offers**, the learned Judge thought it **proper to arrange an open bid in the Court itself** on that very day as between M/s Navalkha and higher offeror Gopaldas Darak. ✫ M/s Navalkha thereafter **offered higher bid at Rs.8,82,000** and its bid was accepted and the learned Judge concluded the sale in its favour with a direction to pay the balance amount. ✫ Thereafter, an application was filed **offering Rs.10 lakhs**. A contention was raised that **DUE PUBLICITY of the sale of the property was NOT made**, but that application was **REJECTED** by the Court. ✫ Therefore, an appeal was filed by the **applicant who made an offer of Rs.10 lakhs and another by one contributory AGAINST** the order of confirmation. ✫ Both appeals were allowed by the Division Bench and the **order passed** by the learned Judge **WAS SET ASIDE** with a direction **to take fresh steps for sale of the property** either ☞ by calling sealed tenders or ☞ by auction in accordance with law. ✫ **That order was challenged** before this Court by M/s Navalkha. ✫ It was contended that there was **NO JUSTIFICATION** for the Division Bench to **INTERFERE** with the order of the learned Single Judge.

	✰ In that context, after quoting **RULE 273** of the Companies (Court) Rules, 1959, the Court observed: **The principles which should govern confirmation of sales are well established**. ✰ Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offeror **DOES NOT** by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. ✰ The condition of confirmation by the Court **operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale**. ✰ In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. ✰ **Unless the Court is satisfied** about the adequacy of the price the act of confirmation of the sale would **NOT** be a proper exercise of judicial discretion. **(2)** **Gordhan Das Chuni Lal v. T. Sriman Kanthimathinatha Pillai (AIR 1921 Mad.286)**: ✰ It was observed that where the property **is authorised to be sold by private contract or otherwise** it is the duty of the court to satisfy itself that the price fixed is the best that could be expected to be offered. ✰ Because the Court is the **CUSTODIAN** of the interests of the company and its creditors and **the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the Company and its creditors as well**. This principle was followed in Rathnaswami Pillai v. Sadapathy Pillai and S. Soundarajan v. M/s Roshan & Co.
Legal Principles held—	☞ From the aforesaid observation, it is **abundantly clear that the Court is the custodian of the interests of the Company and its creditors**. ☞ Hence, it is the **duty** of the Court to see that the price fetched at the **auction is an adequate price** even though there is **no suggestion of irregularity or fraud**. ☞ There is a specific condition No.11 in terms and conditions of **sale as quoted above which empowers the Court to set aside the sale** even though it is confirmed for the interests of creditors, contributories and all concerned and/or public interest. In this view of the matter, **it cannot be said that the Court became FUNCTUS OFFICIO after the sale was confirmed**.
Decision	☞ **The Supreme Court** held that neither the possession of the property **nor** the sale deed was executed in favour of the appellant. The offer of Rs.1.30 Crores is **totally inadequate in comparison to the offer of Rs. 2 Crores** and in case where such higher price is offered, it would be **in the interest of the Company and its creditors to set aside the sale**. ☞ **Supreme Court dismissed the appeal** and directed the Liquidator is directed to take appropriate steps at the earliest, by obtaining an order from the Court for sale of the property **by calling sealed tenders or by auction in accordance with law** after giving **due publicity in the newspapers**, particularly, the newspapers having circulation in Delhi and in the State of Haryana **with a reserved price fixed at Rs.2 Crores** (as offered). The parties are directed to bear their respective costs.

51. P. PUNNAIAH V. JEYPORE SUGAR CO. LTD & ORS [SC]

Hint: Application under section 397/398 has been filed by Appellant on behalf of GPA executed by his daughter. The **QUESTION AROSE** in this case is whether the consent given by her GPA holder **for and on**

her behalf and not by her personally is a valid consent within the meaning of Section 399(3) of the Companies Act, 1956.
Decision: SC decided the case in favour of appellant and held that we are unable to agree with the said reasoning. Section 399(3) thereof does **not either expressly or by necessary implication indicate** that the consent to be accorded thereunder **should be given by the member personally.**

Fact of the Case	✰ The three appellants **in this appeal** are the shareholders of the first respondent-company. ✰ The **FIRST** appellant's daughter Smt. V. Rajeshwari **also holds certain shares** in the **FIRST** respondent-company. She **executed** a General Power of Attorney (GPA) in favour of her father, the first appellant herein. ✰ Under the said deed, Smt. Rajeshwari **EMPOWERED** her father to manage and otherwise **ADMINISTER** her moveable and immovable properties **including** shares and stock as may be held by her and to take all proceedings **before** all the authorities and courts concerning the said properties and shares. The deed also **EMPOWERED** him **TOSIGN** all necessary papers relevant in that behalf and **TO FILE** them in courts and generally to do all things as may be necessary **TO SAFEGUARD HER INTEREST.** ✰ The three appellants herein **filed an application under Sections 397/398** in the HC of Orissa. **FIRST** Appellant **signed the petition on behalf of his daughter on the strength of the GPA**. ✰ The **QUESTION AROSE** in this appeal is whether the consent given by her GPA holder **for and on her behalf and not by her personally is a valid consent** within the meaning of Section 399(3) of the Companies Act, 1956.
Applicable Law	**Section 399(3) of the Companies Act, 1956** Where any members of a company are entitled to make an application in virtue of section 399(1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.
Legal Principles held—	✰ It was rightly said that in pursuance of the said deed, it would have been **perfectly legitimate for the first appellant** to institute suits, petitions and other proceedings with respect to the shares or other moveable and immovable properties held by Smt. Rajeshwari. So, the application filed under section 397/398 by the GPA holder is within the power given under GPA and he is acting in the name of Smt. Rajeshwari. ✰ With a view to **counteract the objection taken by the respondents**, the appellants **filed an affidavit of Smt. Rajeshwari** wherein she affirmed that on her recent visit to India she was apprised (i.e. informed) by her father of the affairs of the first respondent-company and of the proposal to file an application against the first respondent-company and its management **alleging oppression and mismanagement**. **She affirmed that she had authorised her father to act on her behalf as her GPA in that behalf and to take all such steps as he deemed proper to protect her interest.** ✰ **No question of 'consent' would have and could have arisen in such a case**. If so, it is un-understandable as to why and how he could not have given consent on behalf of Smt. Rajeshwari, the member, under Section 399(3). ✰ **No rule or decision could be brought to our notice saying that the consent under Section 399(3) cannot be given by a GPA holder**(who is empowered by the principal to manage and administer the shares and stocks held by the principal and to take all necessary steps and proceedings in all courts, offices and tribunals in that behalf).

Decision	☆ The SC held that we are unable to agree with the said reasoning. Section 399(3) thereof does **not either expressly or by necessary implication indicate** that the consent to be accorded thereunder **should be given by the member personally.** ☆ The normal rule is that whatever **a person can do himself, he can do it through his agent**, **EXCEPT** certain functions which may be personal in nature or otherwise do not admit of such delegation. The consent contemplated by Section 399(3) falls under the general rule and **NOT** under the exception. ☆ Learned counsel for the appellant **invited our attention** to a decision of the **Division Bench of the Bombay HC in Killick Nixon Ltd. v. Bank of India**, (1985). In this case it is held that the GPA holder is empowered to grant consent under Section 399(3). The GPA concerned therein is substantially in the same terms as the one concerned herein. **We agree with the said decision**. ☆ The SC also consider the decision held in the case **R. Subba Rao v. CIT, AIR 1956 SC 604**. The matter arose under **Section 26-A of the Indian Income Tax Act, 1922 read with Rules 2 and 6 of the rules framed in that behalf**. The rules provided that an application for renewal of registration of the firm "shall be signed personally by all the partners". It is **because of the said requirement that it was held that partners must sign such an application personally**. ***In the absence of any such expression in Section 399(3), the said decision is of no help to the respondents herein***. ☆ SC allowed the appeal in favour of the appellant.

52. MACKINTOSH BURN LTD. v. SARKAR AND CHOWDHURY ENTERPRISES PVT.LTD [SC]

Hint: Supreme Court held that the action of the Appellant in not registering the transfer was justified on account of conflict of interest between the company and the transferee.

Fact of the Case	☆ The Appellant (Mackintosh Ltd.) was **a public company** where **a majority of shares were held** by the **Government of West Bengal**. The Respondent (Sarkar and Chowdhury) was holder of 28.54% of shares of the Appellant Company. ☆ The Respondent **purchased 100 more shares of the Appellant Company**, which when **added to his holding, took it up to 39.77%**. They **sought registration of the shares so bought**. The **Appellant denied such registration**. ☆ The Respondent **approached the CLB seeking an order for registration** of the shares. ***The Appellants contended that the Respondent Company is controlled by a competitor in business, and hence, it would not be in the interest of the Government Company to permit the transfer***. **CLB ruled in favour of the Respondents**. **The CLB rejected the contention and directed registration of additional shares acquired by respondent.**
Applicable Law	**Section 58(4) of the Companies Act, 2013** If a public company **without sufficient cause refuses to register the transfer of securities** within a period of **30 days from the date on which the instrument of transfer or the intimation of transmission**, as the case may be, is delivered to the company, the transferee may, **within a period of 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer or intimation of transmission**, appeal to the Tribunal.
Legal Principles held—	☆ That in the instant case, there ***was no resolution passed by the Appellant Company refusing to register the transfer of shares***.

	☆ That refusal to register transfer of shares can be on the ground that the transfer is illegal or impermissible under any law, is in violation of law or any other sufficient cause [**it referred to as Sufficient Cause**]. ***Conflict of interest in a given situation can amount to a sufficient cause provided the surrounding facts and circumstances are given due consideration***.
Decision	☆ **The SC** held that the action of the Appellant **in not registering the transfer was justified** and the **order passed by the CLB and the orders passed by the HC are set aside**. ☆ **The SC** decided in favour of the Appellant (Mackintosh Burn). ☆ The matter is remitted to the NCLT for consideration afresh of the appeal filed under Section 58 of the Companies Act, 2013.

53. HANUMAN PRASAD BAGRI & ORS v. BAGREES CEREALS PVT. LTD. & ORS [SC]

Hint: The SC dismissed the appeal and no relief is granted to the petitioner file petition under 397/398 and held that relief under section 397/398 is granted to the petitioner only if

(a) facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

(b) the winding up order would unfairly prejudice the applicants.

But, SC held that **if the facts fall short of a case** upon which the company court feels that the company should be wound up **on just and equitable grounds in that event NO relief can be granted to the Petitioners** in regard to Section 397 of the Act.

Fact of the Case	☆ A petition under Sections 397 & 398 of the Companies Act, 1956 was filed before the Calcutta HC on grounds of oppression and mismanagement. ☆ The learned Company Judge held that the **Petitioners grievance** in regard to **OUSTER(i.e. expulsion)** from the management of the company **is legitimate and justified**; and **Respondent No.3 had manoeuvred (deceive) the matters in such a manner to result in the OUSTER of the Petitioner No.1 from the management of the Company**. ☆ The learned Company Judge **further directed** the Petitioner No.1 and his group members to **sell their shares to respondents at a value to be determined** by a Valuer as on 16.5.1988, i.e., the date of the petition and also held that the Petitioner No.1 had been **illegally removed** as an Executive Director of the Company. ☆ Respondent No. 2 on behalf of the Company filed an appeal before divisional Bench of HC and also on his own behalf. ☆ The Petitioners claimed the learned Company Judge **should have given guidelines for valuation of the shares on the market value** and should have also provided **for payment of interest on the amount receivable by them both on account of share value and remuneration**. ☆ The Division Bench of the Calcutta HC allowed the appeal and held that one of the conditions precedent for granting relief under Section 397 of the Act is **that the Petitioners should prove that winding up of the company would unfairly prejudice the Petitioners who are claiming of oppression, that otherwise the facts will justify the making of a winding up on just and equitable grounds**. Contesting the correctness of this view, this special leave petition is filed.
Applicable Law	<u>**Section 397 of the Companies Act, 1956**</u>: Application to Tribunal for Relief in cases of Oppression: **(2)** Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to

	the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399. **(3)** If, on any application under sub-section (1), the Tribunal is of opinion- **(a)** that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and **(b)** that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up; the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.
Legal Principles held—	✰ Section 397(2) of the Act provides that **an order could be made on an application made** under sub-section (1) if the court is of the opinion **(1)** that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member or members; and **(2)** that the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, and **(3)** that the winding up order would unfairly prejudice the applicants. ✰ The SC held that **No case appears to have been made out** that the company's affairs are being conducted **in a manner prejudicial to public interest or in a manner oppressive of any member or members**. ✰ In the present case, **the Division Bench examined the matter before it**. It was noticed that the shareholding of the Petitioners **is well under 20% while that of those opposing the winding up is more than 80%**. Therefore, the adversary group has sufficient majority shareholding even to pass a special resolution. ✰ On the other hand, the party **resisting the winding up can demonstrate** that there are **NEITHER** just **NOR** equitable grounds for winding up and an order for winding up would be **unjust and unfair to them**.
Decision	✰ The SC decided the **case in favour of Respondent** i.e. dismissed the appeal. ✰ The SC held that we adequate **support the view taken by the Division Bench** that **if the facts fall short of a case** upon which the company court feels that the company should be wound up **on just and equitable grounds in that event NO relief can be granted to the Petitioners** in regard to Section 397 of the Act.

54. CHERAN PROPERTIES LTD. v. KASTURI AND SONS LTD & ORS [SC]

Hint: In the present case, an arbitral award was passed against the Appellant directing him to transfer the shares to Respondent No. 1 **pursuant to which Respondent No. 1 filed an application for rectification of members register before the NCLT** which was allowed. NCLT ordered rectification of register of members accordingly. NCLAT affirmed the decision. Whether the order of NCLAT is tenable in law.

Decision:

- ✰ **The SC decide the case in favour of the Respondent.**
- ✰ **The SC held that order of NCLT is tenable in law in regard to confirmation of rectification of registration of member in pursuance of the Arbitral Award.**

Fact of the Case	✰ In the present case, an arbitral award was passed against the Appellant directing him to transfer the shares to Respondent No. 1 **pursuant to which Respondent No. 1 filed an application for rectification of members register before the NCLT** which was allowed. ✰ The appeal was preferred by the appellant before the NCLAT against the order of NCLT. The **NCLAT dismissed the appeal**.

	☆ Now, the present appeal was filed by the Appellant before the SC against the order of NCLAT.
Legal Principles held—	The SC consider the following facts before passing the final order: (a) As we have seen, the parent agreement dated 19 July 2004 envisaged **the allotment of equity shares of KSL to KCP** with the intent that KCP **would take over the business, assets and liabilities** of SPIL. (b) While KCP was entitled to transfer his shareholding, **this was expressly subject to the condition of the acceptance by the transfere**e of the terms and conditions of the agreement. (c) KCP's letter dated 17 August 2004 to KSL **contains a specific reference to the share purchase agreement** dated 19 July 2004. It was in pursuance of that agreement that KCP indicated, **as authorised signatory of the appellant that his group of companies had agreed to purchase the shares in SPIL**. The shares were to be purchased by several entities in the same group. A supplementary agreement was to be entered into, to reflect the altered consideration. (d) Eventually, no supplementary agreement was executed and the transaction was structured on the basis of the parent agreement dated 19 July 2004 which the appellant recognised in its letter dated 17 August 2004. Having regard to this factual context, **the defence of the appellant against the enforcement of the award cannot be accepted**. To allow such a defence to prevail would be to cast the mutual intent of the parties to the winds and to put a premium on dishonesty. (e) The arbitral award **envisaged that KSL was entitled to the return of documents of title and the certificates pertaining to the shares of SPIL contemporaneously with the payment or tendering of a sum of Rs 3.58 Crores** together with interest. KSL is in terms of the arbitral award entitled to the share certificates. That necessarily means the transfer of the share certificates. (f) To effectuate the transfer, **recourse to the remedy of the rectification of the register under Section 111 was appropriate and necessary**. (g) The arbitral award **has the character of a decree of a civil court under Section 36 and is capable of being enforced as if it were a decree**. Armed with that decree, KSL **was entitled to seek rectification before the NCLT by invoking the provisions of Section 111** of the Companies Act, 1956. Therefore, **there can be no question about the jurisdiction of NCLT to pass an appropriate order** directing rectification of the register. (h) The present case which arises under the Arbitration and Conciliation Act 1996 stands **on even a higher pedestal**. In the present case, **the arbitral award required the shares to be transmitted to the claimants**. The **arbitral award attained finality**. The **award could be enforced in accordance with the provisions of the Code of Civil Procedure in the same manner as if it were a decree of the Court**. The award postulates a transmission of shares to the claimant. (i) The directions contained in **the award can be enforced only by moving the Tribunal for rectification in the manner contemplated by law**.
Decision	☆ **The SC decide the case in favour of the Respondent.** ☆ **The SC held that order of NCLT is tenable in law in regard to confirmation of rectification of registration of member in pursuance of the Arbitral Award.**

55. THE COMMISSIONER OF IT v. CITY MILLS DISTRIBUTORS (P) LTD [SC]

Hint: SC held in the case that income earned from business carried on by Promoters of company prior to date of incorporation of the company, cannot be taxed as income of the company.

Fact of the Case	✰ The promoters of the Respondent Company (City Mills) had **carried on business on behalf of the company before its incorporation and had received a sum of Rs. 80,534/- as income for the said period**. ✰ The ITO, while assessing the company's total income, **sought to add the above-mentioned pre-incorporation income to the total income of the Respondent Company.** ✰ The Department contended that this was **the income of the assessee company because its promoters had acted and carried on business on its behalf and the assessee company had accepted the act of the promoters after its incorporation**. ✰ The ITAT held that, in law, the promoters and the assessee are different legal persons and that pre-incorporation income was not to be added to the total income of the assessee company. ✰ **As a result of which, the Department had further file appeal against the order of ITAT**.
Applicable Law	✰ A company becomes a legal entity in the eye of the law only when it is incorporated. Prior to its incorporation, **it simply does not exist**.
Legal Principles held –	✰ That a company can enter into an agreement only after its incorporation. The question as to **who is liable to pay tax on such income does not depend upon whether or not the company after incorporation decides to accept the agreements entered into by the promoters**. ✰ It is **the promoter who carried on the business and received the income when it accrued.** Therefore, he will be liable to bear the burden of tax thereon.
Decision	✰ The SC held that the Respondents were not liable to pay tax on the said amount. ✰ The SC decide the case in favour of the Respondent (City Mills).

56. COMPANY LAW BOARD v. UPPER DOAB SUGAR MILLS LTD [SC]

Question: The core issue was whether the CLB, representing the CG had powers to impose conditions as to the ceiling of the remuneration while allowing managerial remuneration.

Hint: SC held CLB impose conditions within the provisions of Company law. So, the act of CLB is valid in law.

Fact of the Case	✰ Shri Rajinder Lal and Shri Narinder Lal have been appointed MDs of the company for the first time after the coming into force of the Act. Their appointment as MDs had to be approved in terms of section 269 of the Act. The company consequently applied to the CG for approving their appointment. ✰ The appellant Board (i.e. CLB), to whom the powers of the CG have been delegated for this purpose, while granting approval to the appointment of the aforesaid 2 persons as MDs. ✰ **CLB** while granting approval to these directors impose conditions w.r.t. total remuneration of each MD by way of commission and salary shall not exceed Rs. 1,20,000 per annum. ✰ **Respondent (Upper Doab)** filed an application to the High Court against the order of CLB and High Court set-aside the conditions imposed by the CLB. ✰ **As a result of which,** Appellant CLB file an appeal against the order of High Court to the Supreme Court.
Applicable Law	✰ Section 198 of the Companies Act, 1956 deals with the Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits. **(1)** The total managerial remuneration payable by a public company or a private company which is a subsidiary of a public company, **to its directors and its**

	managing agent, secretaries and treasurers or manager in respect of any FY shall not exceed 11% of the net profits of that company for that FY computed in the manner laid down in sections 349, 350 and 351, except that the remuneration of the directors shall not be deducted from the gross profits: Provided that nothing in this section shall affect the operation of sections 352 to 354 and 356 to 360. **(2)** The percentage aforesaid shall be exclusive of any fees payable to directors undersection 309(2). **(3)** Within the limits of the maximum remuneration specified in sub- section (1), a company may pay a monthly remuneration ☞ to its managing or WTD in accordance with the provisions of section 309 or ☞ to its manager in accordance with the provisions of section 387. **(4)** Notwithstanding anything contained in sub- sections (1) to (3), but subject to the provisions of section 269, read with Schedule XIII, if, in any FY, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any managing or WTD or manager, by way of remuneration any sum exclusive of any fees payable to directors under section 309(2), except with the previous approval of the CG. ☆ **Section 309** of the Companies Act, 1956 deals with the Remuneration of Directors **(1) Section 309(1)** prescribes the formalities which have to be complied with for fixing of the remuneration of a MD or WTD of a company. **(2) Section 309(2)** deals with director sitting fees for attending each meeting of the Board. **(3) Sections 309(3)**A director who is either in the whole-time employment of the company or a managing director may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other. **Note:** Proviso to Section 309(3) states that except with the approval of the CG such remuneration shall not exceed 5% of the net profits for one such director, and if there is more than one such director, 10% for all of them together. ☆ **Section 637A** of the Act makes it clear inter alia that where the CGis required or authorised by any provision of the Act to accord approval in relation to any matter, then, in the absence of anything to contrary contained in such or any other provision of the Act, the CG may accord such approval subject to such conditions, limitations or restrictions as it may think fit to impose.
Legal Principles held—	☆ In plain reading of Section 309, we understand that Section 309 does not deal with the appointment of MD. It only pertains to the remuneration of MD or WTD **who have already been appointed**. The effect of the proviso to section 309 (3) is that if the tenure of a **MD who has already been appointed** continues after the coming into force of the Act, the remuneration to be paid to such a **MD shall not** after the coming into force of the Act exceed 5 % of the net profits for one such director, and if there be more than one such director, 10 % for all of them together. ☆ However, the present is not a case of MDs having been appointed earlier and continuing to act as such after the coming into force of the Act.
Decision	☆ **In our opinion, the CLB acted well within its power in imposing this condition**.

	☆ In view of the provisions of sections 269 and 637A of the Act, we find **no infirmity in the condition imposed by appellant Board**. The provisions of both sections 269 and 637A expressly deal with the question which arises directly in this ease. ☆ A large number of instances have also been given by the CLB and it would appear there- from that the maximum remuneration which has been allowed by the CLB to the MD of any company is Rs. 1,20,000. ☆ Therefore, the condition imposed by the CLB w.r.t. maximum remuneration payable to MD by way of Commission and salary is valid in law. No individual as MD should not be paid remuneration annually exceed Rs. 1,20,000 or monthly Rs. 10,000.

57. IN THE MATTER OF TMD FRICTION INDIA PVT LTD [DEL] CO.PET. 15/2018

☆ Delhi HC admitted the Appeal.
☆ Delhi HC consider the detailed procedure for section 497 of Companies Act, 1956 deals with Voluntary winding up and passed winding up order.

Fact of the Case	This is a petition filed under Section 497(6) of the Companies Act, 1956 (herein referred to as "the Act") by the Official Liquidator (OL), seeking for voluntary winding up of TMD Friction India Private Limited (in Members Voluntary Liquidation) (herein referred to as the "said company").
Legal Principles held—	☆ At the time of Members Voluntary Winding up of the said company, there were two shareholders. ☆ The directors at the time of Members Voluntary Winding-up were Mr. Stefan Bernhard Gunnewig, Mr. Frank Heinz Malburg and Mr. Xavier Louis Marie Roth Le Gentil. ☆ The financial position of the said company as disclosed in the audited balance sheets ending as on 31.03.2014 & 31.03.2013 are also annexed to the present petition. ☆ The **prescribed Form No. 149 for the Declaration of Solvency was filed** with the ROC. ☆ Pursuant to the provisions of Section 484(1) of the Act and other applicable provisions of the Act, **the E.O.G.M. of the said company was held** on 30.12.2014 and **a special resolution was passed** whereby Sh. Rajiv Kumar Adlakha, **CS was appointed as Voluntary Liquidator** of the said company at a remuneration fixed at Rs.1,50,000/-. ☆ In this regard Form MGT-14 was filed with the ROC. ☆ That as per the requirement of Section 485 of the Act, **the said company has published a notification in newspapers**. ☆ The **notice for appointment of Voluntary Liquidator in Form 152 as required under Section 493 read with Rule 315 of the Companies (Court) Rules, 1959 was filed with ROC by the said Company**. ☆ The Voluntary Liquidator **had also filed Form 151 with ROC for his appointment as Voluntary Liquidator**. ☆ Further, pursuant to the provisions of Section 497 of the Act, **the Liquidator has also published Form No.155 in the newspaper and in Official Gazette for final meeting**. ☆ The Final Meeting of the said company was held on 07.04.2017 and **the Voluntary Liquidator filed accounts of the said Company in Form No. 156 & 157 as prescribed under Rule 329 & 331 of the Companies (Court) Rules, 1959 for the period from 30.12.2014 to 27.01.2017 with the OL on 05.09.2017 and before the ROC on 10.04.2017**. ☆ The **OL has received No Dues Certificate from Income Tax Department** dated 07.10.2015 and **no objection has been received from the ROC**.

	☆ The **Voluntary Liquidator has filed affidavit** dated 31.10.2017 and the shareholders of **the said company have filed indemnity bonds** dated 03.05.2017 with the OL **undertaking that in case of loss to any person or any valid claim arising after the winding up of the said company**, they undertake to indemnify any person for such loses, valid claim and liability. ☆ The OL is also satisfied that the **necessary compliance of Section 497 and other relevant provisions of the Act have been made and the affairs of the said company have not been conducted in a manner prejudicial to the interest of its members or to the public interest** and the said company may be dissolved. ☆ In view of the foregoing and in view of the satisfaction accorded by the OL by way of the present petition, **the said company is hereby wound up and shall be deemed to be dissolved with effect from the date of the filing of the present petition** i.e. 26.04.2018.
Decision	☆ **Delhi HC held that the said company is hereby wound up and shall be deemed to be dissolved with effect from the date of the filing of the present petition** i.e. 26.04.2018

58. BALKRISHAN GUPTA & ORS v. SWADESHI POLYTEX LTD & ANR [SC]

Hint: Shareholder of Respondent Company is a body corporate and such shareholder failed to various dues towards employees and UP Government. As a result, the Collector of Kanpur appoint receiver who pledge shares 10 lakhs in respect of such shareholder. The question arose in this case, whether such shareholder has a right to vote in the meeting and has a right to call EGM under Companies Act, 1956 even the share held by such body corporate is pledge by Receiver.

Decision: The Supreme Court dismissed the appeal and decide the case in favour of Respondents. SC held that **The Supreme Court** held that order of attachment **CANNOT** have the effect of **depriving the holder of the shares of his title to the shares**.

Fact of the Case	☆ The Cotton Mills Company acquired 10 lakhs shares of Rs. 10 each in Swadeshi Polytex Ltd. ☆ Later on, Cotton Mills Company on account of a **very serious setback in its financial position**, the Cotton Mills Company could **NOT MEET** the wage bill, the dues of the U.P. Electricity Board and several other monetary claims against it. There were serious labour troubles in its factory and **its work virtually became paralysed**. ☆ The total liability of the Cotton Mills Company was in the order of Rs. 2.34 crores in the year 1977. On 27/10/1977, the **Collector of Kanpur passed an order under Section 182-A of the U.P. Land Revenue Act, 1901**(hereinafter referred to as 'the Land Revenue Act') read with Section 5 of the U.P. Government Electrical Undertakings (Dues Recovery) Act, 1958 appointing a Receiver in respect of the Cotton Mills Company for a period of **six months with various powers specified therein** and in particular to **SEIZE**1 lac (i.e. 1,00,000) of shares of the Polytex Company of the face value of Rs 10 lacs held by the Cotton Mills Company and to pledge them in favour of the State government of Uttar Pradesh **against a loan for the purpose of meeting the dues payable to the employees of the Cotton Mills Company** and he made a **FURTHER ORDER** under Section 149 of the Land Revenue Act read with Section 5 of the U.P. government Electrical Undertakings (Dues Recovery) Act, 1958 **attaching the remaining 9 lakhs shares** of the Polytex Company held by the Cotton Mills Company and empowering the Receiver to seize them. **Both the order appointing the Receiver and the order attaching 9 lakhs shares** were incorporated in the same document.

	☆ The dispute involved in this case relates to the validity of an extraordinary general meeting (EGM) of the Swadeshi Polytex Ltd. (hereinafter referred to as 'the Polytex Company'), held pursuant to a notice issued under section 169 of the Act by some of its members. ☆ The total paid-up equity share capital of the Polytex Company is Rs. 3,90,00,000 (39,00,000 shares of Rs. 10 each) and it is **NOT** disputed that if the 10 lakhs shares held by the Cotton Mills Company **ARE OMITTED** from consideration, the remaining requisitionists would **NOT** have sufficient voting strength to issue a notice under section 169 of the Act. ☆ The Appellant contend that the Cotton Mills Company could not join the other requisitionists in issuing the notice under section 169 of the Act calling upon the Polytex Company to call the EGM and **WITHOUT** the support of the shares held by the Cotton Mills Company, the remaining requisitionists would **NOT** have been eligible to requisition the meeting.
Applicable Law	☆ **<u>Section 41 of the companies Act, 1956 Definition of "Member":</u>** **a.** The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members. **b.** Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company. **c.** Every person holding ESC or company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be members of the concerned company. ☆ **Section 60 of the Code of Civil Procedure, 1908** says that except those items of E property mentioned in its proviso, lands. houses, or other buildings, goods money, banknotes, cheques, bills of exchange, hands, promissory notes, Government securities, bonds or other securities of money, debts, shares in a corporation and all other saleable property, movable or immovable, belonging to a judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf, is liable for attachment and sale in execution of a decree against him. ☆ **Section 64 of the Code of Civil Procedure, 1908** states that where **an attachment of a property is made**, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies **contrary to such attachment**, **shall be VOID** as against all claims enforceable under the attachment.
Legal Principles held—	☆ In perusal of section 41 of the Companies Act, 1956, Any other person **WHO AGREES** to become a member of a company and whose name is entered in its register of members shall be a member of the company. In the present case the two conditions namely that there is an agreement to become a member and that his name is entered in the register of members of the company are cumulative. **Both the conditions have to be satisfied to enable him to exercise the rights of a member**. Subject to section 42 of the Act, a company or a body corporate may also become a member. **When once a person becomes a member, he is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the provisions of the Act**. ☆ The voting rights of a member of a company are governed by section 87 of the Act. Section 87of the Act says that subject to the provisions of section 89 and section 92(2) of the Act every member of a company limited by shares and holding any ESC therein shall **have a right to vote, in respect of such capital, on every**

	resolution placed before the company and his voting right on a poll shall be in proportion to his share of the paid-up equity capital of the company. ☆ Section 182A(4) of the Land Revenue Act provides that Rules 2 to 4 of Order XL of the Code of Civil Procedure, 1908 shall apply in relation to a Receiver appointed under that section. ☆ A Receiver appointed under Order XL of the Code of Civil Procedure **only holds the property committed to his control under the order of the court but the property does not vest in him**. ***The privileges of a member can be exercised by only that person whose name is entered in the Register of Members. A Receiver whose name is not entered in the Register of Members cannot exercise any of those rights unless in a proceeding to which the company concerned is a party and an order is made therein***. ☆ Under section 51 of the Code of Civil Procedure, 1908 a Receiver may be appointed by a civil court on the application of a decree-holder in execution of a decree for purposes of realising the decree-debt. This is only a mode of equitable relief granted ordinarily when other modes of realization or the decretal amount are impracticable. A Receiver appointed under that section will be able to realise the amounts due from a garnishee and his powers are taking to the powers of a Receiver appointed under Order 40 rule 1 of the Code of Civil Procedure, 1908. But he would not have any beneficial interest in the assets of the judgment-debtor. He collects the debts not as his own but as an officer of the court. ☆ Mere appointment of a Receiver ***in respect of certain shares of a company without more cannot deprive the holder of the shares whose name is entered in the Register of Members of the company the right to vote at the meetings of the company or to issue a notice under section 169 of the Act.*** ☆ What is **forbidden** under section 64 of the Code of Civil Procedure **is a private transfer** by the judgment-debtor of the property attached **contrary to the attachment**, that is, contrary to the claims of the decree holder under the decree for realisation of which the attachment is effected. ☆ A private transfer under section 64 of the Code of Civil Procedure is **not absolutely void**, i.e., **void as against all the world but void only as against the claims enforceable under the attachment**. Until the property is actually sold, **the judgment-debtor retains title in the property attached**. ☆ Under Rule 76 of Order 21 of the Code of Civil Procedure, 1908, the shares in a Corporation **which reattached may sold through a broker**. In the alternative such shares may be sold in public auction under Rule 7 thereof. On such sale' either under Rule 76 or under Rule 77, the purchaser acquires title. ☆ **Until such sale is effected, all other rights of the judgment-debtor remain unaffected** even if the shares may have been seized by the officer of the count under Rule 43 of Order 21 of the Code of Civil Procedure, 1908 for the purpose of effecting the attachment, or through a Receiver or through an order in terms of Rule 46 of Order 21 of the Code of Civil Procedure may have been served on the judgment-debtor or on the company concerned.
Decision	☆ **The Supreme Court dismissed the appeal and decide the case in favour of Respondent.** ☆ **The Supreme Court** held that order of attachment **CANNOT** have the effect of **depriving the holder of the shares of his title to the shares**. We are of the view that the attachment of the shares in the Polytex Company held by the Cotton Mills Company had **NOT** deprived the Cotton Mills Company of its right ☞ to vote at the meeting or ☞ to issue the notice under section 169 of the Act.

59. KAMAL KUMAR DUTTA & ANR v. RUBY GENERAL HOSPITAL LTD. & ORS [SC]

Hint: In the present case, Respondent Company floated by elder brother. **The chord of discord grew between the brothers and attempt was made by the younger brother to oust the elder brother by denying him his shares for the medical equipment worth Rs. 3.5 Crores supplied by him from USA**. Younger brother usurps the company. Whether such act is an act of oppression & suppression. YES

Decision:

- ✫ **The SC decide the case in favour of the Appellant.**
- ✫ **The SC held that** we have examined the matter in detail and **we are satisfied that there is full proof case of oppression**. But **at the same time we do NOT feel inclined to pass an order for winding up** of the company because **it will NOT be in the interest of the company nor to the interest of the parties**.

Fact of the Case	✫ Ruby General Hospital Limited was established in memory of late wife of Dr. Kamal Kumar Dutta. Since Dr. Dutta and Dr. Binod Prasad Sinha were both NRIs, the company was being looked after by Sajal Kumar Dutta. ✫ No problem arose **for some time till the hospital was in a struggling stage**. ✫ But it appears that soon **after the hospital started showing the sign of prosperity, the chord of discord grew between the brothers and attempt was made by the younger brother to oust the elder brother by denying him his shares for the medical equipment worth Rs. 3.5 Crores supplied by him from USA**. ✫ Thus, ultimately the appellants filed a petition under Sections 397 & 398 of the Act before the CLB. ✫ The main grievance of Dr. Dutta **was denial of his shares for supply of medical equipment's worth Rs. 3.5 Crores** and **consequential ousting from the chairman and directorship of the company <u>which led to filing of a petition before the CLB in 1997</u>**. ✫ The stand of the company was that Dr. Kamal Kumar Dutta and Dr. Binod Prasad Sinha who alleged to have had 88.88% shares in the company **discontinued themselves as Directors** and **refusal of the company to allot shares to them worth the value of second hand equipment's was justified**. ✫ The CLB passed a detailed order **giving certain directions in favour of the petitioners**. ✫ **Respondents file appeal before the HC**. On appeal, **HC set aside the order of the CLB.** ✫ Appellants file special leave before the SC against the order of the HC.
Legal Principles held –	The SC consider the following facts before passing the final order: 1. Appellants contends that the High Court has **gone wrong in holding that no case is made out under Sections 397 & 398 of the Act as necessary ingredients of the said sections are NOT present in this case**. Now, we will examine whether there was **any case of oppression of the member** or **attempt to materially change in the management or control over the company** to the detriment of the company. **Point 1: Act of Oppression of the Member:** **(a)** The seed of discord started with the resolution dated 19.4.1995 **when a resolution was passed for infusing some more money in the company** and it **appears that the said resolution was passed in which** Dr. K. K. Dutta, Mr. Sajal Dutta, Wing Cdr. (Retd.) T. Chaudhuri **as Director were present**

along with special invitee, Dr. Ashok K. Maulik as Director and Mr. M. K. Datta was the Financial Controller and Secretary.

(b) Dr. Kamal Kumar Dutta took the chair as the chairman of the meeting.

(c) But the crucial resolution which was passed that gave rise to strained relationship between two brothers was to issue and **allot not exceeding 40,00,000 (forty lacs) equity shares of Rs.10/- each at par to such persons, corporate bodies, banks, mutual funds or other FIs whether or not they are the existing shareholders** of the company and in such manner as may be decided by the Board.

(d) This resolution was alleged to have **been fabricated and not passed on the date though it is alleged that Dr. K. K. Dutta was presen**t.

(e) According to Dr. K. K. Dutta, **this resolution was subsequently inserted and he was not made known about such resolution** and **he came to know about it only on a later date when he was said to be thrown out from the Managing Directorship**.

(f) Though this aspect according to Mr. Nariman was not specifically challenged before the CLB but the answer of **learned counsel for the appellants was that in fact these resolutions were not made known to the appellants and they only came to know about it at a late stage when all these resolutions were placed by Respondent No. 2, Sajal Dutta**.

(g) No proper notice was served on the appellant No. 1 who is a major shareholder of the company or to appellant No.2. If **the BM had been convened without proper service of notice on the appellants by the respondent No. 2 then such BM cannot be said to be valid**.

(h) However, Mr. Nariman tried **to explain various meetings and their subsequent confirmation by next BM to show that once the resolution of the subsequent meeting has confirmed the resolution of earlier meetings then those minutes stand confirmed irrespective of the fact that the appellants had been served or not**.

(i) It should be noted that such an important decision **was taken in the absence of the main promoter** of the company **to oust him from the Managing Directorship** and **to install Sajal Dutta in his place**, **it is the grossest act of oppression by the BODs**.

Point 2: Change in management detrimental to the interest of the main promoter:

(j) Sometime after dispatching Dr. Dutta from the Managing Directorship most of the shares were cornered by the subsidiary companies of Sajal Dutta **so as to acquire the management of the company and to alter material change in the management of the company**. **What can be more unfortunate than this**?

(k) When a **material change is brought about in the management to the detriment of the interest of the main promoter** it is squarely covered under section 398 (1) (b) of the Act.

(l) The **company which is floated by the elder brother and which has been run by the younger brother in the absence of the elder brother the younger brother manages the whole company and that the Managing Director is totally ousted and shares are being cornered substantially so as to have full control of the company, is oppression being squarely covered by section 397 (1) (b) of the Act**.

	(m) All the resolutions which have been passed by the BOD(s), or in the AGM or E.O.G.M. with regard to the raising of funds of Rs. 40 lakhs in the meeting of 19.4.1995 and the meeting dated 16.2.1996 whereby the Appellant No.1 was stripped off of his powers as MD, the resolution by which Dr. Binod Prasad Sinha was removed from the office of Director and other resolutions by which the shares were allotted to the subsidiary company of Sajal Dutta or other persons **are bad and we restore the position ante 19.4.1995 and direct that let a fresh meeting be convened and proper decision be taken in the matter in the interest of the company**.
Decision	✫ **The SC decide the case in favour of the Appellant.** ✫ **The SC held that** we have examined the matter in detail and **we are satisfied that there is full proof case of oppression**. But **at the same time we do NOT feel inclined to pass an order for winding up** of the company because **it will NOT be in the interest of the company nor to the interest of the parties**.

60. SHAH BROTHERS ISPAT PVT. LTD. v. P. MOHANRAJ & ORS. [NCLAT]

Hint: Appellant filed complaint under Section 138 of the NI Act against Corporate Debtor and Independent Director during moratorium period. The **QUESTION AROSE** in this appeal is whether the order of moratorium will **cover a criminal proceeding under Section 138 of NI Act**, which provides punishment of imprisonment for a term which may extend to three years or with fine which may extend to twice the amount of cheque or with both.

Decision: NCLAT decided the case in favour of Appellant. NCLAT held that Section 138 of the NI Act is a criminal proceeding and **NO** criminal proceeding is covered under Section 14 of IBC, 2016.**The court of competent jurisdiction may proceed with the proceeding under Section 138 of NI Act, even during the period of moratorium.**

Fact of the Case	✫ The Appellants filed complaint under Section 138 of the Negotiable Instrument Act, 1881 **PRIOR to initiation** of CIRP. Another complaint under section 138 of the Negotiable Instrument Act, 1882 was filed **AFTER** the order of moratorium. ✫ The Respondent – Directors moved before the **Adjudicating Authority** and **ARGUED** that during the period of moratorium proceeding petition under Section 138 of Negotiable Instrument Act **WAS NOT** maintainable. ✫ The Adjudicating Authority directed the Appellants to withdraw the complaint case filed under Section 138 of NI Act and treating it as a proceeding filed after order of moratorium **with observation that such action amounts to deliberate attempt on the part of Appellant and sheer misuse of the process of law**. ✫ The **QUESTION AROSE** in this appeal is whether the order of moratorium will **cover a criminal proceeding under Section 138 of NI Act**, which provides punishment of imprisonment for a term which may extend to three years or with fine which may extend to twice the amount of cheque or with both?
Applicable Law	Section 14(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:— **(c)** the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
Legal Principles held—	✫ The punishment under section 138 of Negotiable Instrument Act c**annot be imposed against the company** because a company **cannot be imprisoned**. However, fine can be imposed on a Company, if found guilty by **the competent court**. The Directors of the Company **being parties can be imprisoned or fine may be imposed on them**.

	✰ The Respondent submitted that the proceeding under Section 138 of the NI Act **is covered** under Section 14(1)(a) of IBC, 2016. Therefore, proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority **CANNOT PROCEED.**
Decision	✰ The NCLAT held that Imposition of fine **CANNOT** held to be a money claim or recovery against the Corporate Debtor **NOR** order of imprisonment, if passed by the court of competent jurisdiction on the Directors, they cannot come within the purview of Section 14. In fact, **NO** criminal proceeding is covered under Section 14 of IBC, 2016. ✰ The NCLAT decided in favour of the Appellant (Shah Brothers). ✰ The NCLAT held that the complaint u/s 138 can be filed against the Company. ✰ **The court of competent jurisdiction may proceed with the proceeding under Section 138 of NI Act, even during the period of moratorium.**

61. . STANDARD CHARTERED BANK& ORS v. DIRECTORATE OF ENFORCEMENT [SC]

Question: Whether a company could be prosecuted for an offence for which mandatory sentence of imprisonment is provided continued to agitate the minds of the courts and jurists and the law continued to be the old law despite the recommendations of the Law Commission and the difficulties were expressed by the superior courts in many decisions.

Hint: In the aforesaid case, the Supreme Court held that **the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company**. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way.

[Expected in June, 2020]

Fact of the Case	✰ A Prosecution was initiated against the Appellant (Standard Chartered) under section 50 read with section 51 of the Foreign Exchange Regulation Act, 1973. ✰ The appellant, relying on Assistant Commissioner, Assessment-II Bangalore & Ors v. Velliappa Textiles Ltd & ANR. (2003) 11 SCC 405, contended that Company or body corporate was not liable to be prosecuted for the offence under Section 56 of the FERA Act as the minimum punishment prescribed **is imprisonment for a term which shall not be less than 6 months and with fine**.
Applicable Law	✰ **In Velliappa Textile case,** it was held that the company cannot be prosecuted for offences **which require imposition of a mandatory term of imprisonment coupled with fine**. *It was further held that where punishment provided is imprisonment and fine, the court* ***cannot impose only a fine***. ✰ There is **NO DISPUTE** that a company is liable to be prosecuted and punished for criminal offences. It was the generally accepted modern rule is that **except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent**, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents. ✰ **In accordance with Law of Torts,** the general rule prevails that the corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorized powers, and without proof that his act was expressly authorized or approved by the corporation.**(Vicarious Liability)** ✰ In the statutes defining crimes, the prohibition is frequently directed against any "person" who commits the prohibited act, and in many statutes the term "person" is defined. **Even if the person is not specifically defined, it necessarily includes a corporation**. ✰ The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. **Large scale financial**

	irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that **amenability of the corporation** to a criminal law is essential to have a peaceful society with stable economy. So, it is **no possible to grant blanket immunity for any company from any prosecution for serious offences** merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.
Legal Principles held—	✫ That except for such crimes involve personal malicious intent, a corporation may be subject to other criminal processes even when the criminal act is committed through its agents. ✫ That in the case of strict liability, an intent that guilt shall not be predicated upon the automatic "actus reus" and is subject to the defence of due diligence. In the case of absolute liability, the legislature establishes an offence where liability arises instantly upon the breach of the statutory prohibition and no particular state of mind is a prerequisite to guilt. ✫ As the company **cannot be sentenced to imprisonment**, the court **cannot impose that punishment**, but **when imprisonment and fine is the prescribed punishment** the court **can impose the punishment of fine which could be enforced against the company**. Such a discretion is to be read into the Section so far as the juristic person is concerned. ✫ Of course, the court **cannot exercise the same discretion as regards a natural person**. ✫ So, the court would not be passing the sentence in accordance with law. As regards company, **the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company**. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way.
Decision	✫ The Supreme Court held that there is no immunity to the companies from prosecution is in respect of offences for the punishment prescribed includes mandatory imprisonment. ✫ The Supreme Court overrule the views expressed by the majority in Velliappa Textiles on this point and answer the reference accordingly. ✫ The Supreme Court decided in favour of the Respondent (Directorate of Enforcement).

62. PAHUJA TAKII SEED LTD. & ORS v. REGISTRAT OF COMPANIES, NCT OF DELHI & HARYANA [NCLAT]

NCLAT decided the case in favour of Appellant held that question raised w.r.t. compounding application is allowed in favour of Appellant (Pahuja).

[Expected in June, 2020]

Fact of the Case	✫ The Appellant Company (Pahuja Takii) along with its Officers filed applications under Section 441 of the Companies Act, 2013 for compounding of the offence(s) committed by them. ✫ The following questions were raised in this batch of appeals – **(a)** Whether the Companies Act, 2013 bars filing of a joint application for compounding of offence by a defaulting company along with its officers in default? **(b)** Whether the Companies Act, 2013 bars filing of a joint application for compounding of the same offence committed in different years? **(c)** Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with "imprisonment or fine", if repeated within a period of 3 years

	results into a mandatory imprisonment for the defaulters and whether the same can be compounded or not? **(d)** Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with "only fine", if repeated within a period of 3 years results into a mandatory imprisonment for the defaulters and whether the same cannot be compounded? **(e)** Whether the Tribunal has jurisdiction to compound offences where the fine prescribed for such offence does not exceed Rs. 25,00,000/
Legal Principles held—	✫ On perusal of sub-section (1) to (4) of Section 441 of the Companies Act, 2013, any offence committed by a company or any officer thereof which is punishable with fine only, can be compounded by the Tribunal, the Regional Director or any officer authorised by CG. ✫ <u>**REPLY TO POINT (e)**</u>**:** On plain reading of Section 441, it was observed that Section 441 **puts a restriction on the power** of the 'Regional Director' and 'the authorised officers of the CG' permitting them to compound the offences **wherein the maximum amount of fine does not exceed Rs. 25,00,000** and is punishable with 'fine only'. No such fetter has been put on powers of the Tribunal, **which is the main forum for such compounding of offences**, the other forum of 'Regional Director' and 'Officer of the CG' **being alternative but restricted by extent of quantum of punishment**. <u>*Therefore, the Tribunal has the powers to compound all the offences irrespective of any pecuniary limit as evident from a bare perusal of Section 441*</u>. ✫ <u>**REPLY TO POIINT (a) & (b)**</u>**:** In terms of the scheme envisaged under Section 441 of the Companies Act, 2013, there is **NO BAR** on preferring a **single application for compounding the same offence committed during different FY(s)** by the Company and its Officers, **NOR** there **do any bar on a joint application being preferred by a Company along with its Officers in default**. It is **trite** that procedures are deemed to be permitted unless expressly prohibited. In this connection, we may refer **the decision of the Hon'ble SC in Rajendra Prasad Gupta v. Prakash Chandra Mishra and Ors.** Further, **in absence of any specific bar of 'joinder of parties' or joinder of separate cause of actions** in preferring a compounding application, we hold that joinder of parties for same offence is **permitted**. Since facts leading to any non-compliance under the Act on the part of a company and its officers in default will be same, any suggestion to the contrary will only lead to multiplication of proceedings and different findings, which is not desirable. It can be concluded that there is **no bar under the Companies Act, 2013 in filing joint compounding applications**. ✫ Section 451 of the Companies Act, 2013 deals with "punishment in case of repeated default". *"If a company or an officer of a company commits an offence punishable* ***either with fine or with imprisonment*** *and where the same offence is committed for the second or subsequent occasions within a period of 3 years,*

	*then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence **<u>in addition to any imprisonment provided for that offence</u>**".* ✰ **<u>REPLY TO POINT (c)</u>:** As per Section 451, where any offence which is punishable with fine or with imprisonment and if the same offence is committed within a period of 3 years, then they shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence. However, imposing imprisonment is discretion of the prosecuting authority or court to punish defaulter with imprisonment. In view of this, imprisonment is not mandatory. As a result, it is compoundable. ✰ **<u>REPLY TO POINT (d)</u>:** A bare perusal of the provision makes it evident that Section 451 only provides that 'fine' in case of any repeated defaults shall be 'twice the amount of fine', in addition or in alternative to any imprisonment for such default if prescribed under the relevant provisions of Act, 2013. It does not make the imprisonment mandatory.
Register of Members, etc. **[Section 88(5)]**	if a company does not maintain a register of members or debenture holders or other security holders or fails to maintain them in accordance with the provisions of section 88(1) or section 88(2), ✰ the company and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 3 lakhs and ✰ where the failure is a continuing one, with a further fine which may extend to Rs. 1,000 for every day, after the first during which the failure continues.
	☞ It was already held that **companies cannot be imprisoned** but if such Company also commits an offence punishable with fine, in such case, if such offence is **committed for the second or subsequent occasions within a period of 3 years**, then, the company and every officer thereof who is in default shall be liable to pay twice the amount of fine. The sentence 'in addition to any imprisonment' **WILL NOT BE APPLICABLE** to the Company even if provided for that offence. ☞ On the other hand, **if an officer of a company** commits an offence punishable either with fine or with imprisonment and the same offence is committed for the second or subsequent occasions within a period of 3 years, then, such officer thereof who is in default shall be punishable with twice the amount of fine for such offence. It is **not necessary that additional imprisonment will be automatically attracted**, in **absence** of any such additional **punishment of imprisonment** is prescribed under the substantive penal provision of the Act.

Penalty for Contravention Chapter VI (deals with registration of Charges) **[Section 86]**	**(1)** If any company contravenes any provision of this Chapter VI, ✰ The company shall be punishable with fine which shall not be less than Rs. 1 lakh but which may extend to Rs. 10 lakhs and ✰ Every officer of the company who is in default shall be punishable ☞ with imprisonment for a term which may extend to 6 months or ☞ with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 1 lakh, or ☞ with both. **(2)** If any person wilfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of section 77, he shall be liable for action under section 447.
	☞ Whether such officer is to be imposed punishment of fine or imprisonment or both will dependent ***on the basis of gravity of offence which can be decided only by the Court of Competent Jurisdiction (Special Court)***. ☞ Such power having been delegated to the Court of Competent Jurisdiction, **it cannot be held that in view of Section 451** for committing the same offence for the second or subsequent occasions within a period of 3 years, **the officer is liable to be imprisoned**. If **such interpretation is given**, then **it will amount to taking away the power of the Competent Court (Special Court) to decide whether in the fact and circumstances of the case and on the basis of gravity of offence**, the officer will be liable for punished of imprisonment or fine or both.
Interpretation	Q. How the period of three years to be counted to determine that the same offence is committed for the second or subsequent occasions? **Reply:** In order to interpret the words "where the same offence is committed for the second or subsequent occasions within a period of 3 years" used in Section 451 with the help of Explanation to Section 441(2) are as below: *"It is provided that "any second or subsequent offence committed after the expiry of a period of 3 years from the date on which the offence was previously "compounded", **shall be deemed to be a first offence**".*
Decision	✰ The NCLAT also held that Tribunal is wrong in holding that if Section 451 is read along with Section 441(6) for offence punishable with 'fine or imprisonment' or 'only with fine' or 'fine and imprisonment' on repeated defaults committed within 3 years, the Tribunal does not have jurisdiction to compound the offence. ✰ The NCLAT held the above principles with respect to the questions asked. ✰ The NCLAT decided in favour of the Appellants (Pahuja Seed).

63. WORKMEN OF ROHTAS INDUSTRIES LTD. v. ROHTAS INDUSTRIES LTD [SC]

Hint: In the present case, SC **issued directions to the Respondent Company to pay the workers' salaries and wages** in three instalments. However, **the same was NOT paid**. Further, the State of Bihar **has issued a notification wherein this industry has been declared to be a sick industry** and by this Notification the Bihar Government **has declared the company in liquidation to be a relief undertaking for one year from the date of issue of the notification**. On the basis of this notification, **an attempt was made to suggest that the liability of the industry for payment to the workers cannot be enforced**. The finished goods is in dispute is hypothecated with the secured creditor. In this circumstances, **the workmen approached the SC for the release of their dues**. **The question arise before the SC "Whether workmen wages get priority over secured creditors claim"?**

Decision:

- ☆ **The SC decide the case in favour of the Appellant.**
- ☆ **The SC direct that** direct **that the finished stocks which are lying with the industry valued at Rs.91,77,000 shall immediately be disposed of and out of this the wages and other dues of the workers** for the period from May 1984 till 8th July, 1984, shall be met. **The balance, if any, will be utilised for meeting other pressing demands in the discretion of the Official Liquidator subject to orders of the Court**.

Fact of the Case	☆ In the present case, SC **issued directions to the Respondent Company to pay the workers' salaries and wages** in three instalments. However, **the same was NOT paid**. ☆ Further, the State of Bihar **has issued a notification wherein this industry has been declared to be a sick industry** and by this Notification the Bihar Government **has declared the company in liquidation to be a relief undertaking for one year from the date of issue of the notification**. ☆ On the basis of this notification, **an attempt was made to suggest that the liability of the industry for payment to the workers cannot be enforced**. ☆ In this circumstances, **the workmen approached the SC for the release of their dues**.
Legal Principles held—	The SC **consider the following facts** before passing the final order: **(a)** The State of Bihar frankly admitted that so far as the liability of payment of wages to the workers is concerned the SG wants that it should be paid. **(b)** On the direction of the SC, a report had been submitted by the Official Liquidator. This report shows that **the products produced by this industry which are lying in stocks are of the value of Rs. 91,77,000**. This report **also discloses that from the month of May, 1984 till 8th July, 1984 when this industry closed down an amount of Rs. 89,00,000 remains to be paid to the workers as their salaries and emoluments**. **(c)** The learned counsel appearing for the SBI' and other FIs **attempted to contend that these goods which are the finished products lying in stock are pledged with these Banks**. Therefore, **they have a prior claim over the sale proceeds of these stocks. It was contended that this could not be sold and the workers could not be paid off**. **(d)** On the other hand, it was suggested that **a scheme has been drawn up to review the industry in the interests of the workers and the society in general**. **(e)** It is no doubt true that these stock **which have been shown' in the report and the value of which has been shown by the Liquidator as Rs.91,77,000 is pledged with Banks**, **is a priority in law in favour of the Banks.** **(f) However,** it also could not be disputed that these stocks were the products of this industry before its closure and, therefore, **the workers also contributed their labour and it is the result of their hard-work that these stocks could be produced**. Therefore, in our opinion, **it could NOT be said that the wages and emoluments for the period up to closure would NOT rank in priority**. **(g)** It is also significant that after the closure in July, 1984, till today in spite of the order passed by this Court the workers have not been paid. **Their subsistence and living is also perhaps of paramount importance and has to rank with highest priority**. **(h)** Looking **into all the circumstances and taking a broad and humane view** of the situation we are of the opinion, **that it would be just and proper that these goods which are lying in stock should be sold and out of the sale proceeds** the workers should be paid their dues up to the date of closure (from May 1984 to

	July 1984 i.e. 8th July, 1984) **so that at least they will get something for subsistence**. **(i)** Learned counsel for the **SBI pointed out that his client has paid for the insurance of certain assets and for loss thereof in whole or in part**, the insurance has paid for the loss. The **Official Liquidator may keep that amount separately and allow the SBI to adjust the same against its insurance**. So far **as the pledge and the priority of the financial institutions are concerned, we have no doubt that they have other sufficient securities and properties of the Company.** **(j)** Therefore, **if this stock of finished products are sold to meet the basic requirements of the workers, their interests would not be in jeopardy**. **(k)** In addition to these, we also hope and trust **that if the loss of this amount of Rs.91,77,000 somehow comes in way of the scheme of restarting of the industry, the GOI would find funds to save the situation and help early revival of the Company**.
Decision	☆ **The SC decide the case in favour of the Appellant.** ☆ **The SC direct that** direct **that the finished stocks which are lying with the industry valued at Rs.91,77,000 shall immediately be disposed of and out of this the wages and other dues of the workers** for the period from May 1984 till 8th July, 1984, shall be met. The balance, if any, will be utilised for meeting other pressing demands in the discretion of the Official Liquidator subject to orders of the Court.

64. SAS HOSPITALITY PVT LTD & ANR v. SURYA CONSTRUCTIONS PVT LTD & ORS [DEL]

Hint: In the present case, The Plaintiff held 99.96% shares in the Defendant Company, but **since Defendant Nos. 5 to 9 were allotted shares of the Defendant Company in an illegal manner (i.e. non-compliance of Section 59 & Section 62)** as contended by the Plaintiff, **its shareholding stood diluted** to 21.44%. The **defendants in the suit challenged the jurisdiction of the Civil Court** in adjudicating the matter and **instead argued that the NCLT was the appropriate forum**.

Decision:

☆ **The Delhi HC decide the case in favour of the Defendant.**

☆ The HC examined the Defendants' contention that with the introduction of NCLT, HC has no jurisdiction to try and entertain the present petition in view of the bar contained in section 430 and section 434(1)(c) of the Companies Act, 2013.

Fact of the Case	☆ In the present suit, the plaintiff i.e. SAS Hospitality filed a suit seeking a declaration that the allotment of shares by Surya Constructions (i.e. Defendant Company) in favour of five investors (i.e. Defendant No. 5 to 9) **is null and void**. ☆ The Plaintiff held 99.96% shares in the Defendant Company, but **since Defendant Nos. 5 to 9 were allotted shares of the Defendant Company in an illegal manner** as contended by the Plaintiff, **its shareholding stood diluted** to 21.44%. ☆ The **defendants in the suit challenged the jurisdiction of the Civil Court** in adjudicating the matter and **instead argued that the NCLT was the appropriate forum**.
Applicable Law	**(a)** Section 62 deals with the procedure for issuance of share capital. The said procedure involves sending of a letter of offer to existing shareholders [Section 62(1)(a)] and to employees [Section 62(1)(b)]. The manner of sending of the said offer is also prescribed. **The said offer also has to contain the details as to**

	the terms under which the offer is being made, including the terms for conversion of debentures or loans to shares. **(b)** Upon this procedure being followed, **the subscribed share capital can be increased** by the company. **(c)** The effect of the increase in the share capital and allotment of the same to any person has an automatic effect, i.e., **it results in the alteration of the register of members under Section 59 of the 2013 Act**. Thus, while the power to issue share capital vests in the company, the said power has **no** effect, and has no consequence without complying with the provisions of the said Sections. **(d)** **Any dispute in respect of rectification of the register of members** under Section 59, can be **raised by any person aggrieved to the Tribunal i.e., the NCLT**.
Legal Principles held—	☆ **The Delhi HC consider the following applicable laws before passing the final order:** 1. The NCLT has been **vested with powers** that are far reaching **in respect of management and administration of Companies**. 2. Section 407 deals with the constitution of the NCLT whereas Section 420 has vested the **Tribunal with powers to "pass such orders thereon as it think fit**". Tribunal is also vested the power of review. 3. Section 424 states that the **Tribunal has the same powers and functions as are vested with a Civil Court**. In addition to the above, the Tribunal also has the **power to punish for contempt**, which was **hitherto NOT available** with the CLB. In various ways, the **NCLT is NOT merely exercising the jurisdiction of a Company Court under the new Act**, but is also vested with inherent powers and powers to punish for contempt. 4. The bar contained in Section 430 of the 2013 Act **is in respect of entertaining "any suit", or "any proceedings"** which the NCLT is "empowered to determine". In the present case, **(a)** The NCLT would be **empowered to determine that the allotment of shares in favour of the Defendant Nos. 5 to 9 was NOT done in accordance with the procedure prescribed under Section 62** of the 2013 Act. **(b)** The NCLT is also empowered to determine as to **whether rectification of the register is required to be carried out owing to such allotment, or cancellation of allotment ordered, if any**. **(c)** The NCLT can also determine if in the interregnum, the Defendant Nos.5 to 9 **ought to exercise any voting rights**. **(d)** The NCLT would be **empowered to pass any such orders** as it thinks fit, for the **smooth conduct of the affairs** of the company, which would include **an injunction order protecting the assets** of the Defendant No.1 Company. **(e)** The NCLT would also be **empowered to oversee and supervise** the working of the company, and **also appoint such persons as it may deem necessary to regulate the affairs** of the company. **(f)** The **non-compliance of any conditions** contained in Section 62 of the 2013 Act **also constitutes mismanagement of the company**, inasmuch as under Section 241 of the 2013 Act, **the conduct of affairs of the company "in a manner prejudicial" to any member or "in a manner prejudicial to the interest of the company", would be governed by the same**.

	(g) The jurisdiction vests with the Tribunal to go into these allegations under Section 242 of the 2013 Act. **(h)** Section 242(2), **the NCLT has the power to pass "such order as it thinks fit", including providing for "regulation of conduct of affairs of the company in future".**
Decision	☆ **The Delhi HC decide the case in favour of the Defendant.** ☆ The HC examined the Defendants' contention that with the introduction of NCLT, HC has no jurisdiction to try and entertain the present petition in view of the bar contained in section 430 and section 434(1)(c) of the Companies Act, 2013.

65. K. J. SUWRESH & ANR v. TEAMLEASE STAFFING SERVICES PVT. LTD. & ANR [NCLAT]

Hint: In the present case, M/s. ASAP Info Systems Private Limited – Transferor Company No. 1 and M/s. Nichepro Technologies Private Limited – Transferor Company No. 2 and M/s. TeamLease Staffing Services Pvt. Ltd. – Transferee Company **made joint application for approval of scheme of Amalgamation before the NCLT** under Section 230 of the Companies Act, 2013. On receipt of company petition, **NCLT approve the scheme of amalgamation**. The Appellant (i.e. K. J. Suwresh and K. Lakshmisuthaa) holding 100% equity shares in the Transferor Company No. 1 - ASAP Info Systems Private Limited and there was Share Purchase Agreement (referred to as SPA in short) dated 04.07.2016 **between them and the transferee Company whereby the 100% shareholding was to be transferred by them** to the transferee Company (i.e. M/s. TeamLease Staffing Services Pvt. Ltd.). He put grievance is that the payment was to be made by the Transferee Company in tranches and **after initial payment by the transferee company**, **there has been default.** According to the Appellants, they ought to **have been treated either as shareholder or creditors of the transferee Company and in either case they were entitled to Notice.** It is claimed that **NO Notice was given to them** and hence **they are aggrieved by such amalgamation**.

Decision:
NCLAT decide the case in favour of the Respondent, while going through the material on record, **we do not find that there is any substance in the grievance raised by the Appellants**.

Fact of the Case	☆ In the present case, M/s. ASAP Info Systems Private Limited – Transferor Company No. 1 and M/s. Nichepro Technologies Private Limited – Transferor Company No. 2 and M/s. TeamLease Staffing Services Pvt. Ltd. – Transferee Company **made joint application for approval of scheme of Amalgamation before the NCLT** under Section 230 of the Companies Act, 2013. On receipt of company petition, **NCLT approve the scheme of amalgamation**. ☆ The Appellant (i.e. K. J. Suwresh and K. Lakshmisuthaa) holding 100% equity shares in the Transferor Company No. 1 - ASAP Info Systems Private Limited and there was Share Purchase Agreement (referred to as SPA in short) dated 04.07.2016 **between them and the transferee Company whereby the 100% shareholding was to be transferred by them** to the transferee Company (i.e. M/s. TeamLease Staffing Services Pvt. Ltd.). ☆ He put grievance is that the payment was to be made by the Transferee Company in tranches and **after initial payment by the transferee company**, **there has been default.** ☆ According to the Appellants, they ought to **have been treated either as shareholder or creditors of the transferee Company and in either case they were entitled to Notice.** ☆ It is claimed that **NO Notice was given to them** and hence **they are aggrieved by such amalgamation**.
Legal Principles held—	☆ The following arguments raised by the learned Counsel for the Respondents:

	☞ On the Affidavit executed by the Appellant is in our record, and **it is clear and apparent that the Appellants had knowledge**. ☞ The Appellants **clearly had knowledge and information regarding the scheme of amalgamation of these Companies and had given their No Objections**, **even if they relate to Appellant No. 1 in capacity of Director of Lakshmi Car Zone Limited**. ✫ At the time of arguments, Counsel for the Appellants accepted **that Diary No. 4167 shows that the audited balance sheet as available was till 31.03.2016** and **the Share Purchase Agreement was of subsequent date of 04.07.2016**. ✫ Although it is argued that, **the Share Purchase Agreement being subsequent**, **the Auditors may not have known about the same and so did not refer**. ✫ We find from the certified copy of record of proceedings before NCLT, Chennai filed with Diary No.4167 that the Official Liquidator in his Report para – 6 noted that **the CA did record that there was change in management in the month of August, 2016 in respect of transferor Company No.1**. ✫ Para – 4 of the Report of Official Liquidator **shows that both the transferor Companies were wholly owned subsidiaries of transferee Company**.
Decision	✫ **NCLAT** held that we are **not impressed by the arguments on behalf of the Appellants that they had different capacity as the 100% shareholders of the transferor Company No.1 which had entered into the Share Purchase Agreement**. Thus, in that capacity **Notice should have been given to them** and **their objections or NO objections should have been taken**. ✫ **NCLAT** held that after execution of SPA by the Appellant, **they handed over their shares and admitted that they had resigned as Directors on 01.01.2017**. ✫ In fact, the **Appellants even approved the balance sheet of the transferor Company No.1, as on 31st March, 2016 by signing the same on 31.08.2016 as can be seen from Page – 66 of Diary No.4167**. ✫ **It appears** that after going through such documents is that the **Appellants were clearly aware of the proceedings relating to the scheme of amalgamation and had no difficulties initially but it appears that, as their transaction based on SPA landed in difficulties** and so, now **they want to raise grievances** to the scheme of amalgamation on the **plea that Notice to them also was necessary**. ✫ NCLAT decide the case in favour of the Respondent, while going through the material on record, **we do not find that there is any substance in the grievance raised by the Appellants**.

66. INDUSTRIAL CREDIT AND INVESTMENT CORPORATION OF INDIA LTD. v. M/S. SRINIVAS AGENCIES & ORS [SC]

Hint: In the present case, Secured creditors has right to realise their debt from the assets of the company. Therefore, the secured creditor approaching the civil court for realisation. The question arise before the SC " whether the company court has power to permit the secured creditor to proceed with suit against the company after the winding-up order made or company court should transfer to itself such suit during the pendency of winding up proceedings. **LAWS EXPLAINED IN THIS CASE**

Decision:

✫ **The SC held that the approach of the company court would depend upon the facts and circumstances of each case having regard to the position of the plaintiff secured creditor vis-à-vis other secured creditors. But, the company court should not transfer the suit to itself merely for its own convenience.**

It also keep in mind the rationale behind the enactment of the Recovery of Debt due to the Banks and FIs Act, 1993.

☆ **It will also pertinent that the terms to be imposed by the company court while grants the leave has to be reasonable, which would, of course, vary from case to case. Such an approach would maintain the integrity of the secured creditor who had approached the civil court. The Company Court shall also apprise itself about the facts whether dues of workmen are outstanding, if so, to what extent. The company court is to look after the interest of all the creditors.**

Fact of the Case	☆ The **extent of right of secured creditors to realize their debts** from the assets of a company which is under winding-up or has been wound up by approaching fora other than the company court, was required to be spelt out (explained in detail) in these appeals. ☆ The foundational premise of the aforesaid points is that a **secured creditor stands outside the winding-up proceeding** and under the law **he can proceed to realize his security without the leave of the winding-up court**, if by the time he initiated the action the company has not beer wound up. ☆ The SC was called upon to decide **as to when a pending suit or proceeding relating to realization of the debts by such a secured creditor should be transferred to itself by a company court seized with the winding-up proceeding**.
Question is in dispute	The real bone of contention is that when the winding-up court should be granted leave to a secured creditor to proceed with the suit **(a)** after an order of winding-up has been made; and **(b)** winding-up court should transfer itself any suit or proceeding by or against the company during the pendency of the winding-up proceeding.
Legal Principles held—	The SC consider the following facts before passing the final order: **(a)** The aforesaid questions arise **because a secured creditor who has initiated a suit or proceeding in a civil court is interested in realization of his debt only**, whereas the company court looks after the interest of all the creditors; so too, the workmen's dues, which rank pari passu with debts due to secured creditors. **(b)** We have duly applied our mind to the rival contentions. It is **no doubt correct that the interest of the secured creditor, who has taken recourse to an independent proceeding to realise his debt has to be protected**. However, it is apparent **this cannot be done at the cost of other secured creditors**. **(c)** To preserve the integrity of one secured creditor, another secured creditor cannot be discredited - his integrity has to be of equal concern. **(d)** However, it may be that in a particular case **the secured creditor who has approached the civil court happens to be one who has lent huge amount, or be one who is the main secured creditor**. In such a situation, on approach being made by such creditor, **we have no doubt that company court would duly take note of this fact and should like to grant leave required by section 446(1)**; and **by the same token refuse to transfer the proceeding to his court**. This is not to say that in all cases where the proceedings have been initiated by the main secured creditor, the company court would grant leave. Such would depend on the circumstances of each case. **(e)** But, **if the position be that the secured creditor who had approached the civil court is one amongst many similar creditors, it may be that the company court feels that to take care of the interest of other secured creditors, either the relief of leave does not deserve to be granted or that the proceeding is required to be transferred to it for disposal**.

	(f) It may be **pointed out that sections 529 and 529A of the Act do contain provisions in so far as the priority of secured creditor›s claim is concerned**. Of course, **the company court would not transfer the proceeding to it merely because of its convenience ignoring the difficulties which may have to be faced by the secured creditor, who may be at a place far away from the seat of the company court**. **(g)** The need to protect the company from unnecessary litigation and cost have to be borne in mind by the company court. **(h)** Therefore, **we are of the view that the approach to be adopted in this regard by the company court does NOT deserve to be put in a straight jacket formula**. The discretion to be exercised in this regard has to depend on the facts and circumstances of each case. **(i)** While **exercising this power we have NO doubt that the company court would also bear in mind the rationale behind the enactment of Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, to which reference has made above**. **(j)** We make the same observation regarding **the terms which a company court should like to impose while granting leave**. It need not be stated that the terms to be imposed have to be reasonable, which would, of course, vary from case to case **(k)** According to us, such an approach, **would maintain the integrity of that secured creditor who had approached the civil court or desires to do so, and would take care of the interest of other secured creditors as well which the company court is duty bound to do**. **(l)** The company court shall also apprise itself about the fact **whether dues of workmen are outstanding; if so, extent of the same It would be seen whether after the assets of the company are allowed to be used to satisfy the debt of the secured creditor, it would be possible to satisfy the workmen's dues pari passu**. **(m)** The appeals and transfer cases stand disposed of with these observations, **leaving the company court to pass appropriate orders in the concerned matters in the light of what has been stated by us**.
Decision	✰ **The SC held that the approach of the company court would depend upon the facts and circumstances of each case having regard to the position of the plaintiff secured creditor vis-à-vis other secured creditors. But, the company court should not transfer the suit to itself merely for its own convenience. It also keep in mind the rationale behind the enactment of the Recovery of Debt due to the Banks and FIs Act, 1993.** ✰ **It will also pertinent that the terms to be imposed by the company court while grants the leave has to be reasonable, which would, of course, vary from case to case. Such an approach would maintain the integrity of the secured creditor who had approached the civil court. The Company Court shall also apprise itself about the facts whether dues of workmen are outstanding, if so, to what extent. The company court is to look after the interest of all the creditors.**

67. MONTREAUX RESORTS (P) LTD & ORS v. ASCOT HOTELS & RESORTS LTD & ORS [NCLAT]

Hint: SECOND Respondent was the director and hold majority stake in FIRST Appellant Company. Moreover, he holds majority stake FIRST respondent as well. During his directorship in FIRST Appellant

Company, he allotted shares to his wife and 4 daughters and moreover, he executed sale deeds of various pieces of land parcel in favour of FIRST Respondent company instead of FIRST Appellant Company. In View of these, FIRST Appellant Company file petition under section 241 before NCLT w.r.t. oppression and mismanagement in First Respondent Company. NCLT reject the petition on the ground that First Appellant has not **LOCUS STANDI and No BR is passed in Appellant Company** to proceed petition before NCLT.

Decision: **NCLAT decided the case in favour of Appellant Company** and direct the NCLT to rehear the company petition.

Fact of the Case	☆ The appellant company M/s Montreux Resort was incorporated with one of the objects to develop a Holiday Resort at Kasauli. ☆ In terms of business arrangement, it was proposed that 2nd respondent would **infuse investment for developing the project** and would be a **majority shareholder**. ☆ Respondent No.2 to 4 **were inducted as Directors**. It is alleged that Respondent No.2 **further allotted shares to his wife and 4 daughters** i.e. Respondents No.5-8, in an **attempt to fraudulently usurp (i.e. take illegally) majority control** of the **APPELLANT COMPANY** under the **garb of increasing its capital**. ☆ It is further alleged that the 2nd Respondent, during his tenure as the Director of the 1stAppellant got sale deeds of various pieces of land parcels executed in favour of 1st Respondent or his nominees **instead of getting it executed directly in favour of 1st Appellant**. ☆ It is also **alleged** that 2nd Respondent being a majority stake holder in the 1st Respondent has set up competing business with that 1st Appellant, **breaching the fiduciary relationship and the trust reposed in him by the appellants**. ☆ Therefore, appellants had filed Company Petition before the NCLT (hereinafter referred to as the Tribunal) accusing 1strespondent of oppression and mismanagement. ☆ After hearing the parties, **the Tribunal dismissed the petition**. ☆ Being aggrieved by the said order of the Tribunal the appellants have preferred this appeal. ☆ Appellants have argued that the Tribunal has **dismissed the company petition** in relation to **THREE PRELIMINARY OBJECTIONS** raised by the respondents such as ☞ Appellants have no locus standi to file the petition under section 241/242 of the Companies Act, 2013; ☞ No Board resolution have been passed by the appellant company authorising appellant to sign, verify or institute the present proceedings. ☞ Third objection raised to the maintainability thereby questioning the locus of the appellants as shareholders of 1st appellant itself.
Applicable Law	**Section 244(1) "Right to apply under section 241"** The following members of a company shall have the right to apply undersection 241, namely:— **(a)** in the case of a company having a share capital, not less than 100 members of the company or not less than 1/10th of the total number of its members, whichever is less, or any member or members holding not less than 1/10th of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares; **(b)** in the case of a company not having a share capital, not less than 1/5thof the total number of its members:

	Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.
Legal Principles held—	☆ Learned counsel for the appellants argued that **(a)** **They have not made any claim that they are the shareholders of the 1st respondent and it is not their claim**. This is also the position pinpointed by the counsel for the respondent. **(b)** They are **NOT required to be shareholders** of 1st respondent, as it is not 1strespondent whose affairs were alleged to have been mismanaged or conducted oppressively. Learned counsel further argued that the appellants agitating oppression and mismanagement of affairs of 'X' company must be shareholder of that 'x' company, not of the company "Y". **(c)** At the highest, 1st respondent could have been **stripped from the array of respondents INSTEAD of dismissing the petition**. We have given a **thoughtful consideration** on this issue and it would have to be examined whether 1st respondent is a necessary party or not and if so the appellants (original petitioners) would have been directed to make suitable amendments. In the light of it **we do not find that the dismissal of company petition at the preliminary stage** on this would be justified and **at best 1st Respondent could only be deleted from the arrays of the parties which also we have to reach a conclusion after some examination**. **(d)** The other issue on which the company petition **was dismissed** raised in this appeal that **No Board Resolution authorising representation of appellant company was presented**. On this issue learned counsel for the appellants argued that **No Board Resolution is required to be shown by shareholders of a Company claiming to act in the name of that company**, on the principle of **DERRIVATIVE RIGHTS** to act for and/or on behalf of, and/or in the name of the company. **(e)** At the highest appellants (original petitioners) could have been directed that the company **shall NOT be allowed to be represented until** such time a Board Resolution was presented or it could have been directed **to stand stripped from the array of appellants**.
Decision	☆ The NCLAT held that we are of the opinion that the appellants (original petitioners) should have been given time to produce the authority to represent the company or it could have been directed to stand stripped from the arrays of the appellants. Further 2nd to 4th appellants have also an independent right to move the application for oppression and mismanagement **against their interest** even if they are representing the company. Therefore, the dismissal of the petition that **they do not have a Board Resolution etc. would be a partial truth only which should not amount to denial of right of a shareholder to move an application for oppression and mismanagement**. ☆ The other issue raised by the Respondents was that the **appellants are not shareholders of the appellant company**. On the other hand, **the appellants have stated that they are the shareholders of the appellant company on affidavit**, therefore, the Tribunal would have directed the appellants to present the proof of their shareholding during the course of hearing and then should have come to the conclusion whether the appellants are shareholders of the appellant company or not. ☆ In view of the above observations, **we set aside the impugned order** passed in Company Petition and direct the Tribunal to **rehear the company petition in**

	view of our above observations. Parties are directed to appear before the Tribunal on 26 .11.2018

68. S. AHAMED MEERAN v. RONNY GEORGE & ORS [NCLAT]

Hint: NCLT grant waiver to minority shareholder (1st Respondent) to file petition under section 241 and 242 of the Companies Act, 2013 against the 2nd Respondent by passing order in a mechanical manner without considering any exceptional circumstances.

Decision: NCLAT decide the case in favour of appellant and held that the impugned order of Tribunal being based on wrong presumptions of fact and law and as the1st Respondent has **failed** to make out a case for waiver, the said order is **SET ASIDE**. Petition under 241 and 242 is **NOT maintainable.**

Fact of the Case	✰ S. Ahmed Meeran **is a MD** of Professional International Couriers Private Limited (herein referred to as Appellant), Ronny George **is a Minority shareholder** holding 8.99% in Professional International Couriers Private Limited (herein referred to as 1st Respondent) and Professional International Couriers Private Limited (herein referred to as 2nd Respondent) ✰ This appeal has been preferred by Appellant against order dated 14th March, 2018 passed by NCLT, Single Bench Chennai, whereby and whereunder the Tribunal **granted waiver in favour of 1st Respondent**– 'Ronny George' under Proviso to Section 244(1) of the Companies Act, 2013 **for entertaining a petition alleging oppression and mismanagement in the company.** ✰ The shareholding pattern in the 2ndRespondent Company - 'Professional International Couriers Private Limited' as on 31.03.2018, it is clear that **EXCEPT** two members all the member is individually eligible to maintain application under Section 241-242 **having more than 10% of the share of the company**. ✰ **Learned counsel** appearing on behalf of the **Appellant** submitted that the 1st Respondent **is a minority shareholder of 2nd Respondent Company holding 8.99% shares**. According to him the 1stRespondent **FAILED** to **make out a case of any 'exceptional circumstances' to get the application for waiver allowed in its favour**. Further according to him, the **impugned order is AGAINST the decision of this Appellate Tribunal in 'Cyrus Investment Pvt. Ltd. & ANR. Versus Tata Sons Ltd. & Ors., 2017[NCLAT].** ✰ **Learned counsel** appearing on behalf of the **1st Respondent** submitted that the Appellant is **reagitating the issue on wholly irrelevant ground**. According to him, the Tribunal **has considered critical facts laid down by this Appellate Tribunal** in 'Cyrus Investment Pvt. Ltd. & ANR. Versus Tata Sons Ltd. & Ors.' and after careful consideration and taken into consideration the fact that 1stRespondent is the member of the company and **the matter of complaint pertains to oppression and no similar allegations of oppression were made earlier**, the **waiver was allowed**.
Applicable Law	**Proviso to Section 241(1) of the Act** *"Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as tenable the members to apply under section 241"*
Legal Principles held—	✰ <u>Cyrus Investment Pvt. Ltd. & ANR. Vs. Tata Sons Ltd. & Ors., 2017</u>: This Appellate Tribunal noticed the shareholding pattern and taking into consideration the fact that majority of the shareholders having less than 10% of the shareholding, **EXCEPT 2got more than 10%** and that the Appellant 'Cyrus Investment Pvt. Ltd.' has invested about Rs.1,00,000 Crore in 'Tata Sons Ltd.' out of the total investment of Rs.6,00,000 Crore, **held that the Appellant of the said**

	case namely 'Cyrus Investment Pvt. Ltd.' has made out an exceptional case to maintain a petition for waiver under Proviso to section 244(1) of the Companies Act, 2013. ☆ <u>**'S. Ahamed Meeran Vs. Ronny George & Ors.', Company Appeal (AT) No. 161 of 2018:**</u> This decision relates to another Group Company, this Appellate Tribunal by judgment dated 2nd November, 2018 having noticed the shareholding pattern that **majority of them** had **less than 10% shares held that justified waiver** has been granted by the Tribunal and refused to interfere with the impugned order. ☆ The present case of the 1st Respondent 'Ronny George' is not only different but a reversal case where majority of the shareholders have more than 10% of shareholding except two who are less than 10% shareholding. Therefore, 1stRespondent **FAILED** to **make out a case of any 'exceptional circumstances' to get the application for waiver allowed in its favour**
Decision	☆ **The NCLAT** held that the impugned order of Tribunal being based on wrong presumptions of fact and law and as the1st Respondent has **failed** to make out a case for waiver, the said order is **SET ASIDE**. ☆ **NCLAT held** that the petition under 241 and 242 preferred by the 1st Respondent before the Tribunal in respect to 2nd Respondent Company is **not maintainable**.

69. COMPETITION COMMISSION OF INDIA v. BHARTI AIRTEL LTD & ORS [SC]

Hint: Question raised before the SC w.r.t. Jurisdiction of CCI or TRAI to deal with Telecom dispute, which involves anti-competitive agreement.

Decision: SC decide the case in favour of Respondent and held that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted.

Fact of the Case	☞ Reliance Jio Infocom Limited (hereinafter referred to as 'RJIL') and two other individual complainants has filed information under Section 19(1) of the Competition Act, 2002 before the CCI alleging anti- competitive agreement/cartel having been formed by three major telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited (Incumbent Dominant Operators) (hereinafter referred to as the 'IDOs'). This case were registered by the CCI. ☞ RJIL raised the issue that the IDOs have not given POIs (i.e. point of interface) as per the licence conditions resulting into non- compliance and have failed to ensure inter se technical compatibility thereby. ☞ These IDO's and Cellular Operators Association of India [COAI] filed writ petitions before the High court on the ground that the CCI did not have any jurisdiction to deal with such a matter. **The High Court has allowed these writ petitions and quashed/set aside the order passed by the CCI**. ☞ CCI appealed to the Supreme Court.
Question raised	☞ Question raised before SC w.r.t. Jurisdiction of CCI or TRAI to deal with Telecom dispute, which involves anti-competitive agreement.
Legal Principles held—	☞ The CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b)of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. The CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI. ☞ In Haridas Exports, this Court held that where statutes operate in different fields and have different purposes, it cannot be said that there is an implied repeal of one by the other. The Competition Act is also a special statute, which deals with anti-competition. It is also to be borne in mind that if the activity undertaken by some persons is anti-competitive and offends Section 3 of the Competition Act, the consequences thereof are provided in the Competition Act. Section 27 empowers the CCI to pass certain kinds of orders, stipulated in the said provision, after inquiry into the agreements for abuse of dominant position. ☞ Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. If such activities offend the provisions of the Competition Act as well, the consequences under that Act would also follow. Therefore, contention of the IDOs that the jurisdiction of the CCI stands totally ousted cannot be accepted.
Decision	☞ We are of the opinion that the HC is right in concluding that till the jurisdictional issues are straightened and answered by the TRAI which would bring on record findings on the aforesaid aspects**, the CCI is ill-equipped to proceed in the matter**.

	☞ Having regard to the aforesaid nature of jurisdiction conferred **upon an expert regulator pertaining to this specific sector, the High Court is right in concluding that the concepts of "subscriber", "test period", "reasonable demand", "test phase and commercial phase rights and obligations", "reciprocal obligations of service providers" or "breaches of any contract and/ or practice", arising out of TRAI Act and the policy so declared, are the matters within the jurisdiction of the Authority/TDSAT under the TRAI Act only**. ☞ It was also accepted that CCI is the experienced body in conducting competition analysis. The purpose of Competition Act is to eliminate such practices, which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act. ☞ **SC** decide the case in favour of Respondent and held that CCI could have dealt with this matter at this stage itself without availing the inquiry by TRAI. We also do not agree with the respondents that insofar as the telecom sector is concerned, jurisdiction of the CCI under the Competition Act is totally ousted.

70. MAHYCO MONSANTO BIOTECH (INDIA) PVT LTD. v. COMPETITION COMMISSION OF INDIA & ORS [DEL]

Issue: The main issue was "Whether Section 48 of the Competition Act, which provides for vicarious liability of persons in-charge and responsible for the conduct of business of the Company, will apply only on contravention of orders of CCI or DG under Sections 42 to 44 of the Competition Act and **not to contravention of Sections 3 and 4 of the Competition Act."**

Decision: The Delhi HC decided the case against the appellant and held that the directors and officers of the offending enterprise are vicarious liable under section 48 on account of contravention of section 3 and 4.

Fact of the Case	☞ **The Appellant plea that Section 27(b) contain the word "Turnover" which would not be applicable to officer/directors.** ☞ **The Appellant Contends that** Section 48 falls under the Chapter VI so it relates to the contravention of sections 42 to 44 of the Competition Act, 2002.
Applicable Law	☎ **Section 27(b) of the Competition Act, 2002 states** "impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse": ☎ **Section 48 of the Competition Act, 2002:** **(1)** Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention. **(2)** Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or

	direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly. **Explanation.—** For the purposes of this section,— (a) "company" means a body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.
Legal Principles held—	☞ **The HC held that we disagree with the plea taken by the appellant that Section 27(b) of the Competition Act, 2002 contain** the word 'turnover' would not be applicable to Officers / Directors. **The appellant's plea appears to be appealing on a first blush, but on a deeper consideration, if we agree with this submission then the very provision of penalty to be imposed on the Officers/Directors being 'persons' in terms of Section 27(b) would be rendered otiose/nugatory.** In other words, there would **NOT** be any stipulation of penalty to be imposed on Officers / Directors even if they are found to be violating Sections 3 and 4. **That cannot be the intent of Sections 27(b) and 48. Such a stipulation surely requires a purposive interpretation.** ☞ **The HC also held that the contention of the appellant is not valid in law that** Section 48 falls under the Chapter VI so it relates to the contravention of sections 42 to 44 of the Competition Act, 2002 inasmuch as the section contemplates "on contravention of the provisions of the Act", one shall be liable to be proceeded against and punished accordingly.
Decision	☞ **The Delhi HC** decided the case against the appellant and held that the directors and officers of the offending enterprise are vicarious liable under section 48 on account of contravention of section 3 and 4.

71. JASPER INFOTECH PVT LTD (SNAPDEAL) v. KAFF APPLIANCES (INDIA) PVT. LTD [CCI]

Hint: The main issue raised before the CCI that whether the allegation of the informant against the opposite party with regard to **imposition of resale price maintenance in contravention of the provisions of Section 3(4)(e) read with section 3(1) of the Act.**

Decision: CCI decide **the case against the appellant (i.e. in favour of Opposite Party)**

Fact of the Case	☞ **In** the present case, Jasper Infotech Pvt. Ltd (referred to as "Informant") and Kaff Appliances (India) Pvt. Ltd. (referred to as "OP"). ☞ The Informant had displayed the OP's products on its online portal 'Snapdeal' **at a discounted price**. Due to this reason, OP **displayed a caution notice** on its website **alleging that the OP's products sold by the Informant through its website are without its authorization and are counterfeit**. Further, the Caution Notice stated that the OP **will not honour warranties on its products sold through the Informant's website** and **any purchase made from these websites shall be at customers' own risk.** ☞ Aggrieved by the said Caution Notice, **the Informant served a legal notice** to OP **for withdrawal of the said Caution Notice from its website alleging violation of the provisions of the Act**. In response, the **OP stated that it does not permit any online sale of its products and has not authorized any of its dealers in this regard.** ☞ Furthermore, the OP stated in its Legal Notice that **the Informant NEGLECTED to disclose the source of procuring such products and the name of the**

	vendors supplying the alleged counterfeit /defective products on its website. ☞ The Informant **alleged in the information that the main grievance** of the OP **was not with respect to the authenticity** of the products sold on Snapdeal **but the discounted price at which such products were sold by the Informant** through its website. ☞ The Informant submitted that **the OP was attempting to impose a price restriction in the form of Minimum Operating Price ('MOP'), on the Informant's website to make sales at a minimum price and threatened to ban online sales if such prices were not maintained. Therefore, it would be result in a contravention of Section 3(4) (e) of the Act**. ☞ The Informant also stated that **through this threat of not honouring warranties on products sold on the online markets/ websites, the OP attempted to cut off supplies to distributors who were aiming to sell through online channel**. Such a restriction allegedly operated as an absolute ban on any internet sales by e- commerce companies, **and amounted to a violation of Section 3(4) (d) of the Act.**
Legal Principles held—	✞ Upon a bare perusal of the provisions and the material available on record, it is evident that the Informant's online portal, i.e. Snapdeal, is offering an online distribution service to various distributors/dealers. It may also be relevant to highlight that online retail portals are a part of the distribution Channel. It was held by the CCI in earlier judgment such as • **In Deepak Verma v. Clues Network**, wherein CCI while determining the dominance of an online retail portal, held that online and offline are not two different relevant markets, but are two different channels of distribution to the same relevant market. • **In the case of Confederation of Real Estate Brokers Association of India v. Magicbricks.com & Ors.,** wherein CCI while determining the relevant market, the Commission held that online and offline services of brokers cannot be distinguished. Both are alternative channels of delivering the same service. ✞ **The Commission observe that** when the distributors/ dealers are using the services of Informant while selling the products of the OP, **it ipso facto becomes a part of distribution/vertical chain and thus, it would be incorrect to state that the Informant is only a market place facilitating interaction of the buyers and sellers online**. It is not necessary in such evolving markets that any entrant in the downstream level of the value chain should join at the behest of the manufacturer or with its explicit concurrence. ✞ Further, the presence of a large number of dealers who were competing with each other suggests a fair degree of intra-brand competition. The data collected by the DG showed that there were 1,422 dealers selling OP's kitchen appliances all over India during the relevant time period who were found to be competing for the turnover-linked incentives. ✞ Discounts were variable in nature and linked to the target being achieved. Since **incentives were variable, the net landing price for each dealer was also different. This enabled different dealers to offer different prices to customers for the same product**. Moreover, competition among distributors was **found to be even stiffer as they were exclusively dealing with the OP's products**.
Decision	✞ CCI decide **the case against the appellant** and held that vis-à-vis the dealers the evidence did not reveal the existence of any price restriction or minimum Resale Price Maintenance.

	✞ As regards the Informant, though the existence of Caution Notice, Legal Notice and Email has been established, **it has not been conclusively established that they were used as instruments for imposing a minimum resale price maintenance on the Informant**. ✞ Further, since vertical agreements falling under Section 3(4) read with Section 3(1) are subjected to rule of reason analysis, **even if there exists a price restriction by the OP, adverse appreciable effect on the Competition needs to be established**. Based on the material available on record, **the actual impact of the conduct of OP did not demonstrate any adverse effect on competition**. ✞ Furthermore, the existence of intra-brand competition among dealers/distributors negate the anti-competitive impact of the OP's alleged conduct. Thus, **no contravention of the provisions of Section 3(4) (e) of the Act is found against the OP, in the facts and circumstances of the present case**.

72. VEDANTA BIO SCIENCES v. CHEMISTS AND DRUGGISTS ASSOCIATION OF BARODA [CCI]

Hint: The Informant file a complaint against the Opposite Party with respect to enter into anti-competition agreement. In this case, The Opposite Party engaged in practice of mandating NOC prior to the appointment of stockists results in limiting and controlling the supply of drugs in the market, contravening Section 3(3)(b) read with Section 3(1) of the Act and fixing the trade margins for wholesalers or retailers in contravention of the provisions of Section 3(1) read with Section 3(3) (a) of the Act.

Decision: The CCI decide the case in favour of Informant and impose penalty on the respondent**.**

Fact of the Case	☞ **In the present case,** Vedanta Bio Services (referred to as "Informant") and Chemists and Druggists Association of Baroda (referred to as "OP") ☞ **The informant filed a complaint against the OP before CCI** and raised the following allegation in the complaint as under: **(a)** The OP, an unregistered body, is imposing unfair conditions in sale of pharmaceutical products of different companies. **(b)** The OP has formulated guidelines for its members which require any person including a member to obtain permission/NOC (No-Objection Certificate) prior to becoming a stockist of a particular company. **(c)** The OP forced additional/new stockists not to sell products of a pharmaceutical company unless NOC is obtained by the existing stockist from the OP. **(d)** The OP insists on procuring NOC from it before a pharmaceutical company launches new products, without which the company is not allowed to launch new product. **(e)** A circular dated 02.03.2009, was issued by the OP, wherein permission has been granted to some distributors to become stockists of certain pharmaceutical companies, which indicates that procurement of such NOC is necessary. **(f)** The OP was also engaged in fixation of margins for pharmaceutical products.
Two questions raised before the CCI	**(1)** Whether the OP was mandating NOC prior to the appointment of stockist by pharmaceutical companies in contravention of the provisions of Section 3(1) read with Section 3(3) (b) of the Act? **(2)** Whether the OP was fixing the trade margins for wholesalers or retailers in contravention of the provisions of Section 3(1) read with Section 3(3) (a) of the Act?
Issue 1: **CCI reply**	☞ **In the present case, the OP mandate an NOC requirement as a pre-requisite for appointing a stockist by pharmaceutical companies.** So, it is was seen that OP discourage new/existing stockists to enter/expand the market amounting to an entry barrier for them. ☞ Appointment of a new stockist **should be the exclusive right of a pharmaceutical company** without any interference by any third party. Any

	influence or interference with the choice of a distributor, **to take decisions based on its commercial consideration and business requirements**, by a pharmaceutical company **would restrict its freedom to do business with persons of its choice**. Such interference **not only disrupts the distribution chain, but also results in limiting and controlling the supply of drugs in the market, as many-a-time the diktats are sanctioned by consequent boycott of the pharmaceutical companies not following the directions** of the association(s). ☞ The aforesaid evidences (documents, circulars, policies, cross-examinations and other evidences), both oral and documentary, **clearly reveal that indeed the OP was indulging in imposing the requirement of NOC prior to appointment of sto**ckists. ☞ The CCI has held that the practice of mandating NOC prior to the appointment of stockist results in limiting and controlling the supply of drugs in the market in the Baroda district, in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Act.
Issue 2: CCI reply	☞ **The** CCI also observed **that in addition to mandating the requirements of NOC prior to appointment of stockist** by Pharmaceuticals companies, **the OP was also involved in the fixation of trade margins of the non-DPCO drugs**, which **had the potential to determine the sale price of drugs.** ☞ **Based on the circulars and other evidences**, it was confirms that the practice of fixation of trade margins for non-scheduled/non-DPCO products by the OP to the tune of 10% for the wholesaler and 20% for the retailers. ☞ **The OP** contends that **the margin is as per the industry norms and for the betterment of the wholesalers/retailers, the association.** ☞ The Commission finds no merit in any of these contentions raised by the **OP even if he margins are as per industry norms and for the betterment of the wholesalers/retailers**, the association is not within its legitimate right to impose the said margins on wholesaler or retailers. ☞ The CCI held **that it is an independent commercial decision of every entity in the vertical chain to decide the margin it wants to secure or pass on from the upstream entity or the downstream entity, respectively**.
Decision	☞ **The CCI** decide the case in favour of Informant and impose penalty on the respondent. ☞ **The CCI** directs the OP to cease and desist from indulging in the practice of mandating NOC and fixation of trade margins, **which has been held to be anti-competitive in terms of the provisions of Section 3 of the Act**.

73. RAVI PAL v. ALL INDIA SUGAR TRADE ASSOCIATION & ANR [CCI]

Hint: Allegation raised by the Appellant before the CCI that OP engaged in Collecting and disseminating pre-determined purchase price of sugar amongst cartel members through "WhatsApp" and SMS.

Decision: CCI dismissed the complaint and CCI held that **the sugar commodity is subject to the provisions under the Essential Commodities Act, 1955 and orders issued thereunder and, thus, the final market price of sugar is dependent upon numerous factors**. **Presumptive inference and analysis provided by the Informant cannot be the basis for forming a prima facie opinion** as to order investigation in the matter. Finally, the Commission observes that a prima facie case under Section 26(1) of the Act is not made out against the OPs.

Fact of the Case	☞ **In the present case,** Ravi Pal (referred to as "Informant") and All India Sugar Trade Association & ANR (referred to as "OP").

	☞ **The informant raised following allegation against the OPs:** **(a)** Collecting and disseminating pre-determined purchase price of sugar amongst cartel members through "WhatsApp" and SMS; **(b)** Restrict the market for other competitors whose bids are based on market forces; **(c)** Vitiate the tender process so that an enterprise floating the tender has no opinion but to accept the prices determined by OPs; **(d)** Control the supply of sugar in the market where it is sold to wholesalers and consumers; **(e)** Affecting players' of the market in other states (U.P/Karnataka) who are selling/supplying sugar in the same market as the OPs because the former are compelled to lower the prices of sugar due to the elimination of market forces. ☞ The primary allegation raised against the OP **pertaining to the sugar prices over the WhatsApp group during the relevant period purportedly shared "price sensitive information" which in turn used to quote lower prices in the tenders** floated by the sugar millers for sale of sugar in the state of Maharashtra. ☞ During the preliminary conference, the Informant contended **that the messages contained the sugar prices for variants of sugar, namely, S-30 and M-30 and other international future prices of sugar etc**. Based on the same, it was argued **that the price of sugar (as displayed in WhatsApp messages) was allegedly the price of last successful bid (bidding done on daily basis) and the same was made the basis for quoting their bids by leading traders, who were members of the WhatsApp group (mainly traders) in the subsequent tenders of millers** in the state of Maharashtra.
Legal Principles held—	☞ Moreover, when the Commission inquired from the counsel of the Informant **about the basis for alleging the "price sensitivity" of data by the Informant, the same could NOT be addressed by the Informant**. It was stated by **the Informant that the average prices at APMC were lower than the prices on WhatsApp messages and hence, the same could only be as a result of collusion**. The Commission does not find any merit in this argument, as the Informant himself has explained, in the information filed by him, the process followed in the daily tenders and has **stated that the sugar prices circulated were on the basis of last successful bids**. ☞ This means that **such information was already available in public domain post the award of the tender by the sugar mills and the circulation of the same, per se, does not imply that it would become sensitive information**. ☞ Further, with regard to the information purportedly exchanged on WhatsApp group**, the Commission observes that it is not clear from the records as to how such alleged acts can be said to have affected free play of the market forces with respect to prices of sugar**. ☞ Further, the Informant has enlisted the objectives of OP-1, **wherein collection of information and dissemination of information is one of the primary objectives**. ☞ Therefore, unless it **is indicated by the Informant, based on cogent evidence, that there was any meeting of minds amongst the OPs for placement of bids for tenders or with respect to prices to be quoted in such bids, it is not possible to form a prima facie view in the matter under Section 26(1) of the Act, warranting an investigation**. ☞ The Commission **notes that the members of the WhatsApp group also comprise millers (two). There does not seem to be any rationale as to how millers (as sellers) who have an interest in getting higher prices of sugar,**

	as against that of traders, who want to procure at lower prices, would be agreeable to sell the sugar at lower prices. ☞ As noted above, no material has been placed on record related to tenders floated by the millers during the relevant period and the bid details etc. ☞ The **information is lacking in material particular**s as to **how there had been bid rigging or collusive bidding in any specific tender, rather the averments made are general in nature**. ☞ Therefore, **on account of lack of credible material and information, the Commission does not find any merit in the allegations posited by the Informant. The Commission further notes that certain documents which were filed by the Informant indicating the rate at which sugar was purchased after the tender**. ☞ Furthermore, **the sugar commodity is subject to the provisions under the Essential Commodities Act, 1955 and orders issued thereunder and, thus, the final market price of sugar is dependent upon numerous factors**. Therefore, the allegation of the Informant that the alleged practices affected the market price in the absence of any evidence is without merit and does not warrant any investigation. ☞ After appreciation of the allegations of the Informant and documents submitted including the oral submissions made by the Informant, **the Commission is of the view that no evidence has been provided by the Informant to show that there was any meeting of minds** between the OPs to **establish correlation between bids submitted in any specific tender with the alleged sugar prices circulated over the WhatsApp group**. ☞ **Presumptive inference and analysis provided by the Informant cannot be the basis for forming a prima facie opinion** as to order investigation in the matter.
Decision	☞ **Based** on the facts stated in the information and the evidence adduced by the Informant, the Commission observes that a prima facie case under Section 26(1) of the Act is not made out against the OPs. ☞ **Finally,** CCI decide the case in favour of the Respondent.

74. Ms. DEJEE SINGH & ORS v. SANA REALTORS PVT LTD [CCI]

Hint: Delay in handing over the possession of the shop is considered as abuse of dominance under provisions of the Competition Act, 2002.

Decision: CCI decide the case in favour of Respondent and held that handing over the possession of the shop is not considered as the abuse of dominance under provisions of the competition Act, 2002 if other players are available in the market who engaged in the same services/products etc.

Fact of the Case	☞ The present information has been filed by **the informants alleging abuse of dominant position by the OP in the real estate market** for "Small Office Home Office" (hereinafter "SOHO"). ☞ As per the brochure of the OP, **the SOHO units are modern architectural masterpiece that will serve as a home as well as an office**. It takes care of all the basic needs so that one can work from the comfort of a home. ☞ The **primary grievance of the Informant seems to stem from DELAY in handing over of possession of the units which was promised to be delivered by the OP** by the year 2013 as per the Agreement, and **which according to the Informants has violated the provisions of Section 4 (2) (a) of the Act**.

Legal Principles held—	☞ The Commission noted the following: **(a)** The OP has advertised the model of Small Office Home Office as "small and affordable office space to ensure beauty and comfort catering to the needs of the corporate, small and medium enterprises". It also noted **that the primary use of the space, therefore, relates to office use only**. **(b)** Furthermore, the particulars of the place are marked as office in the Agreement as well. **The only distinguishing feature of the project for office space offered by the OP is the unit for a bedroom in the prop**osal, allowing the comfort of a home office. **(c)** Commission also stated that **such an additional feature can be added by the consumer on his own in any office space he/she prefers, as it is up to the discretion of the consumer to style his/ her office space in the way he/she desires**, subject however to any limitations under the contract or any law. Therefore, **the said features is not sufficient to qualify the product as a separate relevant product market altogether**. **(d)** Therefore, the Commission is of the opinion that the relevant market in the present case may be defined as "market for commercial units for office space". **(e)** Choice of a consumer for office space depends on various factors such as development of the region, supply of land, location of business establishment, etc. A buyer of office space is likely to take into account all these factors while exercising his choice, and **(f)** Therefore, **a buyer desirous of setting office in Gurugram may not be willing to establish office in areas other than Gurugram**, as market **conditions that exist in Gurugram can be distinguished from the conditions prevailing in the neighbouring areas**. **(g)** This may be due to factors like proximity of his/ her customers, better connectivity/ transport facilities/ infrastructure, etc. to name a few. Thus, geographical area of Gurugram region has to be taken as the relevant geographic market in the instant case, and "the market for commercial units for office space in Gurugram" is accordingly considered as the relevant market in the instant case. ☞ **The Commission considered the information available in the public domain** that there have been many **established and bigger organised real estate companies such as DLF Limited, Omaxe, etc. offering their projects in the relevant market at the relevant time**. The Commission notes that the **presence of other players in the relevant market indicates that competing products are available to consumers in the relevant market and the OP, therefore, does not appear to be dominant in the relevant market as delineated above**. In the **absence of dominance, its conduct cannot be examined under the provisions of Section 4 of the Act**.
Decision	☞ **The** Commission further notes that no facts, evidence, or even appropriate provisions of Section 3 of the Act are set out in the Information. ☞ Thus, no case of contravention of Section 3 of the Act is also made out against the OP and the matter is ordered to be closed. ☞ The CCI has decided the case in favour of Respondent.

75. KANHAIYA SINGHAL v. INDIABULLS HOUSING FINANCE LTD & ORS [CCI]

Hint: Informant raised allegation against the OP that Ops engaged in the abuse of dominant position on account of increase in interest rate on home loan.

Decision: The CCI decide the case in favour of the Respondent and held that **the large number of players operating in the relevant market which suggests that not only the market is competitive in nature**

but also that **OP-1 does NOT seem to have the ability to operate independently of the competitive forces,** OP-1 is **NOT** found to be dominant in the relevant market defined supra. **In the absence of dominance, the issue of abuse of dominant position against the OP-1 does NOT survive**.

Fact of the Case	☞ Informant had availed a Home Loan facility from OP-1, for which he entered into a Loan Agreement with OP-1. Thereafter, he was extended a home loan of Rs. 1,00,00,000/- at a rate of interest of 8.75% p.a. repayable in 240 equated monthly instalments ('EMI') of Rs. 88,372/-. ☞ The OP 1 has increase the rate of interest on the home loan facility availed by the informant in accordance with the provision contained in the terms and conditions of the loan agreement. ☞ The Informant was **primarily aggrieved by increase in the rate of interest charged by OP-1 on the home loan facility availed by him and is also aggrieved with the terms and conditions of the Loan Agreement**, which are alleged to be one- sided and discriminatory in nature. ☞ Further, the **Informant has alluded that in-spite of RBI reducing the market interest rate**, OP-1 is **not passing on those benefits to the Informant**. ☞ Based on the above, the **Informant alleged that the conduct of OPs amount to be in violation of Sections 3(1), 3(4) and Section 4 of the Act**. ☞ Based on the above averments and allegations, the Informant has prayed that the Commission direct OPs to discontinue such practices of abuse of dominant position and to modify the Loan Agreement to an extent as may be specified by the Commission.
Legal Principles held—	☞ Before examining the allegations, it is appropriate to examine the role of OP-2 to OP-18 in the matter. It is observed that OP-2 to OP-18 are officials / employees of OP-1. Further, the Informant has not provided any evidence to show that OP-2 to OP-18 have indulged in any conduct which are in violation of the provisions of Sections 3 and 4 of the Act. ☞ On the basis of facts and circumstances, the CCI observed that: **(a)** The Informant has not suggested any relevant market in the matter. **(b)** It is evident that the main grievances of the Informant relates to increase in rate of interest charged by OP-1 on the home loan. **(c)** It is observed that home loan is distinct from other types of loans such as personal loan, property loan, vehicle loan, etc. Further, **home loan can be distinguished from other types of loans based on the factor**s such as intended use, rate of interest charged, term of payment, etc. **(d)** That banks and home finance companies extend home loans and compete with each other for providing home loan services. **Therefore, the Commission does not deem it necessary to distinguish between home loans offered by various lending entities**. Based on the above, home loan can be considered as a distinct product or service. Thus, the relevant product market in the instant case is delineated as the "market for provision of home loans." **(e)** With regard to the relevant geographic market, the Commission observes that there are many service **providers that are providing the said services in the aforesaid relevant product market** and are also competing with each other for providing home loans to borrowers. There **exists no distinction between one region and another with reference to availing home loan services within India**. Therefore, **the relevant geographic market in the instant case can be considered to be "India"**. Accordingly, the relevant market in the instant matter is delineated as 'market for provision of home loans in India'. ☞ On the assessment of dominance, the CCI notes the following

	(a) The home loan market in India has many providers including Banks, NBFCs, and HFCs. Few prominent home loan providers are SBI, PNB, ICICI Bank, HDFC Bank and DHFL. The housing finance market in India is fragmented, with 80-plus players. **(b)** It was also observe that the outstanding housing loans disbursed by banks and HFCs was about Rs. 17,00,000 Crores as per the Report on Trend and Progress of Housing in India, 2018 published by National Housing Bank. **(c)** As per the annual report of SBI for the year 2017-182, the housing loans disbursed by SBI were Rs. 3,13,106 Crores (i.e. SBI had a market share of 18.42% in the relevant market delineated above). **(d)** As per the annual report of OP-1 for the year 2017-18, it had disbursed approximately Rs. 23,329 Crores as loans to the housing sector which amounts to roughly a market share of 1.37% in the relevant market delineated above. While considering **the large number of players operating in the relevant market which suggests that not only the market is competitive in nature** but also that **OP-1 does NOT seem to have the ability to operate independently of the competitive forces,** OP-1 is **NOT** found to be dominant in the relevant market defined supra. **In the absence of dominance, the issue of abuse of dominant position against the OP-1 does NOT survive**. ☞ With regard to the allegations made under Section 3(1) read with Section 3(4) of the Act, the Commission observes that the Informant has not suggested existence of any agreement, as envisaged under Section 3 of the Act, involving the Ops. After examining the facts of the case, the Commission has not found anything that would suggest that there exists any kind of horizontal/ vertical agreement that could be brought under the purview of Section 3 of the Act.
Decision	☞ The Commission finds no case of contravention of the provisions of Section 3 or Section 4 of the Act against the OPs in the instant case. Thus, the matter is closed forthwith in terms of the provisions of Section 26(2) of the Act. ☞ Finally, the CCI decide the case in favour of the Respondent.

76. OIL COUNTRY TUBULAR LTD. v. MAHARASHTRA SEAMLESS LTD [CCI]

Hint: Informant file a complaint against MSL w.r.t. contravention of section 3 and 4 before CCI for non-supply of Green-pipe and it enjoys monopoly on account of Government state Policy 2017.

Decision: The CCI decide the case in favour of Respondent (i.e. Opposite Party) on the basis of considering the grounds as given in legal principles rules.

Fact of the Case	☞ The Informant is a **public limited company duly registered/incorporated** under the Companies Act, 1956 and is part of the Kamineni Group of companies. It **is engaged in the business of processing of a wide range of Oil Country Tubular Goods (OCTG) and Drilling Products** required for the Oil Drilling and Exploration Industry in the Oil and Gas sector in India. ☞ The Informant has an **integrated processing facility which takes non-processed and non-treated Plain End Seamless Pipes also known as "green pipes"**, and subjects **them to various extensive processes such as upsetting, heat treatment, non-destructive testing, tool joint and coupling manufacturing, hard-facing, threading of Casing and Tubing, friction welding of Drill Pipe, internal plastic coating of Drill Pipe, etc**. ☞ Once the green pipes are processed and converted into finished products of Casing, Tubing and Drill Pipe conforming **to relevant API specifications, OCTL**

	supplies the same to oil exploration companies such as ONGC and Oil India Limited (OIL) and private companies in India. ☞ In India, there are only four manufacturers of finished casing and tubing namely, MSL, OCTL, Jindal Saw Limited and ISMT Limited. Out of these four manufacturers, MSL has the complete size range till 13 3/8″ OD **for manufacturing the green pipes and processing to Casing and Tubing**. ☞ MSL has both, a manufacturing facility **for producing green pipes, and a processing and finishing facility for turning those green pipes into finished products**. Therefore, it does **NOT** have to procure green pipes separately. On the other hand, **OCTL has only processing facility and has to procure green pipes for this purpose**. ☞ It is stated that in order to participate in the tenders floated by ONGC and OIL, one has to be a registered bidder with ONGC and OIL. **The procedure for becoming a registered bidder is complex and time consuming. MSL, OCTL, ISMT Limited and Jindal Saw Limited are the only registered domestic bidders with ONGC and OIL for supply of seamless casing pipes**. Since May 2017, only MSL and OCTL, among the domestic bidders, **have competed with each other for supply of seamless casing pipes in tenders floated by the ONGC and OIL**. ☞ **The GOI** has announced th**e State Policy of 2017 and restricts the imports of green pipes**, which is used as input in manufacturing of seamless casing pipes. Accordingly, the bidders such as OCTL, who produce seamless casing pipes using green pipes as an input cannot use imported green pipes for supply of seamless casing pipes to Government entities such as ONGC/ OIL under the Steel Policy. ☞ OCTL has been **struggling to source green pipes** and has **not been able to participate in tenders floated by ONGC and OIL** for seamless casing pipes because it is undergoing in CIRP under IBC, 2016. **ISMT Limited is not active** in manufacturing seamless pipes. **Jindal Saw Limited manufactures pipes till 7″ OD size only.** ☞ The only domestic manufacturer (i.e. MST) from whom green pipes can be sourced for sizes above 7″ OD including 9 5/8″ OD and 13 3/8″ OD. Under these circumstances, it was alleged that the Steel Policy creates the absolute monopoly of MSL in respect of seamless casing pipes of sizes above 7" OD which is around 67% (2015), 73% (2016) and 71% (2017) of the yearly requirement of ONGC/ OIL. ☞ In the aforesaid backdrop, the Informant has filed the instant Information alleging that MSL will not supply green pipes to it in respect of the tender floated by ONGC for procurement of seamless casing pipes. It has been **pointed out that MSL has not responded to the e-mails of the Informant in respect of its requirement for procurement of green pipes**. Accordingly, the **Informant has alleged contravention of Section 4(2)(c) and Section 4(2)(a)(i) read with Section 4(1) of the Act. Contravention of Section 3(4)(d) read with Section 3(1) of the Act is also alleged**.
Legal Principles held—	On the basis of material records available with CCI, it observed the following: **(a)** Informant is **engaged in the business of processing a wide range of oil country tubular goods and drilling products required for the oil drilling and exploration industry** in the oil and gas sector in India. It **takes unprocessed, plain end seamless pipes, also known as 'green pipes'**, and processes them into 'seamless casing pipes'. The **final product i.e. seamless casing pipes needs to meet the specifications of the American Petroleum Insti**tute. Once the green pipes are processed and converted into seamless casing

	pipes **conforming to the API specifications, the Informant supplies them to ONGC and OIL.** **(b)** The Informant has pointed out that it does **NOT have any manufacturing facility** for green pipes as it has only processing facility for converting green pipes into seamless casing pipes. **(c)** It has been further highlighted by the **Informant that the GOI came out with its steel policy providing for a preference to domestically manufactured iron and steel products in government procurements** having the value of more than Rs. 50 Crores. **(d)** The informant approached to MSL in respect of Tender floated by ONGC by wat of email dated 17.10.2018 stating its requirement of green pipes and requested to quote price. The Informant contends that MSL did not responds even informant had send three e-mails. **(e)** The conduct of the informant in approaching the MSL **at such belated stage for supply of green-pipes does not seems to be diligent**. Such a conduct does not appear to be consistent with the ordinary course of business behaviour. On the other hand, MSL contends that informant **never approached it for supply of green-pipes before October 2018**. Accordingly, the Commission is of the view that the **conduct of the Informant in writing e-mail**s to MSL **lacked bonafide**. **(f)** Moreover, MSL has **sought to explain non-response to such e-mails of the Informant by referring to the Integrity Pact**, which **prohibits such discreet arrangements between the bidders.** It is not in dispute that both the Informant and MSL were potential competitors in respect of the tender floated by ONGC. **(g)** The Commission also notes that the Steel Policy of 2017, **which restricts import of green pipes, itself provides for waivers where supply requirement in the government procurement cannot be met through domestic sources**. In fact, MSL has pointed out that an exemption from restriction under the Steel Policy was granted for one of the ONGC's tenders bearing No. ZNCKC16005 and **a copy of the minutes dated 22.08.2017 of the second meeting of Grievance Committee on Domestically Manufactured Iron & Steel Products containing details of such exemptions has been annexed in support of the contention**. **(h)** On record the submission made by **MSL that it has no market presence in the upstream market**, which has been defined **by the Informant as the relevant market in as much as it manufactures green pipes only for its captive consumption as raw material required for processing casing pipes**. It has been categorically pointed out by MSL that **it does not supply green pipes to any other entity in India, neither does it export any green pipes, as claimed by the Informant during the hearing**. It has also been highlighted that contrary to the oral submissions made on behalf of the Informant, MSL usually does not have any surplus green pipes, which can be supplied to other entities.
Decision	☞ The CCI held that No case of contravention of the provisions of Section 4 or Section 3 of the Act is made out against the Opposite Party and the Information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act. ☞ The CCI decide the case in favour of Respondent (i.e. Opposite Party).

77. DEPUTY CHIEF MATERIALS MANAGER, RAIL COACH FACTORY, KAPURTHALA, PUNJAB v. FAIVELEY TRANSPORT INDIA LTD & ORS. [COMPAT]

Hint: Appellant raised complaint before CCI against the respondents' because they indulge in formation of cartel and they quote identical price in regular tender.

Decision: The COMPAT decide the case in favour of Respondent and held that in **the absence of other plus-factors; it is NOT possible to record a finding** that the respondents had acted in violation of Section 3(3) (d) read with Section 3(1) of the Act. (Refer grounds given in Legal Principles Rules)

Fact of the Case	☞ The respondents are the suppliers of "Axle Mounted Disk Brake System (AMDBS)"to the appellant railways to be fitted in the LHB coaches. ☞ The railways floated tenders for the supply of AMDBS and the respondents were the successful bidders. They **quoted identical rate, which was accepted by the railways.** ☞ The Appellant filed a complaint against the respondent before the CCI and alleging that the opposite party formed a cartel. As a result, **the respondents quote the identical prices during bidding**. ☞ CCI passed order against the appellant and held that the evidence relied upon by the Director General is **NOT sufficient for holding that the Opposite Parties (Respondents herein) are in contravention of the Section 3 and Section 4 of the Competition Act and closed the case**. Appellant **aggrieved by the order of CCI and filed appeal against the order of CCI before COMPAT**.
Legal Principles held—	☞ We are in complete agreement with the reasons assigned by the Commission for not approving the conclusion recorded by the Jt. DG on the issue of cartel formation by the respondents and by applying the ratio of the **SC judgment in Union of India v. Hindustan Development Corporation and others (1993)**, **we hold that the Commission did not commit any illegality by refusing to approve the findings recorded by the Jt. DG on the issue of formation of cartel/bid rigging by the respondents and violation of Section 3(3)(d) read with Section 3(1) of the Act**. ☞ We may add that in an oligopolistic market like the one in question, **the identity of price quoted by the bidders is not an unusual feature**. The players in a limited market **are aware of the price quoted by each other in one or the other bid and it is a normal tendency to quote the same price** in response to the next tender. ☞ The following facts is considered by **the COMPAT based on the documents and records presented before it**: **(a)** It is significant to **note that the respondents are the only approved supplier** of Item Nos. 1 and 2 of AMDBS and **the attempts made by the Railways to procure supply from other sources have failed**. **(b)** The rates quoted in response to the regular tenders are same but not identical. It should also be noted that there was substantial similarity of the price, but the Tender Committee **did NOT suspect any cartelisation and decided to place orders with the respondents**.
Decision	Therefore, identical price quoted by the respondents for the items of AMDBS did **NOT constitute sufficient evidence of cartel formation** and in **the absence of other plus-factors; it is NOT possible to record a finding** that the respondents had acted in violation of Section 3(3) (d) read with Section 3(1) of the Act.

78. BELARANI BHATTACHARYYA v. ASIAN PAINTS LTD. [CCI]

Hint: Informant filed compliant under section 3 and Section 4 of the Act against the Opposite party before CCI that there was a tie up of opposite party with other companies It is averred that even after receiving the payments from time to time, **the painting jobs were not up to the mark as the paint was peeling out at number of places and all the painting works were not completed**.

Decision: The CCI decide the case in favour of Opposite Party and held that none of the provisions of either section 3 or section 4 is violated by the Opposite Party in the instant matter. Accordingly, the matter is closed in terms of the provisions of section 26(2) of the Act.

Fact of the Case	☞ The Opposite Party **brings out several advertisements in various daily newspapers promising various services relating to painting of house** such as painting by trained painters with supervision, one year warranty in respect of jobs done etc. to the public at large. ☞ On the basis of such advertisements and brand name of the Opposite Party and expecting high quality and smooth service**, the Informant opted to avail the services of the Opposite Party for painting of her residential premises**. The Informant placed orders for interior painting of the ground floor portion and total exterior painting of the premises. ☞ Thereafter, two more estimates to the tune of Rs. 62,490/- and Rs. 13,120/- dated 29.03.2010 and 30.04.2010 were given for painting of ceiling, walls of master bedroom and second bathroom **for which full payments were made in advance with due acknowledgement.** ☞ The Informant was shocked to find that there were **no receipt vouchers from the Opposite Party** pertaining to various jobs undertaken **rather they were in the name of Colour Concepts**. ☞ The Informant for the **first time was made aware of the tie up, which the Opposite Party seems to have entered into with Colour Concepts**. ☞ As per the Informant, for the said painting works **no colour plan was approved by her rather the Opposite Party went ahead with its own colour plan**. ☞ It is averred that even after receiving the payments from time to time, **the painting jobs were not up to the mark as the paint was peeling out at number of places and all the painting works were not completed**. ☞ The consumers are drawn through misleading advertisements and its brand name. **(a)** The painting estimates were given through its intermediary even though the advertisement contained no such reference. **(b)** The market for selling of paints and the market for providing painting service cannot be separated since both constitute a single service under a distinct brand name. When name like Asian Paint Home Solutions appear in the advertisements, the consumers are likely to draw the conclusion that both purchase of paints and the service of painting will be provided by a single entity i.e. the Opposite Party. **(c)** If a customer chooses to avail the services of painting from the Opposite Party then the raw materials produced by the Opposite Party are used for the painting works. Thus, the criteria for a tie-in arrangement under section 3(4)(a) of the Act stand satisfied. **(d)** Due to the agreement between the Opposite Party and COLOR CONCEPTS, **not only the consumer's interest is affected due to poor quality of service** but also **other suppliers are denied entry into the market**. **(e)** The Opposite Party is a dominant player in the market and it abuses its position of dominance in terms of section 4 of the Act.
Legal Principles held –	☞ **On the basis of information and material available on record,** it was found that the Opposite Party has not provided appropriate painting services to the Informant and has also not completed the painting works at her residential premises, as promised through various advertisements. ☞ The Commission held that there was no case of any agreement between Asian Paints and other paint companies or practice adopted by any association of painting companies operating in the relevant market, thus section 3(3) of the Act does not

	apply to the facts of the case. Also, it was held that none of the clauses of section 3(4) read with section 3(1) is applicable to the facts of the case. ☞ With regard to the allegation of violation of section 4 of the Act the Commission **held that the Opposite Party was not in a dominant position in the relevant market of 'providing home solution services for painting homes in geographical area of Kolkata' because all the major companies** such as Berger, Nerolac, etc. are providing home solution services for painting homes.
Decision	☞ **The CCI decide the case in favour of Opposite Party and held that** none of the provisions of either section 3 or section 4 is violated by the Opposite Party in the instant matter. Accordingly, the matter is closed in terms of the provisions of section 26(2) of the Act.

79. PRASAR BHARATI (BROADCASTING CORPORATION OF INDIA) v. TAM MEDIA RESEARCH PRIVATE LTD [CCI]

Hint: Non-inclusion of rural areas by OP in television viewership measurement **gives an undue advantage to the broadcasters who have programmes for the urban areas only over the broadcasters who have programmes for both rural and urban areas and have a pan India presence**. This encourages **urban centric programmes and amounts to imposition of discriminatory conditions on those broadcasters who cater to the rural areas also. This conduct of OP is abusive in contravention of the provisions of section 4 of the Act**.

Decision: The CCI decide the case in favour of Opposite Party and discuss the case issue wise.

Fact of the Case	☞ Informant provides public broadcasting services through Doordarshan, which is free to air covering the length and breadth of the country, **including rural and remote areas, and can be accessed through an ordinary roof top antenna**. ☞ OP (i.e. TAM) provides **television audience measurement services**. OP is the **only entity, which measures the television viewership in India in form of Television Rating Points (TRP)/ Television Viewership Ratings (TVR) since 2011**. ☞ To measure viewership, **it uses an electronic gadget called 'People Meter'** which is connected **to each TV set in the select sample households to monitor what is being viewed on the TV set and for how long**. ☞ It has installed about 8,000 meters, **which represent a very narrow statistical base**. Further, **these are installed in cities with population of more than one lakh**. Therefore, the TRP/TVR generated by OP underestimates the actual viewership of Informant, **as it excludes the rural viewership**. ☞ Non-inclusion of rural areas by OP in television viewership measurement **gives an undue advantage to the broadcasters who have programmes for the urban areas only over the broadcasters who have programmes for both rural and urban areas and have a pan India presence**. ☞ This encourages **urban centric programmes and amounts to imposition of discriminatory conditions on those broadcasters who cater to the rural areas also.** ☞ This limits the market for measuring television viewership as well as the technological and scientific development relating to such services to prejudice of the consumers, broadcasters and a section of advertisers. **This conduct of OP is abusive in contravention of the provisions of section 4 of the Act**.
Decision	**The following issues raised before the CCI:** **(1) Is OP in a dominant position?**

(2) **Is OP imposing unfair or discriminatory condition in supply of its services in violation of section 4(2) (a)(i) of the Act?**
(3) **Is OP imposing unfair or discriminatory price in sale of its services in violation of section 4(2) (a) (ii) of the Act?**
(4) **Is OP limiting or restricting technical or scientific development relating to its services to the prejudice of its customers?**

Reply to Issue No. 1

The Commission holds the view that OP is in a dominant position in the market in the provision of services for audience measurement for channels and programmes on television in India after considering the following grounds:

(a) OP holds 100% market share in the relevant market since August, 2011. It indicating market power of OP in the relevant market.
(b) As regard the issue of entry barrier, the Commission is of the opinion that the **technical and capital requirements in installing and measuring the device 'People Meter' in each sample household across the country may prove to be difficult** for new players wanting to enter the market.
(c) No competitor in the market, it is a commercial advantage over other players. But, it is no significance in assessing the dominance.
(d) The Commission is of the opinion that the **concept of network effects is applicable** in this case. Network effect means that a product/service become valuable with the increase of the number of users. Therefore, **this may act as entry barrier for new players because of OP's long standing association with the advertising industry** for the past two decades and the number of subscriptions it has all over the country.
(e) Moreover, OP's parent companies, Nielson and Kantar **apart from being the financial strength of OP**, have the access to key inputs, skills, knowledge, technology, etc. which a new entrant may not have. **This level of advantage, which OP has in the market, may also act as a barrier or difficulty for new competitors to effectively compete on par** with OP.
(f) The Commission is of the view that OP has the strength to operate independent of competitive forces prevailing and has the ability to impede or influence effective competition in the relevant market.

Reply to Issue No. 02

- The Commission is in agreement with the contention of OP that it is not involved in the negotiations between advertisers and broadcasters and its data only serves as a key parameter in determining the cost and price of advertising slots.
- Therefore, the Commission is of the view that OP is not imposing any discriminatory or unfair condition on broadcasters.

Reply to Issue No. 03

- The Commission also finds force in the argument put forth by OP **that if same rates are offered to differently placed consumers**, i.e., the broadcasters and advertisers/ advertising agencies**; it would lose its subscribers and it would no longer remain profitable to conduct its business**.
- Further, with regard to non-supply of RLD by OP to the broadcasters, the Commission is of the view that the possibility of tampering of information may result in skewed view in favour of the broadcaster's programme(s) thereby impeding effective competition in the market.

	☞ Therefore, the justification offered by OP in this regard appears to be a valid one. In view of the above, the **Commission is of the opinion that no case of imposition of unfair or discriminatory price is made out against OP.** **Reply to Issue No. 04** ☞ In this regard, the DG has observed that OP is procuring expensive 'People Meters' from the group company of one of it promoters. The Commission is of the view that the OP can choose to procure the said device from any supplier which meets its criteria. ☞ Therefore, the justification provided by OP for procuring the said device from its own promoters because of the superior quality and competitive price appears to be tenable. ☞ Therefore, **the OP is not limiting scientific and technical development in manufacturing of 'People Meters' and hence no competition concern arises in this aspect**.

80. MERU TRAVEL SOLUTIONS PVT LTD v. UBER INDIA SYSTEMS PVT. LTD & ORS [CCI]

Hint: Informant filed complaint against the opposite party that OP offering services at reduced rate and gives more discount and it constitutes anti competition practice and abuse of dominance.

Decision: The CCI decided the case in favour of Opposite Party and held that **the radio taxi services market in Delhi is competitive in nature and UBER does not appear to be holding a dominant position in the relevant market**.

Fact of the Case	☞ The Informant raised the following allegation against the Opposite Party in Complaint: **(a)** **Owing to its dominant position, the Uber Group has devised certain abusive practices**, which **include unreasonable discounts amounting to abysmally low/predatory pricing to consumers etc. to adversely affect and oust its competitor from the relevant market**. **(b)** **UBER is giving the whole trip amount received from the passengers to the respective taxi drivers along with additional incentives in order to get them attached exclusively** with the UBER network. **(c)** **UBER's incentive policy is not based upon any economically justified consideration, but solely to gain and maintain the fidelity of the taxi owners** and **to prevent passengers**/ customers **from obtaining radio taxi services from other radio taxi services operators**. **(d)** The loyalty inducing incentive schemes **have or are likely to have an exclusionary effect in the relevant market to the detriment of other competitors**. **(e)** In addition to the payments to drivers, **UBER is said to be offering huge discounts and benefits to its consumers**, which are difficult for similarly placed players to match. ☞ Further, the Informant has also **alleged that UBER enters into exclusive contract with taxi owners in violation of Sections 3(1), 3(2) and 3(4) of the Act whereby the taxi drivers are restrained from getting attached on to any other competing "radio taxi operator" network**.
Applicable Law	☞ The definition of relevant geographic market in the radio taxi services market has been dealt with by the Commission in many previous cases.

- The Commission is of the view that the relevant geographic market in the instant case will be "Delhi". Accordingly, the relevant market in the present case would be market for "Radio Taxi Services in Delhi".
- The Commission has considered the Tech Sci research report and **it is a matter of fact that Uber Group was NOT interviewed** during the collection of data in the Tech Sci report.
- The reliability of the data contained in the Tech Sci report **is further weakened due to the existence of another research report** i.e. 6Wresearch report, with contradictory results, **pertaining to the same relevant market received by the Commission in another case.**
- **Commission has considered the both reports and results of both the reports as follows:**

Tech Sci Report

Parameters	UBER	OLA
Fleet Size	44.42%	32.00%
Active Fleet Size	41.38%	27.00%
Number of Trips	50.10%	23.10%

6Wresearch Report

Parameters	UBER	OLA
Fleet Size	52.90%	17.60%
Active Fleet Size	54.30%	7.80%
Monthly Parameters	52.30%	3.80%
Number of Trips	57.50%	

Legal Principles held—

- Evidently, there are **glaring differences in the data and results depicted** by the two research reports i.e. 6W research report and Tech Sci report; casting a serious doubt on their authenticity and neutrality.
- The **conflicting results indicate that either the data relied upon in the said reports is not accurate** or **the data has been selectively collected and relied upon** to reach some predetermined results.
- Hence, despite the deficiencies observed above, a conclusion may be drawn from a combined reading of both these research reports **that there exists stiff competition**, at least between OLA and UBER, with regard to the radio taxi industry in Delhi. Further, **both the research reports have acknowledged the presence of other major players in the market, apart from UBER and OLA**.
- Further, the fluctuating market share figures of the various players show that the competitive landscape in the relevant market is quite vibrant and dynamic. Based on the foregoing, the Commission is of the view that **the radio taxi services market in Delhi is competitive in nature and UBER does not appear to be holding a dominant position in the relevant market**.

Decision

- Since Uber group does **NOT** seem to be dominant in the relevant market, **there is no need to go into the examination of its conduct in such relevant market**. Based on the aforesaid, **the Commission is of the view that no case of contravention is made out against Uber Group**.
- The CCI decided the case in favour of Opposite Party.

81. TAMIL NADU CONSUMER PRODUCTS DISTRIBUTORS ASSOCIATION v. BRITANNIA INDUSTRIES LTD & ORS [CCI]

Hint: Informant filed complaint against the Opposite Party in relation to conditions imposed by Opposite Parties (OPs) on their distributors and termination of distributorship whenever those conditions are not adhered to, because of abuse of dominant position under section 4 of the Act.

Decision: CCI decide the case in favour of the Opposite Party(Refer legal principle rules)

Fact of the Case	☞ The main concern of the Informant relates to the conditions imposed by Opposite Parties (OPs) on their distributors and termination of distributorship whenever those conditions are not adhered to. ☞ The **purported conditions imposed by OPs, taking advantage of their dominant position, are indicated as abuse of dominant position under Section 4 of the Act**. ☞ The brief details of the allegations are as follows: **(1)** OPs never allow their distributors to deal with any other biscuit manufacturing company even through their sister concerns; **(2)** OPs have orally restricted each and every distributor to operate business with retailers within the area demarcated by them. Further, the area of operation of distributors was reduced from time to time; **(3)** OPs unfairly force their distributors to use gadgets and software introduced by them. This was emphasised to monitor the business of the distributor with retailers in their respective territory; **(4)** OPs have dumped stocks on the distributors beyond their requirement by making automatic dispatches. Further, OPs realize the entire amount against dispatched goods by encashing the blank cheques issued by the distributors; **(5)** OPs offer special rates to firms like Reliance Mart, Big Bazar, etc. As a result, the products of OPs are available to whole sale shops at rates (price) below the cost price of the distributors. Further, OPs transfer/provide slow/less selling stocks for general trading of the distributors; **(6)** OPs require their distributors to maintain infrastructure like godown space, vans, employees, computers, software etc. and also force distributors to extend credit to retailers; **(7)** OPs make their product available at rates below the cost rates of authorised distributors thereby humiliating the distributors before the retailers. **(8)** It has also been submitted that OPs cancel the distributorship of agencies that do not abide by the aforesaid stipulations.
Legal Principles held—	☞ For the purposes of examining the allegations of the Informant under the provisions of Section 4 of the Act**, it is necessary to determine the relevant market at the first instance**. ☞ The purpose of delineating the market is to ascertain whether OPs **enjoy a position of strength required to operate independent of the market forces in the relevant market.** Only **when such a position is enjoyed by OPs, it is imperative to examine whether the impugned conduct**(s) amounts to abuse. ☞ **The commission has considered the following points:** **(a)** OPs are engaged in manufacture/production of a variety of bakery and dairy products such as biscuits, breads, cakes, rusk, milk, butter and cheese. It **is observed that the biscuits segment constitutes the major component of the business of OPs** and hence has been **considered from the perspective of defining relevant market.** The nature of other products manufactured and supplied by OPs under the categories of dairy products, breads and **cakes could**

	be distinguished from biscuits in terms of their characteristics, taste and price. **(b)** More particularly, **these products have lesser shelf-life than that of biscuits**. Accordingly, the **market for biscuits appears to constitute a separate and distinct relevant product market**. **(c)** As regards the **relevant geographic market**, it appears **that the conditions of competition are homogeneous across India. In the absence of any material on record brought by the Informant to suggest heterogeneity in the conditions of competition across India**, the whole of India **is considered as the relevant geographic market. Resultantly, the relevant market in the instant case is the 'market for biscuits in India'**. **(d)** Further, the other bakery and dairy products supplied by OPs viz. cakes, rusk, milk, ghee, cheese, butter, etc. **face intense competition from organised and un-organised local players**; and the business of OPs in these segments appear to be relatively insignificant. Accordingly, it does not merit making assessment of dominant position in respect of these products and it can reasonably be presumed that the conduct of OPs in relation to these products cannot be considered as contravention of the provisions of the Act. **(e)** As **regards the relevant market**, the **Commission notes that Britannia is a prominent biscuit brand in India**. However, **the biscuits industry in India has always evidenced the presence of other organised and unorganised players**. The **other organised players in the market include ITC, Parle and Priya Gold.** **(f)** The market for manufacture and sale of biscuits in India has also witnessed recent entries **by foreign brands such as 'Unibic' and 'Mc Vities'. These competitors of OPs have comparable size and resources; and also offer different categories/range of biscuits. Presence of such players indicates that the buyers have options to choose in the relevant market**. **(g)** Thus, **it is found that market for biscuits, including each of the segments therein, exhibits intense competition and OPs do not possess sufficient market power to act independently of the competitive forces prevailing in the relevant market**. **(h)** Notwithstanding this, the Commission also notes that market-segmentation and offering special rates/discounts on the basis of sale volumes per se cannot be regarded as anti-competitive.
Decision	☞ The CCI decided the case in favour of Opposite Party. ☞ The CCI held that no case of contravention of the provisions of Section 4 of the Act is made out against OPs. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

82. DEPARTMENT OF SPORTS v. ATHLETICS FEDERATION OF INDIA [CCI]

Hint: Informant file a complaint against the Opposite Party w.r.t. take action against the state units/officials/ **athletes who encourage unauthorised marathons without taking permission of AFI and alleged the said action is anti-competitive.**

Decision: CCI decide the case in favour of Informant and held that said **conduct of OP prima facie appears to be abuse of dominant position by OP in terms of the provisions of Section 4 of the Act. Moreover, this case is fit for investigation by DG.**

Fact of the Case	☞ AFI take decision in its AGM to **take action against the state units/ officials/ athletes who encourage unauthorised marathons without taking permission of AFI**.

	☞ Informant file complaint against the Opposite Party (i.e. AFI) the above decision of OP is anti-competitive and is not conducive for development of the sport of athletics at the grass-root level. ☞ It is averred that such a decision of AFI will have an adverse impact on promotion of sports and protection of the interest of sports persons and will prohibit healthy competition.
Legal Principles held—	☞ **Before initiate inquiry w.r.t. the allegations raised against the AFI, we need to check, whether AFI is covered within the definition of enterprises or not:** The assessment of whether an entity is an 'enterprise' or not is **to be done based on the activities of the entity under consideration**. It is observed that in the instant case, the entity in question i.e. AFI has been engaged in organizing various national and international athletic events and generating revenue out of such activities through various means such as royalty, sponsorship, etc. The **said activities of AFI can be aptly termed as economic activities** and hence, **AFI stands covered within the meaning of 'enterprise' in terms of the provisions of Section 2(h) of the Act**. ☞ **What is relevant product Market?** ✋ The allegations of Informant pertain to the conduct of OP in providing services relating to organisation of athletic events, the **relevant product market** in the instant case would be the market for **''provision of services relating to organisation of athletics/ athletic activities''**. ✋ It is observed that provision of services relating to organisation of athletic events is distinct and cannot be substituted with any other related products/ services. ☞ **What is Relevant Geographical Market?** ✋ The relevant geographical market in this case may be taken as 'India' because OP organises various national and international athletic events throughout India. ✋ Accordingly, the **relevant geographical market** in the instant case is the market for **'provision of services relating to organisation of athletics/ athletic activities in India'**. ☞ **Whether AFI has dominance in the relevant Market?** ✋ OP being the apex body for managing athletics in India and by virtue of its association with IAAF, AAA and Indian Olympic Association, it is controlling athletic activities in the entire country. ✋ Further, **OP also conducts national, international athletic meets in the country**. Also, it has **thirty two affiliated state units and institutional units and it conducts national championships and selects Indian Athletics Teams** for various international competitions. Thus, in relation to organisation of athletic activities in India, **OP is the supreme authority having control over all such events and activities**. ✋ Therefore, the **Commission is of the view that OP is dominant in the relevant market of 'provision of services relating to organization of athletics/ athletic activities in India'**. ☞ **Whether Section 3 is Contravened or Section 4?** ✋ It appears that **by virtue of its dominance in the relevant market**, OP is trying to impose discriminatory conditions like mandatory permission for conducting national and international marathon meets and it is thereby restricting the entry of new entrants into the relevant market. The said **conduct of OP prima facie appears to be abuse of dominant position by OP in terms of the provisions of Section 4 of the Act**.

	☝ With regard to contravention of the provisions of Section 3 of the Act in the matter, the Commission observes that the information **does NOT disclose any kind of agreement which can be termed as anti-competitive** in terms of any of the provisions of Section 3 of the Act.
Decision	☞ **The CCI decide the case in favour of Informant** and held that this case is fit for investigation by the Director General. ☞ Accordingly, under the provisions of Section 26(1) of the Act, the Commission directs the DG to cause an investigation into the matter and to complete the investigation within a period of 60 days from the receipt of this order.

83. REGISTRARS ASSOCIATION OF INDIA v. NSDL & ORS [CCI]

Hint: Informant file complaint before CCI that the NDSL propose to enter the share transfer agency segment through its subsidiary. It may result into abuse of dominance by NSDL being a depository to also become a share transfer agent.

Decision: The CCI decide the case in favour of the Opposite Party after considering the grounds as given in legal principle rules and held that **no case of contravention of the provisions of the Act** is made out **against OPs in the instant matter and the matter is closed in terms of the provisions of Section 26(2) of the Act**.

Fact of the Case	☞ Informant is an association representing **Registrars to an Issue** and **Share Transfer Agents** ('RTI'/'STA'). The **members of Informant are acting as an intermediary** between the issuer and the depository and **providing services such as dematerialisation, IPO and corporate actions in securities market in India**. ☞ NSDL (i.e. OP 1) **is the largest depository in India and is engaged in the business of providing depository services like dematerialisation and it handles all securities held and settled in dematerialised form in the National Stock Exchange**. ☞ NSDL Database Management Limited (i.e. OP 2'), a wholly owned subsidiary of OP 1, is **providing integrated services including information technology, process design, operations and administrative infrastructure etc. relating to securities market**. ☞ SEBI (i.e. 'OP 3') is a **regulator formed to safeguard the interest of the investors and to promote/ develop the securities market in India**. ☞ The members of the Informant are operating in the participant market as RTI/ STA wherein OP 1 acts as a regulator. ☞ Informant has stated that OP 2 has **filed an application** before OP 3 **for being registered as a RTI/ STA i.e., to enter into the participant market**. ☞ It is the case of the Informant that OP 1, **through its wholly owned subsidiar**y OP 2, **is trying to enter into the participant market i.e. RTI/ STA market wherein it acts as a regulator**. ☞ As per the Informant, OP 1, being a regulator of the participant market, **has all the information/ details about the said market and no new entrant in the market could match the infrastructure and muscle power of OP 2**. ☞ Being a regulator in the participant market, **it is apprehended that OP 1 would favour OP 2 as the preferred service provider**. ☞ Informant has alleged that the said conduct of OPs **would create business uncertainties for other players in the participant market and would lead to consolidation in the securities market where the two markets such as depository services market and participant market (as envisaged in the**

	Depositories Act, 1996) would merge, thereby creating a monopoly situation in the market. ☞ Further, it is alleged that **the said conduct of OPs is also likely to cause an anti-competitive effect in the market in contravention of the provisions of Sections 3 and 4 of the Act as the proposed entry of OP 2 into RTI/ STA market would discourage competition and hamper innovation in this segment.** ☞ In view of the above, Informant has **prayed before the Commission to institute an inquiry against OPs** under Section 26(1) of the Act.
Legal Principles held—	**The commission has considered the following grounds:** **(a)** The allegations made by the Informant are premature as the application of OP 2 is at the preliminary stage of processing before SEBI. It may be noted that an action for an alleged anticompetitive conduct can be initiated by the Commission in terms of either the provisions of Section 3 or Section 4 of the Act only, if the alleged anti-competitive conduct has already taken place. **(b)** In the instant matter, **entry of OP 2 in the participant market is a mere proposal**. Since OPs are **not operating in the participant market as of now**, the **alleged anti-competitive conduct of OPs in that market cannot be examined in terms of the provisions of Sections 3 or 4 of the Act at this stage**. **(c)** SEBI in its comments/ views has categorically stated **that there are no restrictions on the activities that can be carried out by a subsidiary of a depository**. In view of this, it should be noted that noted that there is nothing binding on OP 1 to not engage in any activities relating to the participant market through its subsidiary OP 2.
Decision	**The CCI** decide the case in favour of the Opposite Party after considering the aforesaid grounds and held that **no case of contravention of the provisions of the Act** is made out **against OPs in the instant matter and the matter is closed in terms of the provisions of Section 26(2) of the Act**.

84. CONFEDERATION OF REAL ESTATE BROKERS ASSOCIATION OF INDIA v. MAGICBRICKS.COM & ORS [CCI]

Hint: The Informant primarily **appears to be aggrieved by the conduct of OPs in indulging NBP or charging much less as brokerage fee compared to the traditional brokerage fee of 2% of the sale/purchase value of a property. The Informant has alleged that OPs are dominant and have contravened of the provisions of Section 4 of the Act.**

Decision: The CCI decide the case in favour of Opposite Party. In the absence of dominance of any of the OPs in the relevant market, the Commission is of the view that, **NO case of contravention of the provisions of Section 4 of the Act is made out against any of the OPs in the present case and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act**.

Fact of the Case	☞ In the present case, Confederation of Real Estate Brokers' Association of India (referred to as "Informant') filed information under Section 19(1)(a) of the Competition Act, 2002 against Magicbricks.com ('OP 1'), 99acres.com ('OP 2'), Housing.com ('OP 3'), Commonfloor.com ('OP 4') and Nobroker.in ('OP 5') [collectively, hereinafter 'OPs'] **alleging contravention of the provisions of Section 4 of the Act.** ☞ The Informant is a confederation of 35 real estate brokers' association, **having combined membership of approximately 20,000 real estate brokers**.

	☞ OPs are various online portals **engaged in the activities of real estate listing, property finder solution, etc**. OPs **run and manage their respective websites and property services division by acting as commission agents in real estate transactions**. ☞ The Informant primarily **appears to be aggrieved by the conduct of OPs in indulging NBP or charging much less as brokerage fee compared to the traditional brokerage fee of 2% of the sale/purchase value of a property while undertaking a real estate transaction or public auctioning of properties.** ☞ It is averred that due to such practice of OPs traditional real estate brokers are getting eliminated from the market. **The Informant has alleged that OPs are dominant and have contravened of the provisions of Section 4 of the Act**.
Legal Principles held—	☞ **What is Relevant Product Market in the instant case?** ✋ India is one of the fastest growing e-commerce markets. With the growth of e-commerce, **the number of online portals engaged in the activities of real estate listing, property finder solution, etc. have been increasing**. Besides OPs, **it is observed that there are also many other real estate listing sites which are offering similar services, providing various options to the consumers**. ✋ Besides the online platforms, **real estate brokerage business in India is also undertaken by the traditional brokers in a large scale**. ✋ Both **the online platforms and the off-line traditional brokers are offering similar services to the customers. Accordingly, the Commission is of the view that on-line and off-line services of brokers cannot be distinguished** while defining the relevant product market in the instant case. ✋ Both are **alternative channels of delivering the same service.** ✋ **So, the market for 'the services of real estate brokers/ agents' is considered as the relevant product market** in the present case. ☞ **What is Relevant Geographic Market in the instant case?** ✋ The traditional **brokers/agents provide services within their respective localities whereas OPs offer their services anywhere in India**. The services offered by OPs on the supply **side enables real estate properties located anywhere in India to be listed for sale/ purchase/ renting whereas on the demand side OPs through their website enable consumers to purchase/ rent any property in their localities or anywhere** in India. ✋ Further, **OPs provide services regarding details of properties such as value, area, locality etc. to the real estate brokers as well as to the consumers throughout India**. ✋ Therefore, the relevant geographic market in this case is considered as 'India'. ☞ **What is Relevant Market in the instant case?** The relevant market in the instant case is delineated as market for 'the services of real estate brokers/ agents in India'. ☞ **Whether OP attained dominant position in the instant case?** ✋ It is observed that based on the claims of OPs on their respective websites and in their advertisements, ranking of websites by Alexa.com, and market capitalisation data of OP 2 and OP 3; the Informant has submitted that OPs are dominant real estate portals/websites.

	☝ However, **the Commission has considered the relevant market as 'the services of real estate brokers/ agents in India', which is different and broader than the relevant market conceived by the Informant**. ☝ The **Commission observes that in the said market, there are large number of players operating, both through online and off-line channels**. It **is so because presently, in India, no licence or registration is required to undertake the brokerage business in real estate sector**. ☝ Thus, the presence of a large number of listing sites and traditional brokers in the said relevant market pose competitive restraint on each other and hence no specific player can act independently of the market forces and affect the consumers or other players in its favour. ☝ The Commission has also perused the website ranking figures of Alexa.com as submitted by the Informant and is of the view that based on the said figures it is **not possible to gauge the dominance of any of the OPs in the relevant market because the ranking is limited to only the websites/portals** and does **NOT** include the off- line brokers. ☝ Further, the said rankings are based on traffic attracted by the websites which keep on changing regularly based on the number of page views. ☝ Accordingly, the Commission is of the opinion that none of the OPs are dominant in the relevant market.
Decision	☞ **The CCI decide the case in favour of Opposite Party.** ☞ **In** the absence of dominance of any of the OPs in the relevant market, the Commission is of the view that, **no case of contravention of the provisions of Section 4 of the Act is made out against any of the OPs in the present case and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act**.

85. XYZ v. REC POWER DISTRIBUTION COMPANY LTD [CCI]

Hint: The Informant filed complaint under Section 3 & 4 on the following two grounds that OP group has **leveraged its dominant position in the first relevant market to enter into or protect the second relevant market and OP has denial of Market Access.**

Decision: Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the OP group and the matter is ordered to be closed forthwith. **The CCI has decide the case in favour of Opposite Party**.

Fact of the Case	☞ **Rural Electrification Corporation Limited (hereinafter, 'REC')** was incorporated in the year 1969 with the **main objective to finance and promote rural electrification projects in the private and public sector in India**. It finances rural electrification projects across India and **also provides loans to Central/State Sector Power Utilities, State Electricity Boards, Rural Electric Cooperatives, NGOs and Private Power Developers**. ☞ RECPDCL, a wholly owned subsidiary of REC, was set up in the year 2007 **with specific focus on developing and investing in electricity distribution and related activities**. ☞ The Informant has alleged that RECPDCL has been leveraging its association with REC **for securing work related to consultancy services in relation to proposed rural electrification projects, mainly preparation of Detailed Project Report (DPR), by giving verbal assurance of securing approvals for the financing of such projects by REC**. It has been alleged that **RECPDCL has secured various orders relating to consultancy services in case of rural**

	electrification projects from the state distribution utilities under the Rajiv Gandhi Grameen Vidyutikaran Yojana (RGGVY) scheme on the pretext that REC **is the nodal agency for implementation of RGGVY**. It has thus, distorted competition in the market for consultancy services related to the said project. ☞ The Informant was further aggrieved **because of the awarding of DPR preparation work to RECPDCL on nomination basis by various state utilities without following the tendering process in complete** disregard to the CVC guidelines and competition law principles. ☞ **This allegedly amounted to denial of market access to the competitors of RECPDCL in the consultancy market**. Thus, as per the information, **the manipulation of competition by RECPDCL under the aegis of REC amounted to contravention of the provisions of Sections 4(2) (c) and 4(2) (e) of the Act**.
Legal Principles held—	The Commission has perused the DG report and the replies/objections filed by the Informant and the OP, along with the material available on record, besides hearing the counsels appearing for the parties. **ISSUE 01: Leveraging of Dominant Position:** ☞ **The** DG **concluded that REC's dominance in rural electrification financing was directly translating into the award of consultancy work by the PIAs to RECPDCL**. ☞ In the **absence of any evidence to support the contrary**, the DG **relied on these circumstantial evidence to establish that REC group was using its position of dominance in the market of financing of rural electrification projects in India under RGGVY/DDUGJY to protect the market for consultancy services for rural electrification projects under RGGVY/DDUGJY in India in violation of Section 4(2) (e) of the Act.** ☞ The Commission has considered the findings of the DG and the submissions of the parties on the issue of leveraging**. The leveraging doctrine applies when a firm has sought to use its dominance in one relevant market to enter into or protect the second market without competing on merits in that market.** ☞ In the instant case, the **DG's investigation reveals that RECPDCL garnered a significant share of the secondary relevant market in the first year of its operation**, i.e. 2013-14. **It also brings out the fact that award of DPRs during the period of investigation was mainly on nomination basis**. ☞ In this regard, the Commission notes that the **DG has relied upon the responses of various competitors and consumers of RECPDCL to conclude that OP group was using its dominant position in the first relevant market to ensure that DPR work was awarded to RECPDCL in the second relevant market**. ☞ Such work was awarded on nomination basis, the reason for which, as per the DG **was not sufficiently explained by the Discoms/consumers.** ☞ Therefore, the Commission looked **into the evidence relied upon by the DG to examine whether the conclusions so drawn are in accordance with the responses of the aforesaid parties or not**. ☞ Thus, it is apparent that **there is NO evidence on record either to show that REC has leveraged its dominant position in the first relevant market to enter into or protect the second relevant market or to show that REC has given any assurance to Discom's that their decision to appoint RECPDCL as a consultant for the preparation of DPRs would lead to approval of the project**.

	☞ **Therefore,** the Commission held that there is **NO concrete evidence on record to establish** that OP group has **leveraged its dominant position in the first relevant market to enter into or protect the second relevant market**. ☞ Therefore, the allegation of violation of the provisions of Section 4(2) (e) of the Act does **NO stand established**. **ISSUE 02: Denial of Market Access:** ☞ The second element in the enquiry of a case **under denial of market access is with regard to the anticompetitive effect/distortion in the market because of such conduct**. ☞ The Commission notes that the DG has primarily relied upon the award of DPRs on nomination basis to RECPDCL. During 2013-14, RECPDCL was awarded 70 DPRs on nomination basis out of total 189 DPRs prepared by the consultants i.e. 37% of the total market. ☞ Further, the market share of RECPDCL in the second market, including all DPRs prepared by it for 2013-14, is approximately 40%. The Commission notes that although the entry of RECPDCL in the second market has led to a reduction in the market share for the other consultancy firms, the market was nevertheless contestable. ☞ The responses from the Discoms (i.e. the consumers of RECPDCL) have clearly revealed the reasons for their preference for appointing RECPDCL. Thus, in the absence of a conduct on the part of OP group, the reduction in the market share for some of the players cannot be relied upon to infer anti-competitive conduct on the part of OP group. ☞ Further, **the data submitted by RECPDCL depicts that the percentage of DPRs prepared by it has decreased in the year 2015-16 to approximately 36%**, which further weakens the allegation regarding denial of market access. ☞ With more than 60% market **shared by the other consultancy firms and in absence of any evidence regarding OP group's influence on the Discoms' decision to follow the nomination route, the Commission is of the view that contravention of Section 4(2) (c) cannot be made out in the instant case**.
Decision	☞ The CCI conclude that the evidence on record **is NOT sufficient to establish that REC, as the nodal agency for implementation of the RGGVY scheme and as one of the appraising authorities of rural electrification projects under the scheme, exercised undue influence on the PIAs or meted out any discriminatory treatment to the competitors of its subsidiary RECPDCL in order to enter into or protect the relevant market of preparation of DPR**s. ☞ In view of the above discussion, **the Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the OP group and the matter is ordered to be closed forthwith**. ☞ **The CCI** has decide the case in favour of Opposite Party.

86. SOUTHWEST INDIA MACHINE TRADING PVT LTD v. CASE NEW HOLLAND CONSTRUCTION EQUIPMENT INDIA PVT LTD [CCI]

Hint: The Informant filed a complaint against the OP with regard to abuse of dominance. In this case, Seller refuse to sell on the ground of misuse by the buyer.

Decision: The CCI decide the case in favour of the Opposite Party.

Fact of the Case	☞ **The** Informant **had issued two purchase orders for the purchase of the 50 units Backhoe Loader and 10 units of Soil Vibratory Compactor on OP**. Later on the **informant place another optional purchase order for the purchase of 100 units of Backhoe Loader and 80 units of Soil Vibratory**

	Compactor. It appears that the **INFORMANT** had **sold these equipment in auction and exported the same**. ☞ After supplying 35 units out of the 50 units of the Backhoe Loaders**, the OP stopped further supplies and informed the INFORMANT that it will take appropriate legal actions against it for selling the equipment in auction and exporting the same thereby jeopardising the market of it in these countries**. ☞ According to the Informant, such conduct of OP amounts to entering into anti-competitive agreement in contravention of the provisions of Section 3 of the Act. ☞ It has been further alleged that through such conduct, OP had: **(a)** directly or indirectly imposed an unfair and discriminatory condition in the sale or purchase of goods; **(b)** limited and restricted the market for goods and denied market access; **(c)** sought to impose supplementary obligations which have no bearing with the subject matter of the contract; and **(d)** used its dominant position in one relevant market to protect other relevant market. ☞ For these purported reasons, it has been alleged by the Informant that the conduct of OP is in contravention of the provisions of Section 4 of the Act as well.
Legal Principles held—	☞ The Commission is of the view that there are **two relevant markets in the instant case**: **(a)** market for manufacture and sale of Backhoe Loaders in India; and **(b)** market for manufacture and sale of Vibratory Soil Compactors in India. **Let us discuss dominance of OP in the aforesaid each market.** ☞ **In case of Market for manufacture and sale of Backhoe Loaders in India:** ☝ The Informant had portrayed OP as a top-tier player in the Backhoe Loaders Segment. However, it could not provide any material which could establish dominance of OP in this relevant market. ☝ It is relevant to note that the Commission, in its order dated 11th March 2014 in Case No. 105/2013, had prima facie found JCB to be in a dominant position in the relevant market for manufacturing and sale of Backhoe Loaders in India. ☝ Given these facts and circumstances, **the Commission is of the view that OP cannot be regarded as a dominant enterprise in the relevant market for manufacture and sale of Backhoe Loaders in India**. ☞ **In case of Market for manufacture and sale of Vibratory Soil Compactors in India:** ☝ The Commission observes the **presence of other players such as JCB, Volvo, Escorts, Dynapac, Greaves, etc. in the soil compactors business** in India, indicating availability of choice to consumers. ☝ Given the materials available on record, OP **cannot be regarded as dominant in the relevant market for manufacture and sale of Vibratory Soil Compactors in India as well**. ☝ In view of the foregoing, it emerges that OP does not enjoy dominant position either in the market for manufacture and sale of Backhoe Loaders in India or in the market for manufacture and sale of Vibratory Soil Compactors in India. ☝ In the **absence of OP being dominant in any of the relevant markets as delineated supra, the Commission does NOT see a case of contravention under Section 4 of the Act**.
Decision	**The CCI** decide the case in favour of the Opposite Party.

87. PICASSO ANIMATION PRIVATE LTD v. PICASSO DIGITAL MEDIA PVT LTD [CCI]

Hint: Informant file complaint that its brand name "Picasso" by OP as well as OP's claim to be associated with Maharishi Group. The Informant had also alleged that the said conduct of the OP amounts to abuse of dominant position by contravening the provisions of Section 4 of the Act.

Decision: The CCI decide the case in favour of Opposite Party

Fact of the Case	☞ The Informant was mainly aggrieved by the use of its brand name "Picasso" by OP as well as OP's claim to be associated with Maharishi Group. ☞ The Informant had alleged that **this illegal conduct of OP has caused loss of goodwill and business to the Informant**. ☞ The Informant had also alleged that the said conduct of the OP amounts to abuse of dominant position by contravening the provisions of Section 4 of the Act.
Legal Principles held—	☞ After a careful perusal of the information and material available on record, the Commission notes that both the Informant and OP **are engaged in the business of offering various animation related services, which includes offering certification and diploma courses in animation**. ☞ We need understand the term of **"Animation"**: ☝ As per the OXFORD dictionary, *'Animation' is a technique of photographing successive drawings or positions of puppets or models to create an illusion of movement when the film is shown in sequence.* ☝ As per the CAMBRIDGE dictionary, 'Animation' means moving images created from drawings, models, etc. that are photographed or created by the computer. **There is NO certain definition of the term but it can be safely inferred that "animation" generally** means and includes drawings and moving images created through photography or with the help of computer. ☞ **What is Relevant Product Market in the instant Case?** ☝ Animation courses are not generally substitutable with other vocational courses offered by institutions in view of their peculiarity. ☝ The **selection of any course is a personal choice of the candidates which is based on various factors** such as individual taste, inclination and interest. Further courses also differ on the fee charged. In view of the above mentioned characteristics, vocational course such as animation is **not generally substitutable with other vocational courses viz., web designing, internet marketing, electrical and electronics, hardware and software repair and maintenance, mobile repair, etc**. and other streams or courses such as, law, arts, hotel management, finance, banking, insurance, engineering or other courses. ☝ Thus, **the relevant product market is "Market for providing animation related education services".** ☞ **What is Relevant Geographical Market in the instant Case?** ☝ The Commission observes that there are many colleges and institutions, **which are providing degrees, certifications and diploma courses in the field of animation at pan India leve**l. Some of the institutions are even providing online courses.

	☝ Further, the conditions of competition in animation related education services are homogenous throughout India in the absence of any evidence to the contrary**. Hence, the relevant geographic market is the territory of India**. ☞ **What is relevant Market in the instant Case?** In view of the above **discussion, the Commission holds that the relevant market in the present matter is "Market of providing animation related education services in India".** ☞ **The Following observation of the CCI:** ☝ It is further noted that apart from the OP, **there are many other institutions providing online and offline trainings in animation courses**. ☝ Prominent amongst them are Arena Animation, Maya Academy of Advanced Cinematic (MAAC), Zee Institute of Creative Arts (ZICA), Global School of Animation, Whistling Woods International Institute, Tekno Point Multimedia, Apeejay Institute of Design, Toonz Webel Academy (TWA) and Massco Media. ☝ **The relevant market seems to be quite competitive with a number of institutions offering animation courses to the students. Though the market shares of these institutions are not available in the public domain**. However, **it can safely be inferred that the OP does not have dominance in the relevant market in view of the competitive scenario and owing to the presence of many reputed institutions**.
Decision	☞ **The CCI decide the case in favour of Opposite Party and held that** in the absence of dominance of the OP in the relevant market, there is no need to look into the allegations regarding abuse of dominance in contravention of the provisions of Section 4 of the Act. ☞ Further, **we do not find any breach under Section 3 of the Act**.

88. RAKESH SANGHI v. BENNETT, COLEMAN & COMPANY LTD & ANR [CCI]

Hint: The INFORMANT wanted to publish legal notice in the two newspaper, but the Opposite Party charge the higher fees in comparison to other newspapers. The informant averred that OP1 has **converted his legal notice, which falls under non-commercial advertisement, into a commercial advertisement as merely the name of a Private Limited Company has been mentioned in the said legal notice**.

Decision: The CCI decide the case in favour of Opposite Party.

Fact of the Case	☞ **As** per the information, the Informant is a lawyer practicing in the city of Hyderabad. **It is stated that the Informant is required to publish notices on behalf of his clients for certain purposes such as transactions of land/real estate, cautioning prospective purchasers against buying disputed properties** etc. ☞ It is averred that the Informant wanted to publish a caution notice in the Hyderabad edition of the newspapers published by the OPs. The rates charged by the OPs was around Rs.1,00,000/-. **The Informant has averred that the rate quoted by the OPs for the said advertisement is much higher than the rates for similar advertisement in other newspapers circulated in Hyderabad and Secunderabad**. ☞ As per the information, OP1 is charging two different rates for commercial and non-commercial advertisements in its newspaper. **It is stated that for commercial advertisements, it is charging more as compared to non-commercial advertisements**.

	☞ The Informant has averred that OP1 has **converted his legal notice, which falls under non-commercial advertisement, into a commercial advertisement as merely the name of a Private Limited Company has been mentioned in the said legal notice**.
Legal Principles held—	☞ **What is relevant Product Market in the instant Case?** The Commission considered the provision of services relating to publication of advertisements including public/ legal notices etc. in newspapers as the relevant product market in this case. ☞ **What is relevant Geographical Market in the instant Case?** The Commission observes that the geographic area of Hyderabad and Secunderabad may be considered as the relevant geographic market in this case. ☞ **What is relevant Market in the instant case?** ✋ It is so because the Informant had proposed to publish the said notice in the newspapers in the geographical area of Hyderabad and Secunderabad. ✋ Accordingly, 'the provision of services related to publication of advertisements including public/ legal notices etc. in the newspapers in Hyderabad and Secunderabad' may be considered as the relevant market in this case. ☞ **Whether Opposite has dominance in the market?** The Commission observes that in the twin cities of Hyderabad and Secunderabad, ✋ The major Telugu daily newspapers such as Eenadu, Sakshi, Vaartha, Andhrajyothi, Surya, Prajasakti, Andhrabhoomi, Andhra Prabha and Namaste Telangana; ✋ The major English daily newspapers such as The Times of India, The Hindu, The Deccan Chronicle, Business Standard and The Economic Times; ✋ The major Urdu daily newspapers such as The Siasat Daily, The Munsif Daily, The Etemaad and Rahnuma-i Decca; and the Hindi daily The Daily Milap are in circulation. ✋ Besides, **there are a number of local newspapers also in circulation in the aforesaid relevant geographical market**. ✋ Therefore**, the presence of a large number of other English newspapers and regional dailies in Hyderabad and Secunderabad prevents the OPs from exercising any kind of market power independent of market forces and the presence of such large number of other newspapers in the aforesaid market also provides more choices to the Informant which are substitutable in nature.**
Decision	☞ **The CCI is of the view of that** neither OP 1 nor OP 2 possess the market power to act independently of competitive forces in the relevant market as defined supra or to affect its competitors or consumers or the relevant market in its favour. ☞ Therefore, neither OP 1 nor OP 2 is found to be dominant in the relevant market. In the absence of dominance of OP 1 or OP 2 in the relevant market, the question of abuse of dominance by them in terms of Section 4 of the Act does not arise. ☞ **The CCI decide the case in favour of Opposite Party and held that** no case of contravention of the provisions of Section 4 of the Act is made out against any of the OPs in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.

89. VEER PRATAP NAIK v. AVEVA INFORMATION TECHNOLOGY INDIA PVT LTD [CCI]

Hint: In the present case, Informant filed complaint on account of concealed the information that the licenses of its products were also available on a monthly rental basis there were fundamental differences between the terms of agreement entered with BOCAD vis-a-vis the agreement entered with the OP and that **OP had abused its dominance and stipulated restrictive conditions in the licenses.**

Decision: The CCI decide the case in favour of Opposite Party.

Fact of the Case	☞ As per the information, **the Informant is engaged in the business of providing engineering support in the form of 3D modelling and preparation of structural steel fabrication drawings to engineering, procurement and construction (EPC) companies in India as well as globally**. ☞ It is stated that the Informant entered into an agreement **with BOCAD Services International S.A. Belgium on 26th August 2010 to purchase 30 'BOCAD licenses' over a period of the next 3 years for a total consideration of 10,000 Euros each**. It is averred that 20 of these licenses were purchased from BOCAD. Later on, BOCAD acquired by AVEVA i.e. before May, 2012. ☞ After the merger, AVEVA's representatives had contacted the Informant and **insisted that the Informant buy the balance 10 licenses of BOCAD as per their earlier agreement**. Thereafter**, OP also offered 6 licenses of the 'Plant Design Management System (PDMS) Software' along with the balance 10 BOCAD licenses**. ☞ In this regard, the INFORMANT **entered into an agreement with the OP vide Licenses Agreement CAAP1102 dated 1st January, 2014**. ☞ It is stated that the OP had **concealed the information that the licenses of its products were also available on a monthly rental basis**, and it had **collected the first year Annual Maintenance Contract (AMC) fee of Rs 10,710,000/- on a yearly basis from the Informant**. ☞ It is further alleged that **there were fundamental differences between the terms of agreement entered with BOCAD vis-a-vis the agreement entered with the OP** and that **OP had abused its dominance and stipulated restrictive conditions in the licenses.**
What was the dispute	☞ The dispute between the Informant and the OP in the present case emanates from an agreement entered into between BOCAD and the Informant for supply of 30 BOCAD 3D licenses. ☞ It is **observed that after BOCAD was acquired by AVEVA, the Informant had entered into a new agreement with the OP for supply of 3D software**. ☞ From the information available in the public domain, it is observed that 3D modelling engineering software is used in industries like 3D architecture, interior design, printing, animation etc. **These software tools allow for building and customising structural models from scratch**.

Legal Principles- held	☞ **What is Relevant Product Market?** Based on the above, the Commission notes that the relevant product market in this case may be defined as the market for '3D modelling software'. ☞ **What is Relevant Geographical Market?** It is noted that since the market for 3D modelling software exhibits distinctly homogenous market conditions in the territory of India, the relevant geographic market in this case may be considered as the 'territory of India'. ☞ **What is Relevant Market?** The relevant market in this case may be defined as the market for '3D modelling software in India'. ☞ **With regard to dominance of OP in the relevant market defined supra**, from the information available in the public domain, it is observed that there are other 3D software companies, which are making and selling 3D software products, which are substitutable with the software being manufactured by OP. **Checking dominance with help of reports:** During the course of the hearing, OP has submitted that even in the markets for Engineering Design Tools (EDT), EDT Plant Design or EDT AEC, it does not have any market power. OP has **further submitted a report of ARC Advisory Group (report) on "Engineering Design Tools for Plant and Infrastructure"** which reveals that in 2014, it had a market share of 9.5% in the market for EDT, 16.7%, in the market for EDT Plant Design and 1% in the market for EDT AEC, on a worldwide basis. Further, according to the said report, AVEVA faces stiff competition from players such as Autodesk (having a market share of 36% in EDT and 53.4% in EDT - AEC), Intergraph (having a market share of 30.4% in EDT - Plant Design and 16.5% in EDT) and Bentley (having a market share of 18.7% in EDT and 24.3% in EDT AEC).
Decision	☞ Based on the above, the Commission observes that the **OP does not enjoy a position of strength, which would enable it to operate independent of market forces in the relevant market**. Therefore**, OP cannot be considered as a dominant player in the relevant market**. ☞ The Commission notes that **in the absence of dominance of OP in the relevant market, the question of abuse of dominant position by the OP does NOT arise.** ☞ **Thus, NO case of contravention of any of the provisions of Section 4 of the Act is made out against OP in the instant case**. ☞ With regard to the contravention of Section 3 of the Act in the matter, **the Commission notes that the allegation of the Informant does not hold any ground as the information does not disclose any kind of agreement which can be termed as anti-competitive in terms of any of the provisions of Section 3** of the Act. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act. ☞ The CCI decide the case in favour of Opposite Party.

90. ASHUTOSH BHARDWAJ v. DLF LTD & ORS [CCI]

Hint: Informant filed a complaint before CCI alleging abuse of dominance by the Opposite Party Group. In the present Case, OP delay in handed over flat to the informant even after receiving the payment.

Further, the **progress of construction was also tardy**. On the contrary, the **OP's demanded further higher sums from the informants.**

Decision: The CCI decide the case in favour of the Informant directs the OP Group to cease and desist from indulging in the conduct, which is found to be unfair and abusive in terms of the provisions of Section 4 of the Act.

Fact of the Case	☞ Informants in both the cases have booked flats in the OP's housing project in Gurgaon. Informants booked flats and entered into flat buyer's agreement with OP. ☞ **Even after making the payment flats were NOT handed over to them on the stipulated time**. ☞ Further, the **progress of construction was also tardy**. On the contrary, the **OP's demanded further higher sums from the informants**. ☞ In these circumstances, the informants filed complaint before the CCI alleging abuse of dominance by the OP Group.
Legal Principles held—	☞ **What is Relevant Product Market?** Based on the above, the relevant product market was defined as the market for the 'provision of services for development/sale of residential apartments'. ☞ **What is Relevant Geographical Market?** The Commission agrees with the DG's view that Gurgaon would be the geographic region for the purpose of the present cases. ☞ **What is Relevant Market?** The relevant market in this case may be defined as the market for the 'provision of services for development/sale of residential apartments in Gurgaon'. ☞ **With regard to Dominance of OP Group:** ✋ There is no doubt that the strength which the OP Group possesses in residential real estate segment in the geographic region of Gurgaon is incomparable. ✋ Therefore, it is opined that the OP Group holds a dominant position in the market for the 'provision of services for development/sale of residential apartments in Gurgaon'.
Decision	☞ **The CCI decide the case in favour of Informant and** directs the OP Group to cease and desist from indulging in the conduct, which is found to be unfair and abusive in terms of the provisions of Section 4 of the Act. ☞ With regard to penalty the Commission is of the view that since a penalty of Rs. 630 crores has already been imposed on the OP Group in the Belaire's case for the same time period to which the present cases belong, no financial penalty under Section 27 of the Act is required to be imposed. In view of the totality and peculiarity of the facts and circumstances, the Commission does not deem it necessary to impose any penalty on the OP Group in these cases.

91. INDIAN COMPETITION REVIEW v. GATEWAY TERMINALS INDIA PVT LTD & ORS [CCI]

Hint: Informant put the allegation against the Opposite Party that conduct of OP 1 in limiting the services of Container Freight stations (CFSs) at JNP, denying market access to the CFSs which are not owned by it, **compelling shipping lines to either** use the services of its own or select CFSs at JNP and **use the services of OP 4 as well as its own CFSs at Pipavav port. (It amount to abuse of dominant position) and the Informants are aggrieved by the alleged conduct of OP 1 in tying the services of its preferred CFSs along with container terminal services at JNP and refusing to deal with shipping lines that are not willing to travel** towards Pipavav port in contravention of the provisions of Section 3(4) of the Act.

Decision: The CCI decide the case in favour of Opposite Party. **The Commission is of the view that no case of contravention of any of the provisions of Section 3(4) of the Act is made out against any of the OPs as well.**

<table>
<tr><td>Fact of the Case</td><td>
☞ The Informants have alleged that OP 1 is abusing its dominant position in the market of container terminal services.
☞ The Informants appear to be aggrieved by the alleged abusive conduct of OP 1 in limiting the services of Container Freight stations (CFSs) at JNP, denying market access to the CFSs which are not owned by it, compelling shipping lines to either
• use the services of its own or
• select CFSs at JNP and use the services of OP 4 as well as its own CFSs at Pipavav port, and using its dominant position in the market of container terminal services at JNP to protect the market of container terminal services at Pipavav port in contravention of the provisions of Section 4 of the Act.

☞ Further, the Informants are aggrieved by the alleged conduct of OP 1 in tying the services of its preferred CFSs along with container terminal services at JNP and refusing to deal with shipping lines that are not willing to travel towards Pipavav port in contravention of the provisions of Section 3(4) of the Act.
☞ Based on the above submissions, the Informants have prayed the Commission to initiate an investigation into the matters under Section 26 (1) of the Act and pass a cease and desist order against the OPs for their above said alleged anti- competitive activities.
</td></tr>
<tr><td>Legal Principles held—</td><td>
☞ Commission Determined Dominance of the OP?
• With regard to the services of CFSs, which is a part of container terminal services, the Commission observes that besides two CFSs being operated by OP 1, there are 33 other players including GDL CFS, PUNJAB CONWARE CFS, BALMER LAWRIE CFS, ULA CFS, SEABIRD CFS and, CONTINENTAL CFS operating at JNP.
• The presence of such a large number of CFSs indicate that the consumers/shipping lines have multiple options for the services of CFS at JNP and the presence of such a large number of CFSs act as a competitive constraint upon the CFSs of OP 1 from acting independently of the market forces in the relevant market.
• Based on the above, OP 1 is NOT found to be in a dominant position in the relevant market as delineated above.
• In the absence of dominance, the Commission is of the view that the alleged conduct of OP 1 need not be examined. In view of the above facts, NO case of contravention of any of the provisions of Section 4 of the Act is made out against OP 1 in the present case.

☞ With regard to the allegations of the Informants that OP 1 has been tying the services of its preferred CFSs along with container terminal services at JNP and refusing to deal with shipping lines that are not willing to travel towards Pipavav port:
• The Commission observes that the relationship between the consignees/ shipping lines and CFSs is a purely commercial arrangement and based on contractual understanding between the parties.
</td></tr>
</table>

	☝ In this regard, it may be noted that Notification No. 69/2011 dated 03.05.2011 of the Customs Department of the GOI stipulates that the usage of a particular CFS **facility is entirely the prerogative of a consignee and in the absence of the consignee making this choice, the shipping lines may nominate the CFS facility**. ☝ Thus, the selection of CFS service providers at ports does not always lie with the shipping lines. **Further, from the submissions made by OP1, the Commission notes that OP 1 has also started to provide 'Direct Port Delivery' (DPD) facility to accredited and approved consignees**. The aforesaid facility enables OP 1 to directly deliver goods to the consignees without intervention of any CFS operator. ☝ Moreover, the Commission observes that, except bald allegations of vertical anticompetitive agreement in the matters, the Informants have not provided any cogent material/documentary evidence in this regard. ☝ Accordingly, **the Commission is of the view that no case of contravention of any of the provisions of Section 3(4) of the Act is made out against any of the OPs as well.**
Decision	☞ The CCI decide the case in favour of Opposite Party. ☞ The Commission finds that no case of contravention of the provisions of either Section 3(4) or Section 4 of the Act is made out against any of the OPs in the instant matters. Accordingly, the matters are closed under the provisions of Section 26(2) of the Act.

92. ONICRA CREDIT RATING AGENCY OF INDIA LTD v. INDIABULLS HOUSING FINANCE LTD [CCI]

Hint: The Present case relate to imposition of pre-payment penalty levied by the Opposite Party on the Informant for premature closure of the mortgage loan amounts to abuse of dominate position.

Decision: The CCI decide the case in favour of Opposite Party.

Fact of the Case	☞ The Informant has alluded that the pre-payment penalty clause in the mortgage Loan Agreement locks-in a borrower with the lender and its imposition amounts to an aftermarket abuse. ☞ The **Informant claims that the pre-payment penalty clause under the mortgage Loan Agreement is anti-competitive and amounts to contravention of Section 3(1) of the Act.** ☞ **It has been submitted that prepayment penalty restricts migration of loans from one bank/financial institution to another, which in-turn discourages competition and innovation. This according to the Informant causes appreciable adverse effect on competition**.
Legal Principles held—	☞ The Commission notes that the arguments of the Informant **regarding the purported aftermarket and the abuse therein are misplaced as the loan services of the nature impugned herein do NOT involve any aftermarket as alleged by the Informant**. ☞ Availing additional loan or migration of a loan from one lender to another are independent services and availing additional loan or migration from one lender to another **cannot be considered as an aftermarket**. ☞ An **aftermarket is a special kind of antitrust market consisting of unique replacement parts, post warranty service or other consumables specific to some primary product**. Therefore, the term refers **to markets for complementary goods and services such as maintenance, upgrades, and replacement parts that may be needed after the consumer has purchased a durable good**.

	☞ Further, an independent secondary aftermarket would generally exist if consumers are not able to ascertain the life time cost of the primary product/ service at the time of its purchase, there is a high switching cost to shift to substitutes and the manufacturer/ service provider of the primary product/service has the ability to substantially hike the price of the good/service offered in the secondary market (i.e. aftermarket) inspite of reputational concerns. ☞ The Informant has **not shown the presence of any of above factors in the instant case and those are also not discernible from the facts presented in the information**. ☞ By contrast, **the terms and conditions of the loan including the rate of interest, term of repayment, rate of prepayment penalty, etc. were made certain to the Informant at the time of availing the loan itself, which enables the Informant to ascertain the life time cost of the loan facility including the cost of migration of the loan to other lenders**. ☞ In view of the above, the Commission notes that facts of the case do **NOT** involve any aftermarket. ☞ Coming to the examination of the facts under Section 3 of the Act, **the Commission notes that neither the Informant has made any submission/allegation nor do the facts presented suggest existence of any horizontal agreement or vertical restraints of the nature culpable under Section 3(3) or Section 3(4) of the Act**. ☞ As noted earlier, **the market for loan against property is competitive and fragmented with the presence of several players including prominent players like State Bank of India, Punjab National Bank, HDFC Bank and ICICI Bank**.
Decision	☞ In such a market scenario, the Commission does **NOT** see any appreciable adverse effect on competition caused by the pre-payment penalty clause in the mortgage Loan Agreement. ☞ Consequently, **no prima facie case of contravention of the provisions of Section 3 of the Act is made out against the Opposite Party**. ☞ In view of the foregoing, the Commission is of the **view that there exists no prima facie case of contravention of the provisions of Sections 3 or 4 of the Act. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act**. ☞ The **CCI decide the case in favour of the Opposite Party**.

93. SATYENDRA SINGH v. GHAZIABAD DEVELOPMENT AUTHORITY [CCI]

Hint: Informant file complaint against the Opposite Party that unilateral increase in price from Rs. 2 Lakhs to Rs. 7 Lakhs of a flat under the Pratap Vihar residential housing scheme for the Economically Weaker Sections (EWS) being developed by the OP in Ghaziabad.

Decision: The CCI decide the case in favour of Informant **directs the DG to cause an investigation into the matter**. The Commission directs the DG **to complete the investigation and file a report on the same within a period of 60 days from the date of receipt of this order**.

Fact of the Case	☞ The Informant is an allottee of a flat under the Pratap Vihar residential housing scheme for the Economically Weaker Sections (EWS) ('Scheme') being developed by the OP in Ghaziabad. ☞ From the facts of the case, it appears that the grievance of the Informant relates to the letter dated 27.11.2015 of the OP demanding a higher price of Rs. 7,00,000/- for a EWS flat allotted to the **Informant under the aforesaid scheme as compared**

	with the price of Rs. 2,00,000/- as declared in the scheme's initial brochure and intimated to the Informant vide allotment letter dated 04.05.2009. ☞ It is the case of the Informant that the **OP has abused its dominant position by arbitrarily increasing the price of the said flat in contravention of the provisions of Section 4 of the Act**.

Legal Principles held—	☞ The Commission observes that the allegations raised by the Informant in the instant **matter relate to the allotment of low cost residential flats under the Pratap Vihar residential housing scheme announced by the OP for the benefit of EWS**.
	☞ **What is Relevant Product Market?**
	  ✋ The Commission is of the view that **other categories of residential flats available in the market for sale cannot be considered as substitute with the low cost residential flats/houses under affordable housing schemes for EWS as there is a considerable difference in prices of both types of flats as well as in their features**.
	  ✋ It may be noted **that a consumer of flats under the affordable housing scheme will NOT consider other residential flats available in the market as substitutable.**
	  ✋ Further**, the market of low cost residential flats under affordable housing scheme for EWS is limited to people falling under a specific income group and other consumers are not eligible for allotment** of flats under such housing schemes.
	  ✋ Thus, based on the above, the Commission **delineates the relevant product market in the instant case as 'the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for economically weaker sections'**.
	☞ **What is relevant Market?**
	  ✋ In view of the relevant product market and the relevant geographic market delineated above, the Commission defines **the relevant market as "the market for provision of services for development and sale of low cost residential flats under affordable housing schemes for economically weaker sections in Ghaziabad" in this case.**
	  ✋ Having delineated the relevant market, the next issue is to **determine whether the OP is dominant in the said relevant market**.
	  ✋ In this regard, the Commission observes **that in the said relevant market the OP appears to be in a dominant position**.
	  ✋ Other than OP, very few other players are there in the relevant market who are developing and selling low cost residential flats targeted for economically weaker sections of the society.
	  ✋ As per the submissions of the OP, till 2015, **it has developed/constructed a total of 10,419 EWS flats whereas, as per the information available in the public domain, no other player in the market has developed EWS flats on a comparable scale.**
	☞ Further, **the size and resources of GDA are huge and it being a statutory authority, the buyers/allottees are completely dependent on it** and there are a very few other options available in the relevant market for such buyers as substitutes of this relevant product.
	☞ Based on the above, the Commission, prima facie, holds that **the OP is in a dominant position in the relevant market**.

	☞ The **Commission observes that the conduct of OP in unilaterally raising the** sale price of flats under the said scheme from Rs. 2,00,000/- to Rs. 7,00,000/-, without any enabling stipulation **in the brochure of the scheme or in the allotment letter, appears to be abusive**.
Decision	☞ The Commission is of the view that the above said conduct of the OP, emanating from its dominant position in the relevant market, **amounts to imposition of unfair price on the Informant and other allottees of flats under the aforesaid scheme which is anti-competitive in terms of Section 4(2) (a) (ii) of the Act**. ☞ In the light of the above analysis, the Commission **finds that a prima facie case of contravention of provisions of Section 4 of the Act is made out against the OP in the instant matter** and it is a fit case to be investigated by the Director General (DG). ☞ Accordingly, the **Commission directs the DG to cause an investigation into the matter**. The Commission directs the DG **to complete the investigation and file a report on the same within a period of 60 days from the date of receipt of this order**. ☞ **The commission decide the case in favour of Informant.**

94. COMPETITION COMMISSION OF INDIA v. CO-ORDINATION COMMITTEE OF ARTISTS AND TECHNICIANS OF W.B. FILM AND TELEVISION & ORS [SC]

Hint: The Hindi **tele serial 'Mahabharat' was dubbed in Bangla and the dubbed version was telecasted in the State of West Bengal**. The **respondents coordination committee objected this and started agitation which forced the broadcasters to stop the serial**. the broadcasters approached the CCI and alleged that the coordination committee, which **comprises film and TV artists and technicians, has entered into an anti-competitive agreement to ban the telecast of the dubbed version of the serial**.

Decision: The SC decide the case in favour of the Appellant.

Fact of the Case	☞ This appeal raises an interesting and important question of law touching upon the width and scope of jurisdiction of the CCI under Section 3 of the Competition Act, 2002. ☞ The Hindi **tele serial 'Mahabharat' was dubbed in Bangla and the dubbed version was telecasted in the State of West Bengal**. The **respondents coordination committee objected this and started agitation which forced the broadcasters to stop the serial**. ☞ Nevertheless, the broadcasters approached the CCI and alleged that the coordination committee, which **comprises film and TV artists and technicians, has entered into an anti-competitive agreement to ban the telecast of the dubbed version of the serial**. ☞ The CCI, per majority, **held that the coordination committee's act was violative of section 3(3) of the Act. On appeal, the COMPAT reversed the judgment stating that coordination committee is not an 'enterprise' under the Act but merely a trade union of film and TV artists and not covered by section 3(3) of the Act**. ☞ **CCI appealed to the SC challenging the decision of the Tribunal**.
Dispute is in question	☞ The dispute is as to **whether relevant market would cover 'broadcast of TV serial' or it would take within its sweep 'film and TV industry of the State of West Bengal'. TV serial in question was produced in Hindi. Thereafter, it was dubbed in Bangla. When the two channels, namely CTVN+ and Channel 10, decided to broadcast this TV serial in dubbed form, i.e. in**

	Bangla language, this move was opposed by the Coordination Committee and EIMPA.
Legal Principles held—	☞ **The** geographic market is the State of West Bengal in the present case and **to this extent there is NO quarrel inasmuch as activities of the Coordination Committee were limited to the said State**. ☞ <u>**COMPAT Decision**</u> ✋ The Tribunal has upheld the minority view of CCI in saying that nature of the information does **NOT** show anything which could **even be distinctly connected with the whole 'film and television industry in the State of West Bengal'**. ✋ The information is **only against showing the dubbed serial on the television** and **it has no relation whatsoever with production, distribution, etc. of any film or any other material on the TV channels**. ☎ SC held that myopic view taken by the Tribunal **which ignores many other vital aspects of this case, most important being the width of the effect of the aforesaid cause on which the agitation was led by the Coordination Committee**. **The effect is not limited to the telecast or broadcast of the television serial**. No doubt, the Coordination Committee was against the 'broadcast of the television serial 'Mahabharat' on the aforesaid two channels, in the dubbed form. ☎ However, even as per the agitators, **the said broadcast was going to adversely affect the TV and Film Industry of West Bengal and the alleged purport behind the threats was to save the entire TV and Film Industry**. ☎ Therefore, the relevant market was not limited to the **broadcasting of the channel but entire film and television industry of West Bengal**. Whether it was the misgiving (i.e. apprehension) of the Coordination Committee that telecast of dubbed version of 'Mahabharat' is going to affect Bengali film and television industry or it was a genuine concern, **is not the relevant factor while defining the 'relevant market**'. ☞ Now question arise whether the activities in which the Coordination Committee indulged in can be treated as 'agreement' for the purpose of Section 3 of the Act. But, before that, we need to **noticed that the entities which are roped in, whose agreements can be offending, are enterprise or association of enterprises or person or association of persons or where the agreement is between any person and an enterprise**. (a) The expression 'ENTERPRISE' may refer to any entity, **regardless of its legal status** or the way in which it was financed. Therefore, it may **include natural as well as legal persons**. (b) This statement gets further strengthened as the agreement entered into by a 'person' or 'association of persons' are also included and when it is read with the definition of 'person' mentioned in Section 2(l) of the Act. Likewise, definition of 'agreement' under Section 2(b) is also very widely worded. Not only it is inclusive, as the word 'includes' therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as 'agreement'. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by

legal proceedings or not. Therefore, the Coordination Committee would be covered by the definition of 'person'.

(c) However, what is important is that such an 'agreement', referred to in Section 3 of the Act **has to relate to an economic activity which is central to the concept of Competition Law**. As generally understood, economic activity refers to any activity consisting of offering products in a market regardless of whether the activities are intended to earn a profit. **Some examples may be given which would not be covered by Section 3(3) of the Act**.

(d) An individual acting as a final consumer is not an enterprise or a person envisaged, as he is not carrying on an economic activity. We may also mention that the European Union Competition Law recognises that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in Section 3.

(e) The reason is obvious. The 'agreement' or 'concerted practice' is the means through which enterprise or association of enterprises or person or association of persons restrict competition. These concepts translate the objective of Competition Law to have economic operators determine their commercial policy independently. Competition Law is aimed at frowning upon the activities of those undertakings (whether natural persons or legal entities) who, while undertaking their economic activities, indulge in practices which effect the competition adversely or take advantage of their dominant position. The notion of enterprise is a relative one.

(f) The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an enterprise when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering activities carried out by non- profit-making organisations or public bodies.

(g) These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits. Thus, any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade. In the instant case, admittedly the Coordination Committee, which may be a 'person' as per the definition contained in Section 2(l) of the Act, is not undertaking any economic activity by itself. Therefore, if we were to look into the 'agreement' of such a 'person', i.e. Coordination Committee, it may not fall under Section 3(1) of the Act as it is not in respect of any production, supply, distribution, storage, acquisition or control of goods or provision of services. The Coordination Committee, which is a trade union acting by itself, and without conjunction with any other, would not be treated as an 'enterprise' or the kind of 'association of persons' described in Section 3. '

(h) A trade union acts as on behalf of its members in collective bargaining and is not engaged in economic activity. In such circumstances, had the Coordination Committee acted only as trade unionists, things would have been different. Then, perhaps, the view taken by the Tribunal could be sustained. However, what is lost in translation by the Tribunal i.e. in applying the aforesaid principle of the activity of the trade union, is a very pertinent and significant fact, which was taken note of by the DG as well as the CCI in its majority opinion. It is this: The Coordination Committee (or for that matter even EIMPA) are, in fact,

	association of enterprises (constituent members) and these members are engaged in production, distribution and exhibition of films. EIMPA is an association of film producers, distributors and exhibitors, operating mainly in the State of West Bengal. Likewise, the Coordination Committee is the joint platform of Federation of Senior. Technician and Workers of Eastern India and West Bengal Motion Pictures Artistes Forum. Both EIMPA as well as the Coordination Committee acted in a concerted and coordinated manner. They joined together in giving call of boycott of competing members i.e. the informant in the instant case and, therefore, matter cannot be viewed narrowly by treating Coordination Committee as a trade union, ignoring the fact that it is backing the cause of those which are 'enterprises'. The constituent members of these bodies take decision relating to production or distribution or exhibition on behalf of the members who are engaged in the similar or identical business of production, distribution or exhibition of the films. (i) Decision of these two bodies reflected collective intent of the members. When some of the members are found to be in the production, distribution or exhibition line, the matter could not have been brushed aside by merely giving it a cloak of trade unionism. For this reason, the argument predicated on the right of trade union under Article 19, as professed by the Coordination Committee, is also not available. When the lenses of the reasoning process are duly adjusted with their focus on the picture, the picture gets sharpened and haziness disappears. One can clearly view that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus,
Decision	☞ The SC held that the CCI rightly observed that the **protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; albeit for a brief period.** ☞ **It also hindered competition in the market by barring dubbed TV serials from** exhibition on TV channels in the State of West Bengal. **It amounted to creating barriers to the entry of new content in the said dubbed TV serial**. ☞ **Such act and conduct also limited the supply of serial dubbed in Bangla, which amounts to violation of the provision of Section 3(3) (b) of the Act.** ☞ **The SC decide the case in Appellant (i.e. CCI)**

95. ADITYA AUTOMOBILE SPARES PVT. LTD & ORS v. KOTAK MAHINDRA BANK LTD [CCI]

Hint: Informants are primarily aggrieved by the conduct of the OP **in denying enhancement of various credit limits, reduction in interest rates and delay in the handing over of the documents/ title deeds mortgaged with it back to the Informants for making a switch over to the Syndicate Bank for availing various banking services/facilities and** The Informants are also aggrieved **with the conduct of the OP in debiting Rs. 32,41,750/- as penal interest in an arbitrary manner without informing them.** The Informants have alleged contravention of the provisions of Section 4(2)(a)(ii) and 4(2)(c) of the Act in the matter.

Decision: The CCI decide the case in favour of Opposite Party. The Commission is of the view that **no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OP** in the present case and the matter is hence, ordered to be closed.

Fact of the Case	☞ The Informants belong to Aditya Group. The business activities of the informants described below: **(a)** Informant No. 1 is an original equipment manufacturer (OEM) of Bajaj, Hero Honda and TVS and also an authorised dealer for Kinetic, LML and Yamaha.

	(b) Informant No. 2, an authorised stockist of Maruti Udyog Limited, is engaged in the sale and marketing of Maruti Suzuki's spare parts in Tamil Nadu and Puducherry. **(c)** The Informant No. 3 is engaged in the sale of spare parts of 4-wheeler and light commercial vehicles and **(d)** Informant No. 4 is engaged in the sale of lubricant oil. ☞ The Informants are primarily aggrieved by the conduct of the OP **in denying enhancement of various credit limits, reduction in interest rates and delay in the handing over of the documents/ title deeds mortgaged with it back to the Informants for making a switch over to the Syndicate Bank for availing various banking services/facilities**. ☞ The Informants are also aggrieved **with the conduct of the OP in debiting Rs. 32,41,750/- as penal interest in an arbitrary manner without informing them**. ☞ The Informants have alleged contravention of the provisions of Section 4(2)(a)(ii) and 4(2)(c) of the Act in the matter.
Legal Principles held—	☞ The Commission observes that the allegations raised in the instant matter relates to various types of banking services/facilities viz. cash credit, bank guarantee and term loan facility availed by the Informants from the OP. It is observed that the allegations in the instant case do not relate to any specific banking facilities availed by the Informants from the OP, but rather to a broader spectrum of banking services/facilities offered by the OP. Thus, **the relevant product market in this case cannot be narrowed down to a specific banking service/facility such as term loan, bank guarantee, cash credit etc. Rather, it should be the broader market of banking services.** ☞ **What is Relevant Product Market:** ✋ Further, it is pertinent to note that the impugned banking services are provided by the OP not only to the Informants but also to different corporate entities for their business operations. ✋ It may be noted that the banking services provided to corporate entities cannot be considered as a substitute with the banking services available for the retail/ general customers. ✋ Even though the nomenclature of the banking services/facilities provided to the retail/ general customers and corporate entities are same, the characteristics of the banking services/facilities differ between the two groups. ✋ It may be noted that banks on the basis of various verticals or indicators like demand requirements, credit worthiness, expected profitability of the proposed business venture etc. make a clear-cut distinction between corporate customers and general customers. ✋ Even if two entities are operating a similar class of account, say current account, the facilities offered to such accounts differ from customer to customer. Further, the accounts used for business purposes/corporate entities also differ from the accounts used by normal customers. ✋ In view of the above, **the relevant product market in the present case may be considered as the market for the "provision of banking services for corporate entities"**. ☞ **With regard to the relevant geographic market:** ✋ The Commission is of the view that the conditions of competition for availing banking services by the corporate entities throughout India are homogenous.

	- A corporate entity **can avail the banking services/facilities from any bank operating anywhere in India**. - Further, Core banking facility enables the bank customers to operate their accounts from any place in India without any hurdle. - Therefore, the **Commission is of the view that the relevant geographic market in this case may be taken as 'INDIA'**. - **What is Relevant Market:** Based on the above, the Commission defines the relevant market in this case as the market for the **"provision of banking services for corporate entities in India".** - **With regard to assessment of the position of dominance of the OP in the relevant market** as defined above, The Commission observes that banking services for corporate entities is a sub-segment of the larger market of banking services. It is observed that the Informants have NOT provided any information relating to the allegation of dominance of the OP in the relevant market. However, Commission deems **it appropriate to examine the information available in the public domain to assess the position of the OP in the larger market of banking services in India and to draw a conclusion regarding the position of dominance of OP in the relevant market** defined above. (a) The Commission observes that in terms of net-worth value for the year 2015-16, the OP had a very small and insignificant market share of nearly 3% in banking services. (b) Further, players like SBI (with a market share of 15.21% in terms of net-worth value for 2015-16), Bank of Baroda (with a market share of 3.80% in terms of net-worth value for 2015-16), Punjab National Bank (with a market share of 3.74% in terms of net-worth value for 2015-16), Bank of India (with a market share of 2.77% in terms of net-worth value for 2015-16) and others are providing banking services on a larger scale in comparison to the OP. (c) Also, in terms of total assets for the financial year 2015-16, the asset portfolio of the OP is much smaller as compared to SBI and other banks. (d) Furthermore, in terms of net sales, net profit and market capitalisation also the OP is lagging behind other banks like SBI and PNB. (e) In view of the above, the OP does **NOT** appear to be dominant in the banking services market, which makes it highly unlikely for it to be in a dominant position in the market of provision of banking services to corporate entities in India. - Accordingly, **the Commission is of the view that the OP is not in a dominant position in the relevant market as defined in para 17 above. Since the OP is not in a dominant position in the relevant market, its conduct need not be examined in terms of the provisions of Section 4 of the Act.**
Decision	- The CCI decide the case in favour of Opposite Party. - The Commission is of the view that **no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OP** in the present case and the matter is hence, ordered to be closed.

96. VIDHARBHA INDUSTRIES ASSOCIATION v. MSEB HOLDING COMPANY LTD [CCI]

Hint: Informant put the allegation in the compliant that OP 4 is imposing unfair prices on the consumers and denying market access to other power generating companies and consumers for distribution of electricity in contravention of the provisions of Section 4(2)(a)(ii) and 4(2) (c) of the Act respectively and OP 2 is limiting the electricity output in contravention of the provisions of Section 4(2)(b)(i) of the Act.
Decision: The CCI decide the case in favour of the Opposite Party.

Fact of the Case	☞ The 'Informant' filed complaint against MSEB Holding Company Ltd ('OP 1'), Maharashtra State Power Generation Company ('OP 2'), Maharashtra State Transmission Company Ltd ('OP 3') and Maharashtra State Electricity Distribution Company Ltd ('OP 4') alleging contravention of the provisions of Section 4 of the Act. ☞ The allegations of the Informant in the instant case are four fold: **(a)** OP 4 buys the entire electricity produced by OP 2 **even if at a higher rate which results in denial of market access to other power producers**; **(b)** OP 4 is buying power at a higher cost from OP 2 which is cost inefficient in comparison to other power generating companies resultantly, the competition in electricity generation sector has been affected and the consumers of OP 4 are compelled to pay higher tariff for electricity; **(c)** OP 4 is denying open access to consumers for availing electricity from other sources; and **(d)** OP 2, through its decision to shut down four units of Koradi Thermal Power Plant, has limited/ restricted the output of electricity. ☞ Thus, the Informant has alleged that ✌ OP 4 is imposing unfair prices on the consumers and denying market access to other power generating companies and consumers for distribution of electricity in contravention of the provisions of Section 4(2)(a)(ii) and 4(2) (c) of the Act respectively and ✌ OP 2 is limiting the electricity output in contravention of the provisions of Section 4(2)(b)(i) of the Act.
Legal Principles held—	☞ The Commission observes that the allegations of the Informant in the instant matter are primarily directed towards the abusive conduct of OP 2 and OP 4. However, OP 1 and OP 3 have been made pro-forma parties to the case. ☞ **With regard to the allegation of shutting down of four units of Koradi Thermal Plant and consequent limitation of output by OP 2:** ✌ On the basis of the submissions made by OP 2, the Commission notes that the aforesaid four units of Koradi Thermal Plant had rendered service for more than 35 years and **had become commercially unviable and harmful to the environment**. ✌ Therefore, the Commission is of the view that **the allegation of the Informant that OP 2 has limited/restricted the output of electricity through the above said conduct in violation of Section 4(2)(b)(i) of the Act is misplaced and does NOT hold ground**. ☞ **What is relevant Market in the present case?** Relevant market in the present matter **may be considered as the market for the 'provision of services for distribution of electricity in the State of Maharashtra except Mumbai'**. ☞ From the DG investigation report, the Commission observes that OP 4 has 100% market share in the relevant market as defined in para 13 because it is the sole

licensee to distribute electricity in the State of Maharashtra except Mumbai and as such, there is no competitor of OP 4 in the relevant market.

- Further, since there is no competitor of OP 4 in the relevant market, the consumers are completely dependent on OP 4 for electricity supply. Thus, the Commission is of the view that OP 4 is in a dominant position in the relevant market as defined above.
- The issues pertaining to abuse of dominant position by OP 4, as emerging from the facts of the instant matter, can be looked into on the following three counts:

- **Whether OP 4 purchases the entire electricity generated by OP 2 irrespective of the price which results in denial of market access to other power producers?**
  - In this regard, the Commission observes the following facts:
    - **(a)** Usually power from public sector undertakings is purchased under long term PPAs through MOU route only whereas power from other sources is purchased through open bidding.
    - **(b)** OP 4 has categorically justified the long term PPAs with OP 2 by stating that the aforesaid PPAs were entered into between OP 2 and OP 4 during difficult circumstances of shortage of electricity and prevalent load shedding of power in the State of Maharashtra.
  - As competitive bidding mechanism was in a nascent stage during that time and ensuring stable and continuous supply of electricity was the top priority, long term PPAs were signed through MOU route and also through competitive bidding process with Rattan India for Amravati power plant.
  - The Commission is of the view that the justification offered by OP 4 for entering long term PPAs with OP 2 looks plausible.
  - Further, **the allegation of the Informant that the long term PPAs entered into between OP 4 and OP 2 hinder competition in the relevant market by restricting OP 4 from purchasing electricity from the sources other than OP 2 is not found to be correct as OP 4 purchases 59% of its power requirements from the sources other than OP 2 and the entire power produced by OP 2 and purchased by OP 4 constitutes only 41% of the power requirement of OP 4**.
  - In view of the above analysis, the Commission is of the opinion that by purchasing the entire electricity produced by OP 2 and entering into long term PPAs with OP 2, **OP 4 has NOT denied market access to other power generating company as alleged by the Informant**.

- **Whether OP 4 has purchased power from OP 2 at a higher cost that resulted in imposition of unfair price on the consumers?**
  - On this issue, the Informant has alleged that inefficiency of power generation by OP 2 is reflected in its high cost which in turn is reflected in the high cost structure and revenue forecast submitted by OP 4 to MERC.
  - As a result of the same, higher tariffs are decided by the MERC and the consumers in the end in the relevant geographical market are paying the highest electricity tariff compared to all other states in India.
  - In this regard, the Commission observes that the purchase price of electricity of OP 4 from power generating companies is determined by the Central/State Electricity Regulatory Commission, as the case may be, **for each year in accordance with the statutory power vested in it under the Electricity Act, 2003 and relevant regulations thereunder**.

	☞ **With regard to the issue of long term PPAs,** ✋ OP 4 is purchasing power from OP 2 by executing PPAs through MOU route whereby tariff is determined by MERC under Section 62 of the Electricity Act, 2003 and same is based on the MOD principle i.e. the least cost power should be dispatched in preference to the more costly power. ✋ The Maharashtra State Load Dispatched Centre (MSLDC) which is the apex body to ensure integrated operations of the power system of the state does optimum scheduling under the MOD principle and OP 4 has no role to play in this regard. ✋ It is reported that the long term PPAs between OP 2 and OP 4 were executed pursuant to approval of MERC and tariffs charged from the ultimate consumers are determined by the MERC through the tariff orders issued from time to time. ✋ **Therefore, OP 4 cannot arbitrarily impose price on the consumers in violation of the provisions of Section 4(2)(a)(ii) of the Act**. ☞ **Whether OP 4 has denied open access to consumers for availing electricity from other power generating companies for distribution of electricity?** ✋ The Commission is of the opinion that in the absence of explicit provision in the Open Access Regulations of 2005, **OP 4 was unable to grant permission for open access through IEX**. ✋ However, some open access applicants approached the MERC **with petition on the issue of non-grant of open access through IEX and consequently, eight applicants have been given permission for open access during the period.** ✋ In view of this, **the Commission is of the view that the conduct of OP 4 regarding open access through IEX is not violative of Section 4(2)(c) of the Act**. On non-grant of open access permission for sourcing power excluding IEX, the DG has reported that due to certain legal issues, the same was not conceded. The Commission considered the aforesaid three cases for non-grant of Open Access excluding IEX and is of the view that the explanation submitted by OP 4 in respect of the above cases is quite reasonable and here again, as in the case of IEX, the Commission does not find any contravention of Section 4(2) (c) by OP 4 as alleged by the Informant..
Decision	☞ Since, no case of contravention of any of the provisions of Section 4 of the Act is made out against OP 4, the matter relating to this information is disposed of accordingly and the proceedings are closed forthwith. ☞ The CCI decide the case in favour of the Opposite Party.

97. BIOCON LTD & ORS v. F. HOFFMANN-LA ROCHE AG & ORS [CCI]

Hint: Informants raised various allegation against the Opposite Party such as denied market access, imposition of unfair prices, imposition of unfair conditions, act for leveraging, and limiting or restricting the market.

Decision: CCI decide the case in favour of Informant. The held that **the contravention with regard to Section 4(2) (c) of the Act is made out against Roche Group**, which warrants detailed investigation into the matter. Thus, the DG is **directed to carry out a detailed investigation into the matter**, in terms of Section 26(1) of the Act, and **submit a report to the Commission, within 60 days**.

Fact of the Case	The Informants filed complained against the Opposite Party and raised the following allegation:

	(a) The Roche Group's **denied market access to its competitors in contravention of Section 4(2)(c) of the Act**. **(b)** Besides, **the Informants have also alleged violation of Section 4(2)(a)(ii) for imposition of unfair prices**, **(c)** Section 4(2)(a)(i) **for imposition of unfair conditions**, **(d)** Section 4(2)(e) **of the Act for leveraging** and **(e)** Section 4(2)(b)(i) **for limiting or restricting the market**.
Legal Principles held—	☞ Observation of CCI w.r.t. Denial of Market Access [**Contravention of Section 4(2)(c) of the Act]** **(a)** The Commission is cognizant that the Informants' drugs have received approvals from DCGI, **despite the attempts made by Roche Group and they were able to enter the market**. However, the same does not rule out the possibility of Roche's actions amounting to denial of market access. **(b)** The denial of market access within the meaning of Section 4(2)(c) of the Act, **need not be complete and absolute in nature**. It means **a partial denial of market access that takes away the freedom of a substitute to compete effectively.** **(c)** So, It amount to a contravention of Section 4(2)(c) of the Act. ☞ **What is Informants' Market Shares?** **(a)** The Roche Group has claimed it as substantial; the Commission observes that, at this stage, it is very difficult to ascertain the impact of Roche Group's strategies on the market shares of the Informants. It is a subject matter of investigation as to whether their market shares could have been higher absent the alleged anti-competitive strategies adopted by Roche Group. **(b)** We are dealing with a case **which involves a highly sensitive sector, where the safety of the patient is of paramount importance**. **(c)** Thus, creating any iota of doubt in the minds of doctors can adversely affect the market for bio-similars, which is prescription induced, beyond repair. **(d)** Such disparagement may also have ripple effects within the medical community. In this scenario, those biosimilar manufacturers who do not have strong marketing channels amongst doctors may be forced out of the market because of abusive denigration by a dominant player. **(e)** The Commission further notes that a dominant enterprise is endowed with a special responsibility not to allow its conduct to impair undistorted competition in the relevant market. **(f)** The Act places special responsibility on such enterprise **not to conduct its business in a manner which is prohibited under Section 4(2) of the Act**. **(g)** It appears to the Commission on prima facie that Roche Group has shirked such responsibility and indulged in abusive conduct. ☞ **With regard to the Informants' allegation on unfair pricing under Section 4(2) (a) (ii) of the Act?** **(a)** The Commission is prima facie not convinced that a case is made out against the Roche Group. **(b)** Being the innovator, it might have **invested huge sums on research and development** of Trastuzumab. Thus, **initial high prices can be attributable to being the reward for innovation**. **(c)** Further, it subsequently introduced cheaper versions in the market viz. BICELTIS/HERCLON.

	☞ **The Informants have also alleged leveraging on the part of Roche Group?** In this regard, the Commission notes that it has taken the prima facie view that the relevant market in the instant case is 'market for biological drugs based on Trastuzumab, including its bio-similars in India' and the impugned conduct of Roche Group therein amounts to contravention of Section 4(2) (c) of the Act. ☞ **With regard to the Informants' allegation under Section 4(2)(e) of the Act?** **(a)** Thus, at this stage, the Commission does not find it relevant to deal with the alleged contravention of Section 4(2)(e) of the Act, which would arise only in case of delineation of narrower relevant markets as defined in the information i.e. ✋ 'market of sale for biological drugs (including biosimilars) used in the targeted therapy of HER-2 positive metastatic breast cancer within the territory of India', ✋ 'market of sale for biological drugs (including biosimilars) used in the targeted therapy of HER-2 positive early breast cancer within the territory of India' and ✋ 'market of sale for biological drugs (including biosimilars) used in the targeted therapy of HER-2 positive metastatic gastric cancer within the territory of India'. **(b)** However, the prima facie determination of the Commission in this order regarding the relevant market and abuse **therein shall not preclude the DG from delineating narrower relevant markets on the basis of investigation into relevant facts and also examine whether the impugned conduct of Roche Group constitutes a contravention of Section 4(2) (e) of the Act**. ☞ **With regard to the Informants' allegation under Section 4(2)(a)(i) of the Act?** **(a)** Roche Group has claimed that it is **its prudent business strategy not to import 150 mg vials of BICELTIS/HERCLON**. **(b)** The Commission agrees with the assertion made by Roche Group and **(c)** The CCI does not find prima facie any imposition of unfair condition in that and accordingly, does not find any contravention under Section 4(2)(a)(i) of the Act.
Decision	☞ **CCI decide the case in favour of Informant.** ☞ Based on the foregoing analysis, the Commission is of the considered view that prima facie, **the contravention with regard to Section 4(2) (c) of the Act is made out against Roche Group**, which warrants detailed investigation into the matter. Thus, the DG is **directed to carry out a detailed investigation into the matter**, in terms of Section 26(1) of the Act, and **submit a report to the Commission, within 60 days**.

98. FX ENTERPRISE SOLUTIONS INDIA PVT. LTD v. HYUNDAI MOTOR INDIA LTD [CCI]

Hint: The informant file a complaint and raised various allegation such as OP impose condition to take **prior consent of the OP before taking up dealerships of another brand,** Resale price maintenance through discount control mechanism, OP **control over the sources of supply for the dealer's products and ties the purchase of desired cars to the sale of high-priced and unwanted cars to its dealers.**

Decision: CCI decide the case in favour of Informant. The Commission imposes a penalty of Rs. 87 Crores on HMIL for the impugned conduct in contravention of the provisions of Section 3(1) read with Section 3(4) of the Act.

Fact of the Case	The Informants alleged the following violations against HMIL. **(a)** The OP enters into exclusive dealership arrangements with its dealers, and dealers are required to **obtain prior consent of the OP before taking up dealerships of another brand.** **(b)** HMIL's dealers are **bound to procure spare parts, accessories and all other requirements, either directly from OP or through vendors approved by the OP**. **(c)** OP also imposes a "Discount Control Mechanism" **through which dealers are only permitted to provide a maximum permissible discount** and the dealers are not authorised to give discount which is above the recommended range. This is alleged **to amount to "resale price maintenance" in contravention of Section 3(4)(e) of the Act**. **(d)** HMIL is responsible **for price collusion amongst competitors through a series of "hub - and - spoke" arrangements**. **(e)** HMIL perpetuates hub and spokes arrangement, wherein **bilateral vertical agreements** between supplier and dealers and **horizontal agreements** between dealers through the role played by a common supplier, **results in price collusion**. **(f)** HMIL has **control over the sources of supply for the dealer's products and ties the purchase of desired cars to the sale of high-priced and unwanted cars to its dealers** and HMIL designates sources of supply for complementary goods for dealers **as well as, which result in a "tie-in" arrangement in violation of Section 3(4)(a) of the Act**.
Legal Principles held—	☞ The Commission takes view that **(a)** HMIL **has contravened the provisions of Section 3(4)(e) read with Section 3(1) of the Act through arrangements which resulted into Resale Price Maintenance**. Such arrangements also included monitoring of the **maximum permissible discount levels through a Discount Control Mechanism**. **(b)** Further, HMIL has contravened the provisions of Section 3(4)(a) read with Section 3(1) of the Act in mandating its dealers to use recommended lubricants/ oils and penalising them for use of non-recommended lubricants and oils. Accordingly, **HMIL is directed to cease and desist from indulging in conduct that has been found to be in contravention of the provisions of the Act**. **(c)** So far as imposition of monetary penalty is concerned, **the Commission notes the submissions made on behalf of HMIL on the issue of quantum of penalty**. It was argued that penalty should be proportionate to the contravention established. It was pointed out that the automobile sector currently witnesses robust competition and does not warrant intervention. **(d)** No supra-normal profits have been made by HMIL during this period. It was also canvassed that the principle of relevant turnover while penalising is to be considered. **(e)** Lastly, it was highlighted that HMIL already has put in place a competition law compliance program and HMIL is a first time offender with no previous valid orders against it. ☞ Coming to the facts of the present case, the Commission **notes that the infringing anti-competitive conduct of HMIL in the instant case included putting in place arrangements,** which resulted into Resale Price Maintenance by way of monitoring of maximum permissible discount level through a Discount Control Mechanism and a penalty mechanism for non-compliance of the discount scheme. **Such conduct pertains to and emanates out of sale of motor vehicles. Hence,**

	for the purposes of determining the relevant turnover for this infringement, revenue from sale of motor vehicles alone has to be taken into account. ☞ On a careful consideration of the nature of the contraventions made and the points urged by HMIL for mitigation, **the Commission decides to impose penalty on HMIL at the rate of 0.3 % of its average relevant turnover of the last three FYs.**
Decision	☞ **CCI decide the case in favour of Informant.** ☞ The Commission imposes a penalty of Rs. 87 crore on HMIL for the impugned conduct in contravention of the provisions of Section 3(1) read with Section 3(4) of the Act.

99. BHARTI AIRTEL LTD v. RELIANCE INDUSTRIES LTD & ANR [CCI]

Hint: The Informant filed complaint against the Opposite Party and raised allegations the free services being offered by OP-2 since the inception of its business and , OP-1 is **alleged to be in contravention of Section 4(2) (e) of the Act as it has allegedly used its financial strength in other markets** to enter into the telecom market through OP-2.

Decision: The CCI decide the case in favour of Opposite Party and held that no prima facie case of contravention of Section 3(1) or Section 4(2) (e) of the Act is made out against the Opposite Parties.

Fact of the Case	☞ The primary concern of the Informant relates to the free services being offered by OP-2 since the inception of its business i.e. from 5th September, 2016 under one offer or the other. ☞ This according to **the Informant amounts to predatory pricing**, in contravention of the provisions of Section 4(2) (a) (ii) of the Act. ☞ Further, OP-1 is **alleged to be in contravention of Section 4(2) (e) of the Act as it has allegedly used its financial strength in other markets** to enter into the telecom market through OP-2.
Legal Principles held—	☞ In order to examine the impugned free services under the provisions of Section 4 of the Act, it needs to be ascertained whether OP-2 enjoys a dominant positon in any relevant market. Only when such a position is established as being enjoyed by OP-2, it will be imperative to examine as to whether its impugned conduct amounts to an abuse or not. ☞ **What is Relevant Product Market in the present case?** On the basis of facts and circumstances of the present case, the relevant product market is 'provision of wireless telecommunication services to end users'. ☞ **What is Relevant Geographical Market in the present case?** Accordingly, the relevant market in the instant case is the market for 'provision of wireless telecommunication services to end users in each of the 22 circles in India'. ☞ **Determining the dominant position of the OP?** **(a)** The Commission notes that **after the opening up of telecommunication market to private players**, **this market has witnessed entry of a number of players competing with each other resulting in decrease of tariffs and constant improvements in quality and variety of services**. **(b)** As per the TRAI press release dated 17th February, 2017, ✌ the wireless subscriber base of private telecommunication players at pan-India level constitutes 91.09% as against 8.91% held by PSU.

	☝ The market is led by the Informant with a market share of 23.5% followed by Vodafone (18.1%), Idea (16.9%), BSNL (8.6%), Ariel (8%), RCOM (7.6%), OP-2 (6.4%), Telenor (4.83%), Tata (4.70), Sistema (0.52%), MTNL (0.32%) and Quadrant (0.27%). **(c)** Further, in none of the 22 telecommunication circles, the Opposite Party has a market share higher than 7%. As may be seen, the market is characterised by the presence of several players ranging from established foreign telecom operators to prominent domestic business houses like TATA. ☝ Many of these players are comparable in terms of economic resources, technical capabilities and access to capital. **Further, the market is characterised by the presence of several players resulting in sufficient choice to consumers who can shift from one service provider to another and that too with ease**. This implies that dependence of consumers on any single telecom operator is **not of any significant extent**. ☝ Against this background, it is difficult to construe dominant position being possessed by OP-2 with 6.4% market share, which presupposes an ability to operate independently of the market forces to affect its consumers or competitors. **(d)** The Commission notes **that financial strength is relevant but NOT the sole factor to determine dominant position of an enterprise**. Considering comparable investments and financial strengths of competitors, the success of OP-2 in managing large scale investments does not suggest dominant position being enjoyed by OP-2. **(e)** The Commission does **not find it appropriate to hold OP-2 dominant in a scenario where its customers constitute less than 7 per cent of the total subscriber base at pan-India level, various functions of telecom service providers are regulated and entrenched players have been in existence for more than a decade with sound business presence, comparable financial positon, technical capabilities and reputation.**
Decision	☞ In the absence of any dominant position being enjoyed by OP-2 in the relevant market, the question of examining the alleged abuse does not arise. Notwithstanding this, the offers of OP-2 do not appear to raise any competition concern at this stage. In view of the foregoing discussion, **the Commission is of the considered view that no prima facie case of contravention of Section 4(2) (a) (ii) of the Act is made out against OP-2.** ☞ The Informant has also made contradictory submissions of the impugned free services of OP-2 as being an outcome of leverage of dominant position by OP- 1 as well as an outcome of alleged anticompetitive agreement between OP-1 and OP-2. The Commission **notes that no agreement of the nature prohibited under Section 3 of the Act is discernible from the facts and allegations levelled by the Informant**. ☞ As noted earlier, the impugned conduct of OP-2 has not been found as prima facie contravening the provisions of the Act prohibiting unfair pricing including predatory pricing. ☞ **In the absence of any finding of anti-competitive conduct by OP-2, OP-1 cannot be held to be in contravention of Section 4(2) (e) of the Act just because it has made huge investments in OP-2**. ☞ Mere investments cannot be regarded as leverage of dominant position, particularly when OP-1 itself is not engaged in business of providing telecom services or any

	activities incidental thereto. **If one were to construe such investment as anti-competitive, the same would deter entry and/or expansion and limit the growth of markets. In view of the above, no prima facie case of contravention of Section 3(1) or Section 4(2) (e) of the Act is made out against the Opposite Parties**. ☞ Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act. ☞ The CCI decide the case in favour of Opposite Party.

100. SHRI RATHI STEEL (DAKSHIN) LTD v. GAIL (INDIA) LTD [CCI]

Hint: The Informant has alleged abuse of dominant position by the Opposite Party on account of incorporation of **unfair terms and conditions in the GSA and for imposition of take or pay liability** (hereinafter referred to as "ToP liability").

Decision: CCI decide the case in favour of the Informant and passed order of investigation.

Fact of the Case	☞ The Informant has alleged abuse of dominant position by the Opposite Party on account of incorporation of **unfair terms and conditions in the GSA and for imposition of take or pay liability** (hereinafter referred to as "ToP liability") by it despite intimation to it by the Informant that due to regular increase in the prices of Re-gasified Liquefied Natural Gas (hereinafter referred to as 'RLNG'), ☞ The Informant has been forced to reduce its daily contracted quantity.
Legal Principles held—	☞ As per the GSA, the Informant is required to take 90% of the contracted quantity every year failing which it will be obliged to pay for the quantities not taken. Such liability is termed as ToP liability. ☞ With experience from the earlier cas], the Commission notes that the GSAs of the Opposite Party largely envisage such liability upon all customers located across different regions. **All these GSAs examined by the Commission are long term contracts with a term of 20 years. This would mean that**: **(a)** potential buyers have to estimate their demand for gas for the next two decades to procure gas from the Opposite Party; **(b)** a contracted buyer has limited flexibility of 10% and it has to pay Take or Pay charges if consumption of gas by it is less than 90% of the contracted quantity although the buyer could request for the unlifted quantity later as Make Good Gas; and **(c)** a buyer who is locked into a contract with the Opposite Party cannot terminate the contract if the price of gas becomes economically unviable for it or it wants to shift to other cheaper alternatives as breach of obligation under the GSA would trigger ToP liability . ☞ The conduct of Opposite Party in implementing such ToP liability from the year 2015 appears to be a modus to ensure de facto exclusivity of the contractual arrangement. This, besides prohibiting the buyers from shifting to alternatives or terminating the GSA in the event of closure of their business, also appears to create entry barriers for alternative suppliers to enter the market or build up a viable customer base. ☞ It is observed **that while imposition of ToP liability as per contractual terms cannot per se be regarded as abuse of dominant position**, the same being imposed in **an exploitative manner without justification or to ensure de facto exclusivity thereby hurdling potential entries or expansion of competitors warrants investigation under the provisions of the Act prohibiting abuse of dominant position**. ☞ Hence, the Commission is convinced that the facts presented in the instant information prima facie suggest contravention of Section 4(2) (a) and Section 4(2) (c) of the Act.

	☞ The Commission is already seized with the issue of unfair imposition of ToP liability by the Opposite Party in Cases No. 16 to 20 of 2016. In those cases, the Opposite Party's stand was that take or pay liability, as imposed on the customers, was only to neutralize the losses borne by the Opposite Party due to non off-take or under-drawal by the customers as per the respective GSAs, and was not to make any profits on account of take or pay deficiency. **The same also formed basis of reduction in the take or pay claim by the Opposite Party.** ☞ However, in the instant matter, full ToP liability has been imposed on the Informant for the calendar year 2015. In the earlier cases, the Opposite Party also contended that it faces ToP obligation under its contracts with certain upstream suppliers. ☞ In this regard, the Commission finds it relevant to inquire into: **(a)** The different sources of gas procurement by the Opposite Party and the nature of arrangements with each supplier including price and ToP liability under each such arrangement; **(b)** whether the gas supplied to the customers of the Opposite Party is supplied from a commingled stream, in which case, what is the basis for price determination/ revision from time to time; **(c)** whether ToP liability was imposed on the Opposite Party by its upstream suppliers for the contract year 2015; whether the Opposite Party has suffered any loss on account of non off-take or under-drawl of gas by its contracted customers during the contract year 2015; **(d)** what were the total ToP liabilities levied by the Opposite Party on all its customers located across India for the contract year 2015; **(e)** whether the Opposite Party had adopted any discriminatory practice in imposition of ToP liability upon its customers located across India; **(f)** whether the Opposite Party imposed full ToP liability only in cases where the concerned buyer contested the legality of the ToP claim or resorted to litigation/ arbitration proceedings; and the policy, if any, of the Opposite Party regarding imposition of different liability upon different class of customers. **(g)** It would also be relevant to appreciate the rationale behind the Opposite Party committing ToP liability to its upstream suppliers for a long period i.e. **whether the Opposite Party took into consideration the potential inclusions and exclusions in its customer base, fluctuations in prices, different modes of risk management etc**.
Decision	☞ **The CCI decide the case against the Opportunity Party.** ☞ The Commission deems it fit to order an investigation in the present case.

101. COCHIN PORT TRUST v. CONTAINER TRAILER OWNERS COORDINATION COMMITTEE [CCI]

Hint: Informant put the allegation against the Opposite Party that they introduced and implemented a 'Turn System' under which they not only unilaterally fixed the prices for coastal container services, but also led to limiting and controlling of such services at the Informant Port. It amounted to a contravention of the provisions of Section 3(3) read with Section 3(1) of the Act.

Decision: The **CCI has decided that case in favour of Informant and pass penalty order against the Opposite Party.**

Fact of the Case	☞ **The** main issue before the Commission in this case was whether there was any collusive/anti-competitive conduct on the part of the OPs which amounted to a contravention of the provisions of Section 3(3) read with Section 3(1) of the Act. ☞ On the basis of the observations recorded earlier, The DG has found that OP-1, along with its four participating association (i.e. OP-13 to OP-16), ✋ introduced and implemented a 'Turn System' under which they not only unilaterally fixed the prices for coastal container services,

	✌ but also led to limiting and controlling of such services at the Informant Port.
Legal Principles held—	☞ **CCI** observed that Turn System, being in nature of a horizontal arrangement, needs to be assessed under the provisions of Section 3(3) read with Section 3(1) of the Act on the basis of evidence available: **(a)** Circulars, letters, emails sent by the OP-1 to the members asking for their cooperation for the implementation of the Turn System. **(b)** Moreover, this Turn System was admittedly followed by the members of the participating associations. **(c)** All the OPs **have admitted the existence of the Turn System** from January 2014 to September 2014. Thus, **it can be safely inferred that this arrangement was agreed upon by them through their respective associations**. ☞ **CCI** finds that the present case is peculiar in the sense that the existence of the agreement i.e. the Turn System or the fixation of price **is not challenged by any of the OPs.** Rather they have admitted the existence of the Turn System. ☞ Now they sought to justify it by providing the prevailing circumstances at the time when such Turn System came into existence and also by citing various reasons why the adoption or implementation of such system should not be considered as an anti-competitive arrangement under the Act. **Due to this reason, the burden of proof now shifted on the OPs to prove that their arrangement/agreement had no AAEC on the markets in India.** ☞ Further with regard to the legality of the Turn System, suffice to say that though there can be efficiency justifications for introducing a turn system in a particular trade, the OPs have failed to demonstrate any such efficiency or redeeming virtue which could have come to their rescue and would have helped them to rebut the presumption of AAEC in the market. **Neither they were able to appropriately justify why they resorted to unilateral price fixation for dealing with issues prevailing during the relevant time when the Turn System was imposed nor were they able to sufficiently explain the reasons for increased rates during the Turn System as compared to the pre/post Turn System period.**
Decision	☞ Thus, in the event of the OPs not being able to rebut the presumption of Appreciable adverse effect on the competition that has arisen because of the price fixation under the Turn System being in the nature of a horizontal agreement/arrangement specifically recognised under Section 3(3) of the Act, ☞ The Commission has **NO hesitation in holding that OP1, along with its four participating associations (namely, OP-13 to OP-16), indulged in the anti-competitive conduct of unilateral price fixation during the Turn System**, in contravention of Section 3(3)(a) read with Section 3(1) of the Act. ☞ The **CCI has decided that case in favour of Informant. The purpose of imposing monetary penalties can be two-fold**: **(a)** for disciplining the erring party for its anti-competitive conduct and, **(b)** for creating deterrence to stall future contraventions. ☞ The direction of the Commission to desist from indulging in such anti-competitive conduct, in future, would meet the ends of justice.

102. WESTERN COALFIELDS LTD v. SSV COAL CARRIERS PVT LTD & ORS [CCI]

Hint: The Informant put allegation on the conduct of the OPs **in submitting identical bids at higher rates is a blatant act of bid-rigging**, which is in clear violation of the provisions of the Act and **prayed for initiation of an investigation against the OPs in the matter.**

Decision: The CCI decide the case in favour of Informant and The CCI directed the OPs and their respective office bearers are directed to cease and desist from indulging into practices, which are found to be in contravention of the provisions of Section 3(3)(d) read with Section 3 (1) of the Act. The Commission finds the present case fit for imposition of penalty.

Fact of the Case	☞ The Informant is one of the eight subsidiary companies of Coal India Limited and **has mining operations spread over various States. It is a major supplier of coal to industries located in various States**. ☞ The OPs are engaged in the business of providing ancillary services in colliery areas including of sand and coal transportation in the areas of operation of the Informant. ☞ The Informant put allegation on the conduct of the OPs **in submitting identical bids at higher rates is a blatant act of bid-rigging**, which is in clear violation of the provisions of the Act and **prayed for initiation of an investigation against the OPs in the matter.**
Legal Principles held—	☞ **From the facts on record, it appears that the Opposite Parties were coordinating and fixing the prices of their services with the object of distorting the fair bidding process. The identical price quotations submitted by the Opposite Parties appear to have actuated by mutual understanding/arrangement or in other words agreement amongst them. Although some of the Opposite Parties had quoted different rates, their rates were too close to the identical rates as quoted by others, which could not be a mere coincidence. In view of the foregoing, the Commission is of the view that the Opposite Parties have contravened the provisions of Section 3 (1) read with Section 3 (3) (d) of the Act.** ☞ **Further, Commission consider the SC judgement held in in Excel Crop Care Limited (supra), wherein SC held that quoting of identical prices in tenders is a strong evidence of bid-rigging and the same cannot be taken as a mere coincidence unless a plausible explanation is given in a clear and cogent manner.** ☞ On a holistic consideration of all these factors along with identical pricing despite different cost structures, apparently last minute filling of price bids; existence of earlier financial dealings amongst the OPs as well as identical price quotes even in previous tenders floated by the Informant, **the Commission has no hesitation whatsoever but to conclude that quoting of identical prices by OP-1, OP-2 and OP-4 are not a mere co-incidence but the result of clear understanding amongst OP-1, OP-2, OP-3 and OP-4 to fix prices in the tenders floated by the Informant, resulting in rigging the bids in the impugned tenders for sand transportation**. Since the agreement amongst OP-1 to OP-4 stands established, the statutory presumption of appreciable adverse effect on competition automatically follows. ☞ The Commission notes that the Hon'ble Supreme Court in Excel Crop (supra) has held that agreements mentioned in Section 3(3) of the Act, **including bid-rigging, would be treated as ipso facto causing appreciable adverse effect on competition**. The Court further held that once an agreement amongst the bidders is established, heavy onus is on the bidders to justify the conduct. ☞ The Informant being a mining PSU has continuous requirement of transportation services, which it procures through tendering process only. Under these circumstances, **collusion to fix prices by rigging the bids in the tenders floated by the Informant most definitely has an adverse impact on the price paid by the Informant for procuring such transportation services**. Such conduct in public procurements **besides defeating the tendering process also has an adverse impact on the process of competition resulting in deprivation of efficient outcomes that would have followed otherwise**.

	Thus, **bid-rigging in tenders floated by the Informant is a brazen defiance of the responsibility cast under the Act.**
Decision	☞ **The CCI decide the case in favour of Informant and** ☞ **The CCI directed the** OPs and their respective office bearers are directed to cease and desist from indulging into practices, which are found to be in contravention of the provisions of Section 3(3)(d) read with Section 3 (1) of the Act. ☞ The Commission finds the present case fit for imposition of penalty. The Commission notes that the infringing anti-competitive conduct of the OPs is bid-rigging in the tenders floated by the Informant for transportation. ☞ Since the impugned conduct emanates from transportation services offered by the OPs, the relevant turnover for this infringement would be their revenue from the said services. ☞ Having dealt with the nature of contravention as well as the mitigating factors, the Commission proceeds to impose penalty on the OPs at the rate of 4% of its average relevant turnover for the last three FYs.

103. INTERNATIONAL AIR TRANSPORT ASSOCIATION v. AIR CARGO AGENTS ASSOCIATION OF INDIA [CCI]

Hint: Informant file a complaint against the conduct of the OPs in allegedly trying to create disruptions in the implementation of CASS in India**, through collective boycott and cartelization against the Informant and its constituent members. such conduct of taking a decision to boycott those airlines that introduce CASS, results in limiting the provision of services of air transport cargo in India in violation of Section 3(3) (b) of the Act**.

Decision: CCI decided the case Informant has failed to furnish any material that could prima facie suggest an agreement amongst the OPs, in contravention of Section 3(3) (b) read with Section 3(1) of the Act. Therefore, the Commission is of the view that no prima facie case of contravention of the provisions of Section 3 of the Act is made out against the OPs.

Fact of the Case	☞ The Informant is stated to be an **international non-profit trade association** comprising **of 265 member airlines belonging to 118 nations across the globe with its headquarters in Montreal, Canada**. ☞ In India, the Informant is present through a wholly owned subsidiary i.e. IATA (India) Private Limited and a branch office in Mumbai. It is submitted **that the role of the Informant is solely that of a facilitator for the aviation industry as a whole**. ☞ Further, **the airlines are not bound to become a member of the Informant and it is a voluntary decision on the part of the airlines to seek membership of the Informant**. ☞ The informant raised the following allegation against the OP: **(a)** OPs are colluding and collectively boycotting business with airlines that seek to implement Cargo Accounts Settlement System ("CASS") in India. **(b)** OPs are exerting undue influence on its member agents taking advantage of such position of power. **(c)** The OPs actively encourage and pressurize the member cargo agents to collectively boycott airlines implementing CASS, despite the benefits of CASS being acknowledged universally. **(d)** In their attempt to derail the implementation of CASS, The OPs are also persuading airlines to refrain from asking agents to join CASS in India. **(e)** The OPs are threatening to take action against airlines who seek to implement the same. The Informant has referred to certain emails and letters written by OP 1 to establish its allegations.

	☞ Based on the above facts and allegations, the Informant has prayed before the Commission to institute an inquiry against the OPs under Section 26(1) of the Act.
Legal Principles held—	☞ The Commission has carefully examination of the information and material available on record, the Commission notes that **the Informant is aggrieved by the conduct of the OPs in allegedly trying to create disruptions in the implementation of CASS in India, through collective boycott and cartelization against the Informant and its constituent members**. ☞ It is alleged that **such conduct of taking a decision to boycott those airlines that introduce CASS, results in limiting the provision of services of air transport cargo in India in violation of Section 3(3) (b) of the Act**. ☞ The Commission **notes that an independent decision by an enterprise to offer or not to offer services at prevailing conditions does not raise antitrust concerns per se**. However, an agreement among competitors not to offer services at prevailing conditions will raise antitrust concerns. ☞ The Commission finds the following on the basis of documents and information available with: **(a)** The Informant has **not produced any evidence to establish that OP 1 has taken coercive action against any of its members** who have agreed to participate in the CASS implementation. **(b)** The Commission observes **that though three members of OP 1 wrote similar letters to the airlines but the Informant has not provided any additional evidence to prima facie establish** that this is a result of any concerted action on their part. **(c)** The only additional evidence, **which may be considered in this regard, is the emails written by OP 1 to its members** circulating the draft letter. **(d)** However, as already stated, the said emails are only recommendatory in nature and **there is no direction from OP 1 to its member agents to mandatorily write to the airlines**. Thus, it appears that OP 1 is not forcing its member agents to send the emails but has left the decision to the free will of the member agents. **(e)** On the basis of available documents**, it cannot be concluded that the letters written by member cargo agents of OP 1 was the result of a collective decision**. ☞ In the instant case, **the Informant has not provided any data which shows the negative impact on the business of the member airlines of the Informant** which can be attributed to the activities of the OPs. **This is despite the fact that the alleged conduct happened in 2014 while the information has been filed in 201**7.
Decision	☞ The Commission notes that the Informant has failed to furnish any material that could prima facie suggest an agreement amongst the OPs, in contravention of Section 3(3) (b) read with Section 3(1) of the Act. ☞ Therefore, the Commission is of the view that no prima facie case of contravention of the provisions of Section 3 of the Act is made out against the OPs. ☞ Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act. ☞ CCI decide the case in favour of the Opposite Party.

104. AKHIL R. BHANSALI v. SKODA AUTO INDIA PVT. LTD. & ANR [CCI]

Hint: The Informant file a complaint on account of deficiency in car servicing would amount to abuse of dominant position. Further, Informant alleged that **OP abuse its dominant position in terms of Section**

4(2) (b) of the Act by limiting and restricting provision of services by appointing only limited number of dealers, making spare parts available only at select and exclusive dealership, etc.

Decision: CCI decide the case in favour of the Opposite Party. The Commission observes that the allegations in the instant matter appear to be a case of deficiency in after sales services by the authorised dealer of OP-1 at Chennai which is a case of an individual consumer dispute and there is no competition issue involved in the matter.

Fact of the Case	☞ **In the present case,** the Informant file a complaint before CCI against the Opposite Party and **alleged that OP abuse its dominant position in terms of Section 4(2) (b) of the Act by limiting and restricting provision of services by appointing only limited number of dealers, making spare parts available only at select and exclusive dealership, etc**. ☞ However, on careful perusal of the facts and allegations in the matter, it is observed that the primary grievance of the Informant relates to the quality of service being provided by the authorised dealer of OP-1 in Chennai i.e. Gurudev Motors Pvt. Ltd.
Legal Principles held—	☞ The allegations pertaining to abuse of dominance appear to have been made by the Informant to project an issue of consumer grievance as competition issue. ☞ The Informant has **filed no substantive evidence to support its contentions of contravention of the provisions of the Act by the OPs**. ☞ In case the services provided by the dealer had been to the satisfaction of the Informant, the Informant would not have had any reason to file this information with the Commission. ☞ In the earlier Case filed by S**ubhash Yadav against Force Motor Limited and Ors**., the Commission has held that: "It may be noted that the aim and object of the Act, is **(a)** to prevent the practices having adverse effect on the competition, **(b)** to promote competition and thereby to protect the interest of the customers. ☞ In a nutshell, **the purpose of this Act is to protect and promote fair competition in the markets in India**. ☞ However, **for the protection of individual consumer interest, there is another statute already in existence known as Consumer Protection Act, 1986 which mainly deals with protection of consumer interest against the deficiencies in services or goods being purchased by the consumers from sellers**." ☞ On the basis of the facts and circumstances of the case, **the Commission observes that the allegations in the instant matter appear to be a case of deficiency in after sales services by the authorised dealer of OP-1 at Chennai which is a case of an individual consumer dispute and there is no competition issue involved in the matter**.
Decision	☞ The CCI decide the case in favour of Opposite Party. ☞ After considering the aforesaid facts, **the Commission is of the view that the allegations of the Informant do not give rise to any competition concern**. ☞ Accordingly, the Commission finds that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OPs in the instant case and the matter is closed forthwith in terms of the provisions of Section 26(2) of the Act.

105. MAHARASHTRA ELECTRICAL ENGINEERS ASSOCIATION v. MAHARASHTRA INDUSTRIAL DEVELOPMENT CORPORATION & ANR [CCI]

Hint: the Informant filed a complaint before CCI against the Opposite Party and has pointed out a few instances where tenders have been awarded by OP-1 to OP-2 **even though OP-2 was not allegedly eligible as detailed in the information**.

Decisions: The CCI decide the case in favour of Opposite Party.

Fact of the Case	☞ The Informant which is an association of electrical contractors has filed the instant information against MIDC (OP-1) **alleging that it is favouring OP-2 in award of tenders to the exclusion of the members of the association**. ☞ The Informant has alleged that OP-1 is not adhering to its own circular which provided for the qualification of the contractors and also the laid down conditions for the tender. ☞ In support of the allegations, the Informant has pointed out a few instances where tenders have been awarded by OP-1 to OP-2 **even though OP-2 was not allegedly eligible as detailed in the information**. ☞ The Informant has alleged that such conduct of OP-1 is in contravention of the provisions of Section 3 and 4 of the Act. The Informant **has also sought an interim relief in terms of the provisions of Section 33 of the Act by way of an ad interim ex parte stay to restrain OP-1 from allotting/ awarding any further tender in favour of OP-2 till the adjudication of the instant information**.
Legal Principles held—	☞ On a careful perusal of the information and the documents filed therewith, the Commission is of opinion that the instant information does not disclose any material which may attract the provisions of Section 3 or Section 4 of the Act. ☞ It may be observed that under the scheme of the Act, **(a)** The Commission may examine the agreements which cause or are likely to cause appreciable adverse effect on competition within India in terms of the provisions contained in Section 3 of the Act. **(b)** Similarly, the Commission may also examine the abusive conduct indulged in by a dominant enterprise in the relevant market as provided under Section 4 of the Act. ☞ As narrated earlier, the allegations made by the Informant **at best indicate non-observance of the tender conditions/ circulars by OP-1 in award of its contracts in favour of OP-2**. The Informant has (a) Not placed any agreement which can be examined under Section 3 of the Act (b) No term of any tender has been pointed out which can be examined under Section 4 of the Act. ☞ Rather, the grievance of the Informant emanates out of the alleged non- adherence to tender conditions and circulars by OP-1. ☞ The information has been filed making generalized allegations against MIDC in respect of award of contracts in favour of OP-2. ☞ The Informant has to avail its remedies in respect of its grievances highlighted herein in respect of the tendering process elsewhere. ☞ Without commenting upon the merits of such allegations, the Commission is of opinion that the entire thrust of the information does not reveal any competition issue whatsoever.
Decision	☞ The CCI decide the case in favour of Opposite Party. ☞ The Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

106. ASSOCIATION OF REGISTRATION PLATES MANUFACTURERS OF INDIA. v. SHIMNIT UTSCH INDIA PRIVATE LTD & ORS [CCI]

Hint: Informant filed a complained raised two allegation that OPs have been **rigging bids with the connivance of officials of Transport Departments to come up with "tailor-made pre-eligibility criteria" which ensured erection of artificial barriers at the pre-qualification stage** for other manufacturers and Informant has shown **through charts the rates at which tenders were awarded to the OPs in different States** over time.

Decisions: The CCI decide the case in favour of Opposite Party. **the Commission is of the opinion that the allegation made by the Informant does not make out any specific case of bid rigging in any State tender post-2009. No conduct nor any evidence amongst the OPs post-2009 has been detailed in the information.**

Fact of the Case	☞ The sum and substance of the allegations made by the Informant Association against the OPs essentially centres around the tendering process of various States in awarding HSRP contracts. ☞ The Informant has stated that the **OP companies have formed a CARTEL to engage in collusive bidding in various States** to get HSRP contracts. ☞ It is alleged that OPs have been **rigging bids with the connivance of officials of Transport Departments to come up with "tailor-made pre-eligibility criteria" which ensured erection of artificial barriers at the pre-qualification stage** for other manufacturers. ☞ Further, the Informant has shown **through charts the rates at which tenders were awarded to the OPs in different States** over time. **(a)** Initially, **when tenders were floated with "tailor-made" conditions, the OPs were awarded tenders at exorbitant rates in case of north-eastern States** **(b)** whereas **after open NITs (i.e. without "tailor-made" tender conditions) were floated**, the OPs re-strategized their modus operandi and **started quoting unreasonably lower/ predatory rates for securing contracts**.
Legal Principles held—	☞ The Commission has perused the information and the documents filed therewith. From the above detailed factual matrix, it is evident that the substratum of allegations made by the Informant rests upon "tailor-made" tender conditions which have been allegedly incorporated in the tenders floated by various State Governments for awarding HSRP contracts. ☞ These conditions **are stated to be included with the connivance of officials of Transport Departments. The process for initiation of CBI investigation in this regard appears to have been set in motion**. ☞ The Commission notes that the Informant has made unique allegations against the OPs. Initially, **when these companies quoted exorbitant rates**, the Informant alleged cartel formation by them. Subsequently, when the **tender conditions were eased, the Informant has alleged that they started abusing their dominant position through predatory pricing**. ☞ From the averments made in the information, it is observed that the OP companies succeeded in getting contracts initially when tender conditions were favourable to them and most of such tenders pertain to the year 2009 or earlier period. ☞ **In fact, the Informant has mentioned that some of such contracts were subsequently cancelled by the respective State Governments. Post-relaxing of norms, prices have fallen and other manufacturers have got contracts as well**. ☞ **On a careful consideration of the matter, the Commission is of the opinion that the allegation made by the Informant does not make out any specific case of bid rigging in any State tender post-2009. No conduct nor any evidence amongst the OPs post-2009 has been detailed in the information.** ☞ However, CCI does not much concerns about the allegations, which indicate misconduct by public officials in connivance with some of the persons associated with bidding entities as also hawala transactions through shell/ front companies and cognizance of the same has already been taken by the Government and the CBI.
Decision	☞ The CCI decide the case in favour of Opposite Party.

	☞ In view of the above, the Commission holds that no case of contravention of the provisions of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

107. VIJAY MENON v. MAHARASHTRA STATE POWER GENERATION CO LTD [CCI]

Hint: Informant filed a complaint against the opposite party **on account of condition seeks to disqualify bidders against whom an inquiry is pending before the Commission** or who have been already penalised. It is in the nature **of barrier to entry and hence, a major restraint on the dynamics of competition**

Decision: The CCI decide the case in favour of Opposite Party.

Fact of the Case	☞ The gravamen of the information filed by the Informant emanates out of the qualifying requirement put by MAHAGENCO in its tender floated in the month of September 2017 for appointment of supervision, monitoring and coordination agency for the work of supervision of rake movement, coal quality monitoring and loading of quality coal and movement of sized coal for various thermal power stations of MAHAGENCO by rail mode from coal companies. The impugned condition, as excerpted earlier, seeks to disqualify bidders against whom an inquiry is pending before the Commission or who have been already penalised. ☞ The Informant has stated **that such condition is illegal, baseless and against the spirit of the Act as it seeks to disqualify an otherwise qualified bidder merely because an inquiry is pending before the Commission**. It has been also argued that **such condition is in the nature of barrier to entry and hence, a major restraint on the dynamics of competition**.
Legal Principles held—	☞ **On the basis of documents and information available with CCI**, the Commission is of the opinion that the **issue projected in the information is purely administrative in nature as the procurer**, being a consumer, retains the discretion to disqualify the bidders as per the experience gained and the exigency of the requirement. **No competition issue is revealed from the facts alleged in the information**. ☞ This right of consumer's choice must be sacrosanct in a market economy because it **is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility** of the product or service for the consumer. **(a)** For an individual, that consumer's choice is based on personal assessment of competing products or services, their relative prices or personal preferences. **(b)** For any other type of consumer, this process of decision making in exercise of consumers choice is more structured and reflected in the procurement procedures. ☞ Such a consumer **may use experts or consultants to advise, do its own technical assessment, take advice of others it may trust or even purchase from known and reliable sources**. **Each of the purchase process is acceptable and valid so long as it does not restrict market entry and allows vendors to freely compete in the procurement process.** ☞ In case of public entities, **there are administrative mechanisms in place for carrying on the due process of exercising consumer's choice on behalf of the public**. ☞ Of course, there could be competition concerns in rare cases where a monopoly buyer exercises the option in an anti-competitive manner but the present case does not appear to be in that category.
Decision	☞ **The CCI decide the case in favour of Opposite Party.**

	☞ In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act **is made out against the Opposite Party and the information is ordered to be closed f**orthwith in terms of the provisions contained in Section 26(2) of the Act.

108. GURGAON INSTITUTIONAL WELFARE ASSOCIATION v. HARYANA URBAN DEVELOPMENT AUTHORITY [CCI]

Hint: The Informant file complaint and put allegation against the Opposite Party that it restricted its right to transfer the title of plot and building constructed over it without the prior permission of the Opposite Party. OP argued that that the members of the Informant/allottees were already aware about the said restriction at the time of allotment and none of them ever raised any objection to the said restriction. Moreover, the **Opposite Party also argued that its actions are legal under the relevant laws and regulation applicable to the allotment of such plots and thus, Commission should not intervene.**

Decision: The CCI decide the case in favour of Informant. The Commission finds that a prima facie case of abuse of dominant position within the meaning of Section 4(2) (a) (i) has been made out against the Opposite Party. This case needs to be sent for investigation to the Director General (the 'DG') under the provisions of Section 26(1) of the act.

Fact of the Case	☞ The Informant file complaint and put allegation against the Opposite Party that it restricted its right to transfer the title of plot and building constructed over it without the prior permission of the Opposite Party. ☞ It has been argued that **since the institutional plots were offered on free hold basis, the complete ownership must vest in the allottees after paying the entire consideration.** ☞ The Opposite Party has **not denied the existence of such condition**. Rather it has argued that the members of the Informant/allottees were already aware about the said restriction at the time of allotment and none of them ever raised any objection to the said restriction. ☞ The **Opposite Party also argued that its actions are legal under the relevant laws and regulation applicable to the allotment of such plots and thus, Commission should not intervene.**
Legal Principles held—	☞ The Informant has annexed various allotment letters and conveyance deeds with the information highlighting the inconsistency between the standard format provided under the HUDA Regulations and the clauses appearing in the conveyance deeds executed by the Opposite Party. ☞ A conveyance deed dated 02nd July, 2010 contained the following as Clause 2: *"The Vendor shall have a first and paramount charge over the said site for the unpaid portion of the sale price and the Transferee shall have no right to transfer by way of sale, gift, mortgage or otherwise the land or any right, title or interest therein (except by way of lease on a monthly basis) without the previous permission in writing of the Estate Officer. The Estate Officer while granting such permission may impose such conditions as may be the Chief Administrator from time to time."* ☞ The aforesaid condition is inconsistent with the language contained in Form 'D' of the Haryana Urban Development (Disposal of Land and Buildings) Regulations, 1978 ('HUDA Regulations'). ☞ At the preliminary conference held with the parties, **the Opposite Party could NOT explain the inconsistency between the stipulation appearing in the conveyance deed executed by it and the one appearing in the HUDA Regulations**.

	☞ The Commission, vide order dated 28th June, 2017, **directed the Opposite Party to specifically provide information on various queries in writing and to appear for a preliminary conference scheduled on 09th August, 2017**. ☞ On 09th August, 2017, the Opposite Party appeared before the Commission **but did NOT file the information on queries sought by the Commission**. ☞ During the hearing**, the learned counsel for the Opposite Party undertook to file a response to all the queries raised by the Commission**. However, the response filed by the Opposite Party did not contain specific answers to the queries which were posed by the Commission. Instead, the Opposite Party chose to take shelter under the HUDA Act and regulations to justify its actions. The condition of seeking prior permission of the Estate Officer, even for plots where sale consideration is fully paid seems to be apparently unfair. ☞ **The Informant has cited an instance of mortgage in the information:** ✋ Wherein one V&S International Pvt. Ltd. mortgaged the institutional plot allotted by the Opposite Party to HDFC while raising a loan. It is stated that the Opposite Party allowed the said mortgage. ✋ However, when V&S International Pvt. Ltd. failed to repay the loan and the institutional plot was sold out in an auction by the lending bank, namely HDFC Bank, to Four Aces Electronics Pvt. Ltd**., the Opposite Party failed to transfer the property in favour of the buyer Four Aces Electronics Pvt. Ltd., despite repeated requests.** ✋ This instance prima facie indicates that **the provision of seeking permission from the Estate Officer for transfer of rights in the property is not being used in favour of the allottees**. ✋ Thus, contrary to claims of the Opposite Party, that it allows for transfer of rights in the property, **the Commission notes that prima facie the material on record suggest that it imposes restriction** on transfer of rights in the institutional plots allotted by it. ☞ To ascertain whether the Opposite Party **undertook any actions to modify the terms and condition which were allegedly anti-competitive/unfair by virtue of the relevant provisions of the Act coming into force, the Commission had asked the Opposite Party, vide order dated 28th June, 2017, to furnish information**. ☞ However, **the Opposite Party did NOT provide any answer to this query**. Despite being given an opportunity, **the Opposite Party failed to provide valid justification for its conduct.**
Decision	☞ **The CCI** decide the case in favour of the Informant. ☞ The Commission finds that a prima facie case of abuse of dominant position within the meaning of Section 4(2) (a) (i) has been made out against the Opposite Party. This case needs to be sent for investigation to the Director General (the 'DG') under the provisions of Section 26(1) of the act. The DG is directed to carry out a detailed investigation into the matter and submit a report to the Commission, within 60 days.

109. DWARIKESH SUGAR INDUSTRIES LTD v. WAVE DISTILLERIES & BREWERIES LTD & ORS [CCI]

Hint: Informant put allegation that the **price at which reserved molasses was sold was 9 to 10 times lower than that of the unreserved molasses**. Manufacturers of country liquor in state of UP (referred to as "OP"). It was alleged that the OPs are in a dominant position in the relevant market of reserved molasses in the State of Uttar Pradesh and **have also been abusing the same by determining the purchase price of molasses at unreasonably low rates.**

Decision: The CCI decide the case in favour of OP.

Fact of the Case	§ The Informant is engaged in **the manufacturing of crystal sugars** through vacuum pan process and manufacture Molasses also. § It was stated that **molasses is a natural by-product in the process of sugar manufacturing which is a basic raw material for manufacturing of alcohol based products**, including potable liquor. The **control, storage, gradation, regulation of supply and distribution of molasses in the State of Uttar Pradesh is governed** by the U.P. Sheera Niyantran Adhiniyam, 1964 and the Molasses Policy ('the Policy') issued thereunder by the Controller of Molasses, Government of Uttar Pradesh. § That the Policy so issued mandates the sugar mills (like the Informant) to sell/ supply certain percentage of their molasses to the manufacturers of country liquor ('reserved molasses') within the State of Uttar Pradesh and rest of the molasses can be sold freely in the open market ('unreserved molasses'). § The Informant raised allegation that the **price at which reserved molasses was sold was 9 to 10 times lower than that of the unreserved molasses**. § Manufacturers of country liquor in state of UP (referred to as "OP"). It was alleged that the OPs are in a dominant position in the relevant market of reserved molasses in the State of Uttar Pradesh and **have also been abusing the same by determining the purchase price of molasses at unreasonably low rates**. The Informant, being bound by the State's policies, had no other option but to accept the price offered by the OPs, which was unreasonably low as compared to the open market price.
Legal Principles held—	§ **Whether there was an agreement between the OPs, which directly or indirectly determined the purchase price of reserved molasses in violation of the provisions of Section 3(3) (a) read with Section 3(1) of the Act?** ☞ The Commission is of the considered opinion that the Informant has not sold its reserved molasses to the OPs at the prices offered by them but it further entered into a process of negotiation with the OPs and ultimately sold its reserved molasses at the market determined and mutually negotiated varying prices to different OPs and third parties. ☞ **No evidence of coordination amongst the OPs is found with regard to the purchase price of reserved molasses**. The DG did not find any evidence to conclude that an agreement was entered into amongst OPs to directly or indirectly determine the purchase price of reserved molasses. ☞ In view of the above discussion, **the Commission is of the opinion that the allegations made by the Informant that the OPs have entered into an agreement to determine the purchase price of reserved molasses** are not substantiated. ☞ Hence, no contravention of the provisions of Section 3(3) (a) read with Section 3(1) of **the Act is made out.**

	§ **With regard to the allegations of the Informant regarding abuse of dominance by the OPs in contravention of the provisions of Section 4 of the Act:** ☞ The Commission is of the view that the concept of collective dominance does not find a place under the Act. ☞ Hence, no case of contravention of Section 4 of the Act is also made out against the OPs.
Decision	§ **The CCI** decide the case in favour of OP. § However, It may be pointed out that there is a need to review the controls over molasses' distribution and dismantle them in a phased manner so that the industry can realize its full potential, emerging more competitive and competitive neutral. § There is a need to do Competition Impact Assessment of the U.P. Sheera Niyantram Adhiniyam, 1964 and the attendant Rules and Policy governing the entire value chain. Hence, a copy of this order be forwarded to Chief Secretary of Government of Uttar Pradesh.

110. C.P. PAUL v. KERALA STATE ELECTRICITY BOARD & ANR [CCI]

Hint: Informant raised allegation that his Hotel **was entitled to receive power supply from KSEBL at industrial tariff rates under LT-IV category as his hotel had been classified as a star hotel by the Tourism Department. But, KSEBL raised a bill dated 09.03.1998 charging the Informant's hotel at a higher tariff under LT-VII category instead of the applicable LT- IV category**, for the month of February, 1998.

Decision: The CCI decide the case in favour of OP and held that the face of case states that it is not a competition issue.

Fact of the Case	§ The Informant who is a proprietor of a Hotel claimed that as per the prevailing industrial policy of the Government of Kerala, **his Hotel was entitled to receive power supply from KSEBL at industrial tariff rates under LT-IV category as his hotel had been classified as a star hotel by the Tourism Department** w.e.f. 01.08.1988 for a period of 3 years. § It is alleged that while the Informant's application for renewal of star classification was pending, **KSEBL raised a bill dated 09.03.1998 charging the Informant's hotel at a higher tariff under LT-VII category instead of the applicable LT-IV category**, for the month of February, 1998. § However, It has been pointed out that w.e.f. May, 1999 the Government of Kerala changed its Policy and tariffs **under LT-VII category and was made applicable for all hotels**. § The Informant filed an appeal before the High Court of Kerala. The High Court vide its judgement dated 16.01.2006 declared that the Informant was entitled to receive power supply at industrial tariff for February 1998. § However, while this appeal was pending, KSEBL issued another bill, which was again challenged by the Informant by filing of a writ petition. § Subsequently, KSEBL disconnected the power supply of the Informant's premise and later dismantled the connection on 16.05.2006 for non-payment of bill dated 18.06.2005. § Based on the above averments and allegations, **the present information has been filed by the Informant against the Opposite Parties alleging contravention of the provisions of Section 4 of the Act.**
Legal Principles held—	§ The Commission observed that KSEBL raised another bill claiming arrears and surcharge to informant demanding Rs. 4,46,97,799/ and request to remit within 30

	days, in violation of the order passed by the HC. The said amount was not paid by the Informant being **non est in the eyes of law**. § Having considered the allegations made in the information, the Commission is of the considered opinion that no competition issue whatsoever is involved in the matter or is otherwise made out in the present case, which can be said to be abusive in terms of the provisions of Section 4 of the Act.
Decision	§ The CCI decide the case in favour of OP. § In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

111. HPCL-MITTAL PIPELINES LTD v. GUJARAT ENERGY TRANSMISSION CORPORATION LTD & ORS [CCI]

Hint: Informant alleged that the open access requests for procuring electricity were rejected by the SLDC-GETCO in order to ensure that HPCL only sourced its demand of electricity through PGVCL, a subsidiary of SLDC-GETCO engaged in the downstream market for distribution and retail sale of supply of electricity.

Decision: The CCI decide the case against the OP.

Fact of the Case	§ **HPCL,** an industrial electricity consumer, had sought permission from SLDC-GETCO to procure electricity through "Open Access Mechanism" as provided for under the Electricity Act, 2003. § The Open access Mechanism allows the large users of electricity to purchase cheaper powers from a source other than the distribution licensee licensed to supply power to a particular area. § Pursuant to the Electricity Act, SLDC-GETCO is the sole authority entrusted with the power to approve or disapprove open access requests. It was alleged by HPCL that SLDC-GETCO indiscriminately rejected its requests for open access transmission on 12 different occasions, even though HPCL had satisfied all the pre-requisites, on various grounds that were unfair, unreasoned and reflected non-application of mind. § Further, HPCL alleged that the requests were rejected by the SLDC-GETCO in order to ensure that HPCL only sourced its demand of electricity through PGVCL, a subsidiary of SLDC-GETCO engaged in the downstream market for distribution and retail sale of supply of electricity. § HPCL alleged that SDLC-GETCO impose unfair and discriminatory conditions by denying open access permission and thereby restricting the production of electricity, denying market access to the power generators, and manipulating the downstream distribution market in favour of its subsidiary (i.e. PGVCL).
Legal Principles held—	§ **With regard to denial of market access?** ☞ The Commission observes that as per the Hon'ble COMPAT's view in M/s Kansan News Private Ltd. Case, denial of market access is a competition law issue only when such denial is occasioned to a competitor. ☞ In this regard, it is relevant to note that although Informant is only a consumer in the present case and as such not competing with OP-1 or OP-2, the denial of market access is exclusionary to the 'source/electricity supplier' through which the Informant was planning to access its power requirement. ☞ Further, such 'source/electricity supplier', was competing with OP-2's group entity, OP-3, which was a group entity of OP-1 (the holding company of OP-2) and was the licensee distributor for the Informant during the relevant time when open access permission was denied.

	☞ Prima facie, it appears that the denial of open access permission to the Informant has resulted in a violation of Section 4(2) (c) of the Act. ☞ Further, this denial of market access under Section 4(2) (c) also seems to be a consequent violation of Section 4(2) (e), § In the present case. It appears that OP-2 has leveraged its dominant position in the relevant market to adversely affect the competition in the downstream market, where it is present through its group entity OP-3. § The structural linkages between the OPs as depicted in the diagram illustrated earlier also points toward the conflict of interest that exists in the present case. § Thus, given the conflict of interest situation that exists in the present case, anti-competitive motive behind such denial by OP-2 cannot be ruled out and may need to be tested in detailed investigation.
Decision	§ The CCI decide the case against the OP. § Based on the foregoing analysis, the Commission is of the considered view that prima facie, the contravention with regard to Section 4(2) (b) (i), Section 4(2) (c) and Section 4(2) (e) of the Act is made out against OP2, which warrants detailed investigation into the matter. § Thus, the DG is directed to carry out a detailed investigation into the matter, in terms of Section 26(1) of the Act, and submit a report to the Commission, within 60 days. § During the course of investigation, if involvement of any other party/entity is found, the DG shall investigate the conduct of such other party/entity(s) who may have indulged in the said contravention.

112. INDUSTRIES & COMMERCE ASSOCIATION v. COAL INDIA LIMITED & ORS [CCI]

Hint: The Informant submits that the process of e-auction is in respect of a scarce and otherwise essential commodity, like coking coal, in the context where the price of the end product is not controlled. Accordingly, **e- auction of such a commodity by a dominant enterprise, being monopolist, can only yield the highest price, which has the effect of imposition of unfair and excessive prices upon the purchasers and the end consumers**.

Decision: The CCI dismissed the complaint. The Commission is of the opinion that the change in policy by Ministry of Coal for grant of linkages through e-auction is not amenable within the purview of the Act.

Fact of the Case	§ The Informant Association comprising of 72 small scale industries that are involved in the manufacture and sale of hard coke, has filed the instant information against CIL and its subsidiary BCCL alleging contravention of the provisions of Section 4 of the Act. § Since the introduction of NCDP in 2008, the members of the Informant Association have entered into two consecutive FSAs with BCCL of five years each. The first FSA expired in 2013 and the second FSA is due to expire in 2018. § The real trigger for filing the present information appears to be a **paradigm change in the policy framework effected by the GOI whereby and where under coal linkages are proposed to be auctioned for non-regulated sector through competitive bidding (after expiry of the existing FSAs in 2018) instead of granting the same through extant administrative dispensation method**. § The Informant submits that the process of e-auction is in respect of a scarce and otherwise essential commodity, like coking coal, in the context where the price of the end product is not controlled. § Accordingly, **e- auction of such a commodity by a dominant enterprise, being monopolist, can only yield the highest price, which has the effect of imposition of unfair and excessive prices upon the purchasers and the end consumers**.

	§ Thus, it is alleged that such conduct of the dominant entity that results in imposition of unfair and excessive prices upon the purchasers and the end consumers is ex-facie exploitative in nature.
Legal Principles held—	§ The Commission is of opinion that the entire approach and reasoning adopted by the Informant is tenuous (i.e. insignificant). § While formulating policies, MoC is not engaged in any of the activities specified in Section 2(h) of the Act which defines 'enterprise'. **Formulation of policies does not fall in the realm of commercial or economic activity as envisaged under the definition of the term 'enterprise' as given thereunder**. § Hence, **it is unnecessary to examine as to whether MoC, CIL and BCCL constitute 'Group' for the purposes of Section 4 read with Explanation (b) to Section 5 of the Act**. § The challenge by the Informant to model FSA is also highly premature. The auctions for grant of linkages are yet to be conducted. § Thus, at this stage, any examination of the terms of Model FSA would be a speculative exercise until the FSAs are executed by the successful bidders in the e-auction and the final terms are concretized.
Decision	§ For the reasons given above, the Commission is of the opinion that the change in policy by Ministry of Coal for grant of linkages through e- auction is not amenable within the purview of the Act. § Consequently, the challenge to model FSA proposed thereunder is also speculative and premature. In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith. § The CCI dismissed the complaint.

113. EXPRESS INDUSTRY COUNCIL OF INDIA v. JET AIRWAYS (INDIA) LTD. & ORS [CCI]

Hint: In the present case, it has been alleged that certain domestic Airlines in India connived (i.e. encouraged) **to introduce a 'Fuel Surcharge' (FSC) for transporting cargo**. This surcharge was fixed **at a uniform rate of Rs. 5/ Kg** and came into force on May 15, 2008. **Although it was further alleged that** there **does NOT appear to be any legal provision under which such FSC** could have been levied by the Airlines. **However, the ostensible reason was given by such domestic airlines that FSC was charged to mitigate the volatility of fuel prices. It was further stated that** levying FSC **at a uniform rate** from the same date itself **constitutes an act of cartelization** covered under Section 3 of the Act. The **said cartel of the Airlines is stated to be continuing** till date.

Decision:

§ **The CCI decide the case in favour of the Informant (i.e. Express Industry Council of India).**

§ The CCI imposes a penalty on the Opposite Party **for their impugned conduct which has been held to be in contravention of the provisions of Section 3(1) read with Section 3(3) (a) of the Act**.

Fact of the Case	§ **In the present case,** it has been alleged that certain domestic Airlines in India connived (i.e. encouraged) **to introduce a 'Fuel Surcharge' (FSC) for transporting cargo**. This surcharge was fixed **at a uniform rate of Rs. 5/ Kg** and came into force on May 15, 2008. § **Although it was further alleged that** there **does NOT appear to be any legal provision under which such FSC** could have been levied by the Airlines. § **However, the ostensible reason was given by such domestic airlines that FSC was charged to mitigate the volatility of fuel prices.**

	§ **It was further stated that** levying FSC **at a uniform rate** from the same date itself **constitutes an act of cartelization** covered under Section 3 of the Act. The **said cartel of the Airlines is stated to be continuing** till date.
Applicable Law	Whether OPs have operated in concerted manner while fixing FSC and thereby violated the provisions of Section 3(1) read with Section 3(3) of the Act?
Legal Principles held—	**The CCI consider the following facts before passing the final order:** **(a)** OPs have stated that **each airline takes into account several factors** to determine FSC. **(b)** The reason provided by **OPs for introduction of FSC was 'sharp volatility' in ATF** (Aviation Turbine Fuel) prices. **(c)** While trying to **justify the changes in FSC**, It appears that OPs have paid **NO heed (i.e. attention) to the purpose admitted by them for levying FSC** and have **now provided reasons which go far beyond the avowed (i.e. approved) objective behind introduction of such a levy**. **(d)** In fact, from the reasons adduced (i.e. submit) by OPs, CCI has no hesitation in holding that the very purpose of introduction of FSC to cushion (i.e. pillow) the volatility in ATF prices has been relegated (i.e. deport) to the margins long back and, instead, **all sorts of reasons have now been offered to explain the continuous and coordinated revisions in FSC by the airlines**. **(e)** Thus, far from being a cushion to hedge the volatility in ATF prices, **FSC has become a tool to seek rent from the potential users of cargo services in the garb of various reasons which have nothing to do with the stated objective**. There are also **serious loopholes in the justifications** provided by OPs. **(f)** The OPs have associated random factors to FSC prices, without having a systematic mechanism to arrive at these prices. For example**, it may be noted that OP-1 has explained that it was due to increase in ATF price coupled with increase in dollar exchange rate, that FSC was increased. However, there have been instances when the correlation between the ATF price and USD exchange rate vis-à-vis FSC rate has been missing**. **(g)** The Commission notes that each OP has stated various factors **that determine FSC. Inspite of citing diverse factors that determine the change in FSC, all OPs have increased FSC by the same amount**. **(h)** It is difficult to comprehend as to **how even after considering variety of factors determining the change in FSC rates**, **all OPs could have reached a similar rate to affect an increase in FSC rates on various occasions**. **(i)** To sum up, **the Airlines were unable to furnish any data/ calculation/methodology or costing of any kind whatsoever in support of the determination of FSC rates.** Even the authorized representatives of OPs could **not furnish the rationale for revision of FSC on certain occasions when questioned in front of the DG**. **Merely providing factors which are not correlated to the FSC is a futile exercise conducted by the OPs**. **(j)** This is unable to justify the concerted acts of the OPs. It may be noted that a parallel conduct is legal only when the adaptation to **the market conditions are done independently and NOT on the basis of information exchanged between the competitors, the object of which is to influence the market**. **(k)** One of the elements that indicates concerted action is the exchange of information between the enterprises directly or indirectly. Price competition in a market encourages **an efficient supply of output/ services by companies**.

	(l) Any company **is free to change/ revise its prices taking into consideration the foreseeable conduct of its competitors**. That however is not suggestive of the fact that it cooperates with the competitors. **(m)** Such **coordinated course of action relating to a change of prices ensures its success by prior elimination of all uncertainty as to each other's conduct** regarding the essential elements of that action, such as the amount, subject-matter, date, etc. **(n)** In view of the foregoing, it is opined **that the OPs have acted in parallel and the only plausible reason for increment of FSC rates by the airlines was collusion amongst them**. **(o)** As these OPs **are engaged in similar business** and **operating at the same level of the production chain**, allegations of anti-competitive agreements, decisions or practices **among them squarely stand covered within the ambit of Section 3(3) read with Section 3(1) of the Act**. **(p)** Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that OP-1, OP-2 and OP- 3 **have acted in a concerted manner in fixing and revising the FSC rates and thereby contravened the provisions of Section 3(1) read with Section 3(3) (a) of the Act**. **(q)** Accordingly, OP-1, OP-2 and OP-3 are directed **to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act**.
Decision	§ **The CCI decide the case in favour of the Informant (i.e. Express Industry Council of India).** § The CCI imposes a penalty on the Opposite Party **for their impugned conduct which has been held to be in contravention of the provisions of Section 3(1) read with Section 3(3) (a) of the Act**.

114. VISHAL PANDE v. HONDA MOTORCYCLE AND SCOOTER INDIA PVT LTD [CCI]

Hint: Informant put various allegations against the Opposite Party such as Prohibiting the Informant from dealing in any manner with any competing product, Forced selling of the AMC, EW and RSA authorised only by the OP, Purchase of oils and consumables only from OP nominated two vendors, Re-sale price maintenance and discount control mechanism, Fixation of limits of geographic operation, Termination of dealership and refusal to take back stock etc. and prayed before the Commission to initiate an inquiry against the OP for contravention of the provisions of Sections 3 and 4 of the Act and issue an appropriate direction.

Decision: The CCI decide the case in favour of the Informant.

Fact of the Case	§ In the present case, the Informant is one of the authorised dealer of two wheelers of the OP for a period of 15 years. § The Informant acquired dealership and service centre of the OP in Aurangabad through a non-exclusive standard form of agreement between the parties ("Dealership Agreement"). § The Informant raised the following allegation that the OP has imposed the following restrictive conditions in the said dealership agreement: **(a)** Purchase of oils and consumables only from OP nominated two vendors. **(b)** Forced to maintain stock of authorised accessories like mats, side stand, mud-guard, number plate, side-step, etc., classified as genuine accessories. **(c)** Prohibiting the Informant from dealing in any manner with any competing product. **(d)** Forced selling of the AMC, EW and RSA authorised only by the OP.

	(e) Deliberate deduction from dealer's account to fund advertising expenses. **(f)** Compulsory off-loading of stock and slow moving models. **(g)** Compulsory billing of merchandise. **(h)** Restriction regarding the sale of batteries. **(i)** Exclusive arrangements with financers and insurance partners. **(j)** Re-sale price maintenance and discount control mechanism. **(k)** Fixation of limits of geographic operation. **(l)** Enforcing hub and spokes arrangement by negatively evaluating dealers. **(m)** Termination of dealership and refusal to take back stock. § The Informant has **prayed before the Commission to initiate an inquiry against the OP for contravention of the provisions of Sections 3 and 4** of the Act and issue an appropriate direction.
Legal Principles held –	§ **With regard to the determination of dominant position:** ☝ It would be relevant to look into **the sale data of the OP and its competitors in both the relevant markets**. ☝ The **OP is at the third place with a market share varying** between 7.14 % and 12.63 %. ☝ Considering the market share of the OP in this relevant market, **it does not appear prima-facie to enjoy a dominant position in this relevant market** **'market for manufacture and sale of motorcycles in India'**. Accordingly, **it does not merit investigation for abuse in this market**. § **However, in the 'market for manufacture and sale of scooters in India', the Commission observes that**, ☝ The OP is consistently leading in this relevant market with a high market share ranging between 43.30 % and 56.82 % followed by TVS Motor Co Ltd. whose market share is ranging between 21.44 % and 14.76 %. ☝ Further, the relevant market **appears to exhibit entry barriers due to huge capital cost involved in setting up a manufacturing facility**. ☝ At prima-facie stage, **these considerations suggest that the OP enjoys a dominant position in the 'market for manufacture and sale of scooters in India'**. § The Commission has given a careful examination to **the alleged imposition of several unfair conditions** on the Informant through the Dealership Agreement **which merit examination as abuse of dominant position in the 'market for manufacture and sale of scooters in India'**. § Based on above, the Commission is prima-facie satisfied that **(a)** The restrictions imposed by the OP for sale of oil, lubricants and batteries **are unfair and in contravention of Section 4(2)(a)(i) of the Act.** **(b)** Similarly, the condition for mandatory purchase of accessories, merchandise items, forceful billing of slow moving vehicles, compulsory deduction of advertising expenses, restrictions on insurance and finance options, making purchase of AMC, EW and RSA contingent upon purchase of booklets from Corporate India Warranties (I) Private Limited, termination of dealership **without prior notice and refusal for stock buyback appear to be unfair and suggest prima-facie contravention of Section 4(2) (a)(i) of the Ac**t. **(c)** the Dealership Agreement has been concluded with the said supplementary obligations which, by their nature or commercial usage, **have no connection with the subject of the contract. Thus, the Commission is of the prima-facie view that the conduct of the OP merits examination under Section 4(2) (d) of the Act**.

	(d) The Commission **also notes that the mandatory requirement imposed by the OP on its dealers for** purchase of oil and consumables, genuine accessories, AMC, EW and RSA, advertising services, merchandise items, batteries, insurance and finance options, from designated sources; resale price maintenance and discount control mechanism**; allocation of any area or market for the disposal or sale of the goods; and exclusive supply agreement/refusal to deal**; **also appear to be in the nature of anti-competitive restraints covered under section 3(4) of the Act**.
Decision	§ The CCI decide the case in favour of the Informant. § The Commission is of the prima-facie view, **a case of contravention of the provisions of Section 4 and 3(4) of the Act is made out against the OP**. **The DG is directed to cause an investigation to be made into the matter and to complete the investigation within a period of 60 days from receipt of this order**.

115. IN RE: CARTELISATION IN RESPECT OF ZINC CARBON DRY CELL BATTERIES MARKET IN INDIA AGAINST EVEREADY INDUSTRIES INDIA LTD & ORS [CCI]

Hint: The instant case was taken up by the CCI suo motu pursuant to the Lesser Penalty Application submitted by OP-3. OP-3 stating in the said application **that there existed a cartel** amongst OP-1, OP-2, and OP3, [Manufacturers] **which were all engaged in the business of manufacture and supply of zinc-carbon dry cell batteries** to control the distribution and price of zinc-carbon dry cell batteries **in India in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act**. In the said application, **it was also disclosed that the Manufacturers were members of OP-4 which is a trade association**, namely, Association of Indian Dry Cell Manufacturers (AIDCM) which **facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers**.

Decision:

§ **The CCI held that** OP-1, OP-2 and OP-3 have been **involved in cartelisation of zinc-carbon dry cell batteries** in India which has **been facilitated by OP-4**, in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act.

§ Further, the individuals of OPs have also been actively involved in the said cartelisation in the domestic market.

Fact of the Case	§ The instant case was taken up by the CCI suo motu pursuant to the Lesser Penalty Application submitted by OP-3. § OP-3 stating in the said application **that there existed a cartel** amongst OP-1, OP-2, and OP3, [Manufacturers] **which were all engaged in the business of manufacture and supply of zinc-carbon dry cell batteries** to control the distribution and price of zinc-carbon dry cell batteries **in India in contravention of the provisions of Section 3(3) read with Section 3(1) of the Act**. § In the said application, **it was also disclosed that the Manufacturers were members of OP-4 which is a trade association**, namely, Association of Indian Dry Cell Manufacturers (AIDCM) which **facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers**.
Legal Principles held –	§ The Commission has **considered** the **Lesser Penalty Applications** filed by the Manufacturers, **the investigation report** of the DG and the **submissions of OPs** and their individuals. § The CCI consider the following facts before passing the final Order:

	(a) It is noted that all the **Manufacturers have admitted the fact that they were involved in the cartelisation** of zinc-carbon dry cell batteries. **(b)** From the information and evidence furnished by OPs and the investigation by the DG, **it is observed that the Manufacturers indulged in anticompetitive conduct of price coordination, limiting production/ supply as well as market allocation**. **(c)** The **price coordination amongst the Manufacturers encompassed NOT only increase in the MRP** of the zinc carbon dry call batteries **but also exclusion of 'price competition' at all levels in the distribution chain of zinc- carbon dry cell batteries to ensure implementation of the agreement to increase price.** **(d)** In addition, **the Manufacturers also agreed to control supply in the market to establish higher prices and indulged in market allocation by requesting each other to withdraw their products from the market**. **(e)** For these purposes, the Manufacturers exchanged amongst themselves confidential and commercially sensitive information about pricing as well as other information such as production and sales data. **(f)** In order to increase price of the zinc carbon dry call batteries, **the Manufacturers mutually agreed on the implementation modalities of MRP**. They **NOT only decided the schedule of start of production of units with new MRP but also the start of billing as well as availability of products, with revised rates in the market**. **(g)** The evidence gathered during investigation and submission of OPs shows that the **individuals of the Manufacturers regularly discussed and agreed when to give effect to the price increase during the personal/AIDCM meetings**. **(h)** OP-1 **being the market leader would take lead by issuing press release** to announce increase in price of its zinc-carbon dry cell batteries. Thereafter, OP-2 and OP- 3 **would respond to it immediately with corresponding increase in price of their batteries on the pretext of following the market leader**. Further, evidence collected during investigation **shows that price coordination agreement amongst the Manufacturers was not limited to deciding and implementing increase in MRP of zinc-carbon dry cell batteries alone but extended to include monitoring and controlling of prices at all levels so as to exclude 'price competition' in the entire distribution chain of zinc-carbon dry cell batteries**. **(i)** Notably, in the distribution chain, **the Manufacturers sold the batteries to the distributors/ wholesalers and through them to the retailers on 'principal to principal' basis**. Once the batteries were sold to wholesalers/ retailers **they pushed sales of the batteries by offering attractive margins/ incentives**. **(j)** At the same time, **sales staff of the companies tried to promote sales performance of their products by resorting to promotional schemes - like scratch coupons, gifts, combo offers, festival offerings etc. All this resulted in 'price competition' at various levels**. For instance, if wholesalers / retailers of OP-1 tried to boost sale of OP-1's products, by offering incentives to the consumers, it would result in lower sales for OP-2 and OP-3. **(k)** Since the '**price competition' in the distribution chain, as stated above, could have rendered the agreement/understanding reached among the Manufacturers ineffective**, they entered into agreement/understanding/

	coordination amongst themselves to **cover all other elements of the price structure besides MRP, comprising trade discount, wholesale price, dealer/ stockist landing cost, open market rates, retailers' margin, sales promotion schemes etc**. **(l)** The evidence on record shows that despite the above agreement/ understanding/ coordination, **the Manufacturers faced problem in actual implementation of increased MRP in the market**. Since **deviation from the agreed stand by any of the Manufacturers could result in drop of sales volume of others, they would bring to one another's notice concerns about slow implementation of the mutually agreed decisions and would seek corrective action if deviations from the agreement were observed in the market**. Besides, **they would regularly share amongst them information regarding operating margin rates, wholesale offer price etc. prevailing in various states/ cities/ towns collected by the sales staff** and would even control supply in the market to establish higher prices of batteries. **(m)** The **e-mails exchanged** amongst the Manufacturers show that there was also an understanding amongst them to **allocate market based on geographical area and types of batteries**. They **would often request each other to withdraw their products from a particular geographical area** such as a state or town or city. **(n)** Apart from all this, Manufacturers in their meetings held **under the aegis of AIDCM, would share common concerns about low rates of batteries offered by other maverick players, mostly importers/ traders, as this occasionally caused constraints in raising/ maintaining the higher market price** of their battery products. **(o)** The evidence gathered by the DG shows that on one occasion in AIDCM meeting on 10 February 2012, **the Manufacturers deliberated the impact of alkaline and rechargeable batteries on the market of the zinc-carbon dry cell batteries and contemplated** reduction in MRP of AA and AAA size batteries **by reducing trade margins**. Also, the Manufacturers discussed the low rates at which their batteries **were being sold by the modern retail channels like 'Walmart' and 'Metro Cash & Carry' etc.** and agreed on the strategy to counter such issues. **(p)** The top management of the Manufacturers **played an active role in this collusion**. It is observed that **the coordination amongst the Manufacturers took place at the highest level in these companies**. The top managerial personnel **discussed various aspects of coordination in the meetings of AIDCM (reflected in the minutes of such meetings), on the sidelines of meetings of AIDCM (reflected in the hand-written notes and agenda points prepared by the individual members for the meeting) and in private meetings**. **(q)** Moreover, there were **frequent direct email/ fax communications amongst the individuals of OPs, which show their close personal and friendly relations and the underlying deep commitment to adhere to 'gentlemen's agreement'**. There is further evidence to show that by collating and disseminating crucial business data of the competitors, AIDCM facilitated better coordination amongst the Manufacturers. **(r)** The **monthly data on production and sales of the Manufacturers collected by AIDCM was used to compare/ assess the impact of the**

	overall arrangement on pricing and other business strategies, on their market shares over a period. **(s)** The Commission finds **that practice by AIDCM of compiling and disseminating commercially sensitive data was greatly helpful to the Manufacturers to monitor the outcome of overall 'agreement/ understanding' reached at amongst them** with regard to pricing, output, sale/ supply, allocation of market, etc. **(t)** In fact, comparison of the market shares of OPs for the past six years i.e. from 2010-11 to 2015-16 **based on their sales of zinc carbon dry cell batteries** shows that **market share of each of the OPs remained stable over these years**. This **is a clear indicator of the effectiveness of the cartel arrangement**. **(u)** In view of the foregoing, **the Commission finds that OP-4 through its practices, decisions and conduct of the office bearers** i.e. individuals of OP-4, **facilitated anti-competitive agreement/ understanding and concerted action amongst its members** in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act. In view of the foregoing, the Commission is of the opinion that
Decision	§ **The CCI held that** OP-1, OP-2 and OP-3 have been **involved in cartelisation of zinc-carbon dry cell batteries** in India which has **been facilitated by OP-4**, in contravention of the provisions of Section 3(3)(a), 3(3)(b) and 3(3)(c) read with Section 3(1) of the Act. § Further, the individuals of OPs have also been actively involved in the said cartelisation in the domestic market.

116. CREDAI-NCR v. DEPARTMENT OF TOWN AND COUNTRY PLANNING, HARYANA & ORS [CCI]

Hint: In the Present case, the OPs impose unfair and extensive obligations on the developers in terms of the development works that the developer must carry out in the specified territory and the charges levied on them are also required to be paid within tight timelines. Further, the conditions therein **obligate the developers to pay EDC as and when demanded**. OPs include restrictive and onerous clauses in Sohna License, Sohna LOI (Letter of Intent) and Sohna Agreement. Whether OPs abuse of dominance in pursuance of Section 4 of the Competition Act, 2002?

Decision:

§ **The CCI decide the case in favour of the Informant.**

§ **The CCI held that** the conduct of the OPs prima facie appears to be in contravention of the provisions of Section 4(2)(a)(i) of the Act.

§ Accordingly, the **DG is directed to cause an investigation into the matter, complete the investigation within a period of 60 days** from the receipt of this order and submit its report.

Fact of the Case	§ The **present information has been filed under Section 19(1)(a) of the Competition Act, 2002** (hereinafter, the 'Act') by Confederation of Real Estate Developers Association of India - NCR (hereinafter, the 'Informant'/ 'CREDAI-NCR') **against** Department of Town and Country Planning, Government of Haryana (hereinafter, 'OP-1'/ 'DTCP') and Haryana Urban Development Authority, (hereinafter, 'OP-2'/ 'HUDA') (hereinafter, **OP-1 and OP-2 collectively referred to as the 'OPs'**) **alleging contravention of the provisions of Section 4 of the Act**.

	§ It is stated in the information that on 15.11.2012, OP-1 had issued the Sohna Master Plan 2031 (hereinafter, 'Sohna Master Plan') **for Group Housing Colony in the revenue estate of Tehsil Sohna of Gurugram District in Haryana. Based on this plan**, various developers submitted their bids and thereafter, **the Sohna Letter of Intent** (hereinafter, 'Sohna LOI') were executed between each developer and the Director of OP-1. § It is stated that before execution of the LOI, **the developers had fulfilled the conditions stipulated under the Haryana Development and Regulation of Urban Areas Development Act, 1975** (hereinafter, the 'Haryana Development Act') and **the Haryana Development and Regulation of Urban Areas Development Rules, 1976** (hereinafter, the 'Rules of 1976') **including submission of the bank guarantee towards External Development Charges** (hereinafter, 'EDC'), Infrastructure Development Charges (hereinafter, 'IDC') and **other charges and fees viz. conversion charges, license fees and scrutiny fees.** Thereafter, **bilateral agreements (hereinafter, 'Sohna Agreement') between developers and Director of OP-1 were executed and licences (hereinafter, 'Sohna License') were issued to the developers**. § It is alleged in the information that **some of the terms and conditions** of the Sohna License, Sohna LOI (Letter of Intent) and Sohna Agreement **are unfair and discriminatory**. § It is averred (i.e. substantiate) that through the Sohna LOI, **the OPs impose unfair and extensive obligations on the developers in terms of the development works that the developer must carry out in the specified territory and the charges levied on them are also required to be paid within tight timelines.** Further, the conditions therein **obligate the developers to pay EDC as and when demanded**. § However, **NO CLAIM for damages lies** against the OPs **for delay in provision of development facilities**. It is further alleged that the **charges and payment schedule in the Sohna Master Plan** has been decided **by the OPs unilaterally without making available the basis of calculation of these charges or implementation schedule of the development work.** § The Informant has further alleged that under the terms of the Sohna License**, EDC are subject to revision as per the actual charges incurred including any enhanced land acquisition costs**, which is to be worked out later and **the developer is liable to pay an additional amount as and when directed**. § Furthermore, **the assumption on costs or timelines w.r.t. the development of infrastructure are also NOT disclosed**. In addition, the Sohna LOI obligates **the developers to pay interest on delayed payment of EDC and IDC to the OPs**. It is alleged that the **OPs are levying an exorbitant rate of interest on EDC and IDC on developers onerously without any authority under the Haryana Development Act**. § Further, the **developers are forced to accept fulfilment of such supplementary obligations of payment of interest, which has NOT been contemplated in the Haryana Development Act**. § Further, it is alleged that **NO activity on infrastructure development has been initiated by the OPs**, which has **further delayed the development of the projects**. But under the license agreement, **the charges and interest continue to be levied on the developers causing undue hardship in the development of their respective projects**.

	§ It is alleged that in the light of inaction by the OPs, **the developers are faced with the impossible task of fulfilling their obligations** under the Sohna LOI, Sohna Agreement and Sohna License within strict timelines and potential penalties covering **land that has not even been acquired by the OPs**. § In view of the above facts, the Informant has prayed the Commission to **(a)** Direct the **DG to Cause an investigation into the affairs of the OPs in performing their obligations** under the HUDA Act and Haryana Urban Development Act and abuse of their position in the State of Haryana; **(b)** **Restrain the OPs from invoking the bank guarantee against the developers pending adjudication of this information**; **(c)** Restrain the OPs and direct them **to cease and desist from compelling developers to pay any pending EDC and IDC** or any increase thereof along with interest; **(d)** Direct the **OPs to renegotiate the licenses and bilateral agreements with realistic time- schedules based on mutually agreeable development milestones and payment schedules**; **(e)** Direct the **OPs to return interest on EDC and IDC paid in advance by the developers in territories where they have carried out NO development work**; **(f)** Direct the **OPs to revise the EDC and IDC as mutually feasible and as per reasonably acceptable development schedule**; **(g)** **Impose penalty on the OPs for abusing their dominant position** to the prejudice of the developers; and **(h)** **Pass such other and further order, as the Commission may deem fit and proper in the circumstances of the case.**
Legal Principles held—	The CCI consider the following facts before passing the final order: **1.** It has been submitted that **the OPs do NOT fall within the definition of 'enterprise'.** Therefore, **the present information against them is NOT maintainable**. **(a)** Clearly, **the activities of OP-1 in the form of levying of EDC/ IDC have a direct economic/commercial impact**. In other words, **OP-1 is performing actions relating to economic/commercial activities, which in turn is affecting provision of development and construction services by the developers**. **(b)** Thus, in view of foregoing**, the Commission is of the opinion that OP-1 is covered within the ambit of the term 'enterprise' as defined in the Act.** **2.** Another contention raised by OP-1 is that the **developers are NOT consumers under the Act**. **(a)** In this regard, the CCI observes that the **OPs here are engaged in provision of commercial/economic services, which are being availed by the developers on payment of requisite fee and charges levied on them**. **(b)** Thus, the **CCI finds that the developers in this case are covered within the definition of 'consumer' under the Act**. **3.** The Commission is of the opinion on the basis of the submissions of the Informant and the response of OP-1 thereto, **that even though the terms of Sohna LOI, Sohna Agreement and Sohna Licence relating to EDC/ IDC emanate (i.e. come) largely from the statutory provisions of the relevant statutes, prima**

	facie the terms of these documents appear to be one-sided and in favour of the OPs. **4.** Further, the **alleged conduct of the OPs such as failure to adhere to its obligations** under the Sohna Master Plan in a time-bound manner and **imposing onerous obligations on the developers to pay EDC/ IDC**, prima facie, appears to be abusive. In response to the allegations, OP-1 has NOT denied that it has **NOT provided External Development Works in accordance with the Sohna Master Plan, rather it has justified that it is not possible to provide such services unless the entire EDC/ IDC amount is paid by the developers along with interest and penal interest**. **5.** The CCI finds that the conduct of the OPs **whereby they have NOT undertaken any External Development Works related to the Sohna project is ultimately affecting the end consumers i.e. the allottees/ home-buyers, as because of non-development by the OPs, the completion of the project is getting delayed and the same is rendered uninhabitable**.
Decision	§ **The CCI decide the case in favour of the Informant.** § **The CCI held that** the conduct of the OPs prima facie appears to be in contravention of the provisions of Section 4(2)(a)(i) of the Act. § Accordingly, the **DG is directed to cause an investigation into the matter, complete the investigation within a period of 60 days** from the receipt of this order and submit its report.

117. INDIA GLYCOLS LTD v. INDIAN SUGAR MILLS ASSOCIATION & ORS [CCI]

Hint: In the present case, complaint filed by the Informant before the CCI **with respect to supply of ethanol at an artificially higher price**, it amounts to anti competition practices under section 3 of the Competition Act, 2002.

Decision: CCI dismissed the complaint and decide the case in favour of the Opposite Party.

Fact of the Case	§ The present information has been filed by India Glycols Ltd. ('the Informant') against Indian Sugar Mills Association ("Opposite Party-1"/ OP-1/ ISMA), National Federation of Cooperative Sugar Factories Ltd.("Opposite Party-2"/ OP-2/ NFCSF), Indian Oil Corporation Ltd. ("Opposite Party-3"/ OP-3/ IOCL), Hindustan Petroleum Corporation Ltd. ("Opposite Party-4"/ OP-4/ HPCL) and Bharat Petroleum Corporation Ltd. ("Opposite Party-5"/ OP-5/ BPCL) (collectively, "the OPs") **alleging contravention of the provisions of the Act**. § As per the Informant, OP-1 and OP-2 **hold the entire market for sugar mills in India and supply ethanol to chemical industries** and to OP-3 to OP-5. § It has been alleged that OP-1 is **forcing the PSU OMCs to purchase ethanol at an artificially higher price and the same amounts to violation** of Section 4 of the Act. § It has also been alleged that **the role of OP-2 is equally anti-competitive since it has colluded with OP-1 in artificially raising the price of ethanol** in contravention of the provisions of Section 3 (3) (a) of the Act. § The Informant is also aggrieved at the mandatory Ethanol Blending Programme (EBP) promulgated by the Ministry of Petroleum and Natural Gas ('MoPNG') vide

	its notification dated 02.01.2013 **whereby the OMCs were directed to sell only petrol blended with ethanol with percentage of ethanol upto 10%**. It is alleged that **such a programme has created anti-competitive conditions in the market for supply of ethanol by encouraging members of OP-1 and OP-2 to rig bids and to artificially increase the prices of ethanol**. § Thus, while seeking discontinuance of such a programme, **the Informant has sought that joint tender mechanism of PSU OMCs be SCRAPPED and the same be replaced by independent tendering by all the OMCs including private OMCs for procurement of ethanol at market-driven prices**. So that **proper competition amongst all the OMCs is ensured** and **the Informant and other buyers of ethanol are also benefited by fair competition in the market** for sale and purchase of ethanol.	
Legal Principles held—	**Issue No. I**	**Whether the process of mandatory EBP notified by MoPNG as well as procurement of ethanol by the OMCs at fixed notified prices contravene any provision of the Act?**
	☝ It needs no emphasis that **a policy or pricing strategy of the Government cannot be examined in abstract by the Commission unless the same falls within the framework of the Act**. ☝ The Commission observes **that policy formulation is the prerogative of the Government**. It is in its domain to effect a change in the extant policy by shifting the focus or changing the economic policies. ☝ No doubt, **such changes could result in adversely affecting some of the existing interests**, yet the same cannot be a ground to challenge them before the Commission. ☝ It is **not for the Commission to consider the relative merits of different economic policies or the pricing mechanisms of the Government** and decide as to **whether a more wise or a better alternative can be evolved**. ☝ The Commission held **that formulation of policies falls in the domain of the Executive and the Commission is NOT the appropriate forum to sit in appeal over such decisions unless such policies contravene any provision of the Act** and can be examined within the existing regulatory framework.	
	Issue No. II:	**Whether OP-1 has abused its dominant position in the market for supply of ethanol to the PSU OMCs in violation of the provisions of Section 4 of the Act?**
	☝ The primary activities of ISMA are **to provide a platform to its constituent members to discuss matters of common interest relating to the sugar industry besides making representations to the government authorities and agencies** to **support the cause of its members in respect of the matters of policy and procedures governing the sugar industry**. ☝ Since **ISMA is NOT undertaking any activity which is economic or commercial activity pertaining to production and supply of ethanol, allegations made by the Informant in this regard do NOT survive**. ☝ As a result, **question of ISMA being dominant in such a market does NOT arise**. ☝ The Informant argued that ISMA **is involved in business of 'provision of services' to its members to bring it within the scope of 'enterprise' is disingenuous**. However, there is no needs for **further analysis because the allegations made by the Informant are in respect of production and supply**	

of ethanol and NOT in respect of the alleged services provided by ISMA to its members.

- It would indeed be a subversion (i.e. destruction) of law if ISMA **is held to be an 'enterprise' for providing its platform to the members as 'services'** and **to hold it guilty for altogether different activity i.e. production and supply of ethanol**.
- In view of the above, the Commission **held that ISMA cannot be considered to be an 'enterprise' within the meaning of the term as defined in Section 2 (h) of the Act. Accordingly, the issue of abuse of dominant position by ISMA in respect of production and supply of ethanol does NOT arise**.

Issue No. III:	**Whether OP-1 and OP-2 acted in collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol to force the PSU OMCs to purchase ethanol at an artificially higher price in contravention of the provisions of Section 3 of the Act?**

- When the DG examined the production and supply data of **the three main sugar mills which produce and supply about 75-80% of the total ethanol supplied to the OMCs** in State of U.P., **the same revealed that the production and utilisation pattern of these mills of different derivatives of alcohol during financial years 2012-13 to 2014-15 significantly differ**.
- It indicates that **the sugar mills are independently taking decisions on their production mix and its utilisation including ethanol** and such decisions seem to be market driven.
- It seems that these **sugar mills are producing and supplying different derivatives of alcohol as per the demand and supply commitments made by each one of them looking to the market forces**.
- Further, the **DG considers the several reports and studies undertaken by various government agencies and organizations working on policy matters, which seemed to unanimously indicate that production and supply of ethanol for EBP is at a lower level which is due to the fact that production of sugarcane in the country is inconsistent**.
- Therefore, **supply of molasses in the country is also NOT only inconsistent but limited too.**
- Under such a scenario, **it will be logical and prudent to compare and see the production and supply of ethanol in connection with the production and availability of molasses**.
- In the light of these facts and analysis, **the investigation came to the conclusion that the production, availability and supply of molasses in the country has a huge and decisive impact on the production and supply of ethanol and that OP-1 and OP-2 cannot be said to be in any collusion to create an artificial scarcity of ethanol by limiting production and supply of ethanol at low level which may force the OMCs (OP-3 to OP-5) to purchase ethanol at an artificially higher price**.
- For the reasons adumbrated, **the Commission held that no contravention of the provisions of Section 3 (3)(a) and 3(3)(b) of the Act is made out against ISMA (OP-1) and NFCSF (OP-2).**
- In view of the above, the Commission **held that no case of contravention of the provisions of the Act is made out against OP-3 to OP-5 on the aforesaid count**.

Decision	**CCI dismissed the complaint and decide the case in favour of the Opposite Party**.

118. In Re: ANTI-COMPETITIVE PRACTICES PREVAILING IN BANKING SECTOR [CCI]

Hint: The instant matter **concerns Savings Bank Interest Rates ('SBIRs') and service charges on Automated Teller Machines ('ATMs') transactions, offered/ charged by banks**. Considering **the similarity of these rates across different banks**, the **Commission took up the matter on a suo moto basis**.

Decision: The CCI concludes that no cartelisation in banking services.

Fact of the Case	☆ The instant matter **concerns Savings Bank Interest Rates ('SBIRs') and service charges on Automated Teller Machines ('ATMs') transactions, offered/ charged by banks**. ☆ Considering **the similarity of these rates across different banks**, the **Commission took up the matter on a suo moto basis**.
Legal Principles held –	**The CCI Consider the following facts before passing the final order:** **1. Assessment of Saving Bank Interest Rate:** **(a)** At the outset, it is observed that out of the Sample Banks, BOB, BOI, CB and Axis **did NOT discuss SBIRs in any of their meetings**. **(b)** Assets-Liability Committee (ALCOs) of the other Sample Banks viz. SBI, ICICI, HDFC, PNB, UBI and CBI had discussion regarding SBIRs **but for different reasons chose NOT to change the SBIRs**. **(c)** Soon after deregulation, CBI was the first bank to discuss the issue of SBIR in its meeting dated 28th October, 2011. **(d)** From the minutes of its ALCO meeting, **it is seen that CBI considered the impact of an increase of fifty basis points** (bps) i.e. half a percent in SBIR on the cost of funds and estimated a rise to result **in increased cost by more than 7%, which would have to be recovered from the borrowers of retail loans**. Therefore, **CBI deliberately decided not to enhance the SBIR**. **(e)** PNB considered SBIR in its meeting dated 29th October, 2011 and **decided not enhance the same as no other major bank did so**. PNB **also believed that SB Accounts were more influenced by customer service and were not sensitive to interest rate to a large extent**. **(f)** Similarly, SBI in its meeting held on 3rd December, 2011 **took note of certain smaller banks increasing SBIR but no impact on the growth of SB deposits in SBI was felt**. Therefore, it decided to maintain the same SBIR i.e. 4%. **(g)** In its meeting held on 31st October, 2011, ICICI noted that unlike smaller banks, **increase in SBIR by one hundred bps would have a significantly negative impact on the net interest income. Therefore, it decided not to increase the SBIR**. **(h)** The in-depth investigation by the DG **did NOT reveal any incriminating material suggesting cartel amongst the banks**. **(i)** Thus, the Commission **is of the view that SBIRs offered by the banks are an outcome of their independent assessment of market conditions and not of any collusive arrangement**. **2. Assessment of Service Charges:**

	(a) It is noted that rates of SCBs **for different types of services varied significantly**. **(b)** The studies of BCSBI, which covered public, private and foreign banks, suggest that there **was no similarity in charges levied by different banks for various services like account maintenance, account closure, issue and cancellation of DDs, POs, BCs, ATM transactions, SMS alerts etc**. **(c)** They also reveal that very few SCBs conducted costing exercise, in addition to considering **the charges levied by peer banks, for imposing/ revising service charges**. **(d)** As similarity of service charges across banks is not observed, **Commission is of the view that there has not been any collusion amongst the SCBs for determining service charges as well**. **(e)** As regards role of the Indian Bank Association (IBA), **investigation could not bring forth any material indicating use of its platform to decide or implement similar SBIRs by bank**s. **(f)** This is further reinforced by the fact that **private SCBs such as Yes Bank, Kotak, IndusInd Bank are offering higher SBIRs despite being members of IBA**. **(g)** Even on the recommendation of BCSBI to IBA **for issuance of guidelines on certain service charges**, **IBA took the stance that it will NOT prescribe any standard service charges and the same should be determined by individual banks having due regard to their costs and other relevant factors**. **(h)** Thus, it is difficult to draw an inference that IBA was used as a platform or was instrumental in determining similar SBIRs or coordinating service charges. In view of the foregoing, **Commission is of the view that there is no reason to disagree with the findings of the DG as the material on record does not suggest any cartelisation amongst banks and/or IBA, during 2011 to 2016, to determine SBIRs or service charges**. Accordingly**, no case of contravention of the provisions of Section 3(3) of the Act is made out.**
Decision	The CCI concludes that no cartelisation in banking services.

119. PARSOLI MOTOR WORKS PVT. LTD v. BMW INDIA PVT. LTD & ORS [CCI]

Hint: Informant put various allegation against the OP such as refusal of renewal of dealership agreement, **OP is allowing dealers based outside the State of Gujarat to sell OP cars to customers based in the State of Gujarat. The Informant has filed the instant information alleging abuse of dominance by the OPs.**

Decision: The CCI decide the case in favour of OP.

Fact of the Case	§ The Informant was a dealer for BMW vehicles for the territory of the State of Gujarat under a dealership agreement with OP-1 since 2007, **which was being renewed from time to time**. However, vide letter dated 07.12.2017, **BMW India intimated the Informant for NOT renewing the existing dealership agreement which was to expire on 31.12.2017**. § Feeling aggrieved by the decision of BMW in not renewing the agreement, **the Informant has filed the instant information alleging abuse of dominance by the OPs.**

	§ The Informant is also aggrieved of the fact that **BMW India has NOT given sufficient time to the Informant to exit from the business**. § The Informant has also alleged that contrary to its own policy, **BMW India is allowing dealers based outside the State of Gujarat to sell BMW cars to customers based in the State of Gujarat**. Such acts on the part of OP-**1 have caused financial losses to the Informant besides defrauding the State exchequer by not paying entry tax on such sales**.
Legal Principles held—	§ **With regard to dominance of OP in Relevant Market?** ☟ From the information available in public domain, it appears that BMW India has negligible share in the passenger car segment in India which is dominated by a number of players. ☟ As a result, in the dealership network also, BMW India would not have spread much as compared to that of Maruti, Hyundai, Tata etc., who command a significant market share. ☟ In such a market construct, **BMW India cannot be said to be a dominant player and as such the question of abuse of dominant position will not arise**. ☟ The Commission also notes that the Informant has not provided any document or data wherefrom the dominance of the OPs can even be prima facie established in any relevant market. Hence, the instant information does not disclose any infringement of the provisions of the Act. § **With regard to concerned of Informant that OP has not given sufficient time to the Informant to exit from the business:** ☟ On perusal of the information and the documents filed therewith, the Commission observes that the existing dealership agreement between the Informant and OP-1 was renewed for a period of one year commencing from 01.01.2017 and was to expire on 31.12.2017. ☟ As such, the Informant was fully cognizant of the fact that the existing agreement would expire on 31.12.2017. ☟ In these circumstances, the Commission did not find any fault on account of OP to delay in intimate the Informant about the not reviewing the dealership agreement. ☟ The Informant has not challenged any term of the now expired dealership agreement. § **The Informant has also made allegations in the information about evasion of entry tax by BMW in respect of the vehicles which were allowed to be sold to the customers of the State of Gujarat from its dealers based outside the State of Gujarat. The Commission is of opinion that such issue does NOT raise any competition concern.**
Decision	§ The CCI decide the case in favour of OP. § The Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the Opposite Parties.

120. JAIDEEP UGRANKAR v. CLIENT ASSOCIATES [CCI]

Hint: Informant raised the obligation against Opposite Party such as Post employment obligations, Employer deducted incremental salary paid at the time of resignation etc. amounts to contravention of Section 3 and 4 of the Competition Act, 2002.

Decision: The CCI decide the case in favour of OP.

Fact of the Case	§ The Informant was in the employment of the Opposite Party, **which provides wealth management services to its clients**.

	§ After a period of 10 years, the Informant resigned from the services of the OP. At the time of his resignation, incremental salary paid to him **was deducted from his final settlement dues and the appointment contract contained non-solicit and non-compete clauses**. § Aggrieved by the acts of the OP, the Informant had filed the present complaint alleging violation of sections 3 and 4 of the Competition Act, 2002 by the OP. § The Informant has prayed to the Commission that the Opposite Party be directed to **(a)** withdraw the postemployment obligations and **(b)** release the agreed revised salary for the months of April to September, 2017 along with agreed requisite bonus.
Legal Principles held—	§ **In the present case**, the Commission observes that the grievance of the Informant relates to **imposition of arbitrary post-employment obligations upon the Informant and the act of the Opposite Party in recovering the revised salary from his current salary post resignation.** § **With regard to the allegation of contravention of Provision of Section 3 of the Act:** ☝ The CCI observed that no allegation has been specifically mentioned in the information. ☝ Further, the facts of the matter do not suggest any conduct on the part of Opposite Party that could be a subject matter of scrutiny under Section 3 of the Act. § **With regard to the allegation of contravention of Provision of Section 4 of the Act:** ☝ The overall market of private wealth management services is very wide and presence of the Opposite Party would be relatively marginal. ☝ There are numerous firms like Opposite Party, which procure the kind of services offered by the Informant. ☝ Thus, **the Commission is of the view that the Opposite Party cannot be held to enjoy dominant position in the relevant market** as a procurer or consumer of such professional services.
Decision	§ **The CCI** decide the case in favour of Opposite Party. § Based on the above analysis, Commission is of the, prima facie, view that no case of contravention of the provisions of either Section 3 or Section 4 of the Act is made out against the Opposite Party in the instant matter.

121. M/S. B. HIMMATLAL AGRAWAL PARTNER v. COMPETENT COMMISSION OF INDIA & ANR [SC]

Hint: Appellant filed appeal against the order of CCI before NCLAT along with the application of stay of demand. NCLAT admit the appeal subject to condition of deposit 10% **of the amount of penalty imposed by the CCI.** NCLAT dismissed the appeal on account of non-compliance of pre-deposit of demand.

Decision: The SC decided the case in favour of Appellant. The SC held that the Appellate Tribunal had no jurisdiction to dismiss the appeal itself and restore the appeal.

Fact of the Case	§ A complaint was filed against the appellant firm before the Competition Commission of India ("CCI") alleging that the appellant firm was involved in anti-competitive and unfair trade practices in collusion with nine other firms. The appellant firm filed its reply. § After considering the said reply, the CCI imposed penalties on the appellant firm as well as nine parties. Insofar as appellant is concerned, penalty of Rs.3.61 Crores has been imposed.

	§ The appellant filed the statutory appeal **against the above order before NCLAT along with a stay application**. § NCLAT admitted the appeal. **NCLAT granted stay with a condition that 10% of the penalty should be deposited**. The appellant could not fulfil the said condition of deposit. § NCLAT **dismissed the appeal for non-fulfilment of deposit**.
Legal Principles held—	§ **The appellant** contends that appeal has been filed before the NCLAT under section 53 of the Act, along with application for stay of the operation of CCI during the pendency of the Appeal. § Appeal was admitted insofar as stay is concerned, which **was granted subject to the condition that the appellant deposits 10% of the amount of penalty imposed by the CCI**. § In this context, it needs to be understood that **the condition of deposit was attached to the order of stay**. In case of non- compliance of the said condition, the **consequence would be that stay has ceased to operate as the condition for stay is not fulfilled**. However, non-compliance of the conditional order of stay would have **no bearing insofar as the main appeal is concerned**. § This is the **statutory provision that give right to the aggrieved party to file an appeal against the order before Appellate Tribunal**. This **statutory provision does NOT impose any condition of pre-deposit for entertaining** the appeal. § Therefore, **right to file the appeal and have the said appeal decided on merits**, if it is filed within the period of limitation, **is conferred by the statute and that cannot be taken away by imposing the condition of deposit of an amount leading** to dismissal of the main appeal itself if the said condition is not satisfied. § **Section 53(3)** specifically cast a duty upon the **Appellate Tribunal to pass order on appeal, as it thinks fit i.e. either confirming, modifying or setting aside the direction, decision or order appealed against**. It is to be done after giving an opportunity of hearing to the parties to the appeal. § Thus, it clearly implies that appeal has to be decided on merits. **The Appellate Tribunal, which is the creature of a statute, has to act within the domain** prescribed by the law/statutory provision. § Hence,
Decision	§ **The SC** decided the case in favour of Appellant. § **The SC** held that the Appellate Tribunal had no jurisdiction to dismiss the appeal itself and restore the appeal, which shall be decided by the Appellate Tribunal on merits. § Further, we make it clear that as far as stay of the penalty order is concerned non-compliance of the condition of deposit of 10% of the penalty. It would result in no stay of the CCI order in favour of the appellant.

122. STARLIGHT BRUCHEM LTD v. FLORA AND FAUNA HOUSING & LAND DEVELOPMENTS PVT LTD& ORS [CCI]

Hint: The Informant has alleged that OP-1 to OP-4 have been following a non-transparent policy of procurement, based on an arrangement, agreement or understanding to buy from only certain manufacturers who belong to the same group, or from some 'favoured' manufacturers. (It would amount to denial of market access to the other manufacturers from selling their produce). Further, it is alleged that OP-5, which owns or controls OP-1 to OP-4, has used its dominant position in wholesale of liquor to enter into and enhance its market share.

Decision: CCI decide the case in favour of the Informant.

Fact of the Case	§ The present information has been filed by Starlight Bruchem Ltd. (Informant) under Section 19(1)(a) of the Competition Act, 2002 (Act) against Flora and Fauna Housing & Land Developments Private Limited (OP-1), Patiala Kings Liquor Pvt. Ltd. (OP-2), Royal Beverages Pvt. Ltd. Ltd. (OP-3), Kiwi Wines And Beverages Pvt. Ltd. (OP-4), Chadha Holdings Pvt Ltd. (OP-5) and Government of Uttar Pradesh (OP-6), alleging inter alia contravention of the provisions of Section 3 and 4 of the Act. (Hereinafter, OP-1 to OP-5 are referred to as 'OPs'). § **OP-1 to OP-4 are the exclusive licensees for wholesale of country liquor in the State of Uttar Pradesh**. These are **alleged to be enterprises owned or controlled by a common parent holding company i.e. OP-5**. § As per the information, OP-5 is the holding company for Chadha Group. It has also set up/bought distilleries viz. Wave Distilleries and Breweries Limited and Lords Distilleries Limited. § OP-6 is the Government of the State of Uttar Pradesh **which is responsible for framing policy for the manufacture, sale and distribution of liquor** in the State of Uttar Pradesh under the powers granted by the United Provinces Excise Act, 1910 (UPE Act). It is also **empowered to grant licenses** under the UPE Act. § The Informant has alleged that OP-1 to OP-4 have been following a non-transparent policy of procurement, based on an arrangement, agreement or understanding to buy ☝ From only certain manufacturers who belong to the same group, or ☝ from some 'favoured' manufacturers. § Since the manufacturers/distillers **CANNOT** sell liquor directly to the retailer or end- consumer, **such conduct of denial of market access to the other manufacturers from selling their produce has resulted** in the other manufacturers **facing severe losses** and in many cases **shutting down their units**. § Further, it is alleged that OP-5, which owns or controls OP-1 to OP-4, **has used its dominant position in wholesale of liquor to enter into and enhance its market share for manufacturing country liquor by setting up/ acquiring** Wave Distilleries and Breweries Ltd. and Lords Distilleries Ltd., **from which OP-1 to OP-4 buy bulk of their requirements.**
Legal Principles held—	On the basis of material on record, the CCI observed that: § **With regard to allegations made about contravention of Section 3 of the Act:** ☝ The Commission notes that the same are based **merely on conjectures (i.e. presumption)**. ☝ There is **NO** credible evidence on record, **which shows existence of any agreement amongst OP-1 to OP-4 in support of the contentions made by the Informant**. ☝ Accordingly, such allegations are found to be devoid of merit. § **With regard to the allegation of discrimination and denial of market access in procurement of country liquor:** ☝ It is observed that each of OP-1 to OP-4 have **been procuring country liquor from more than one distillery**; ☝ However, significant percentage i.e. around 25 to 55%, of the procurement by OP-1, OP-3 and OP-4 in this period was from two distilleries, namely, Wave Distilleries and Breweries Limited and Lords Distilleries Limited, which are group companies of OP-5.

	☝ It is further observed that in the years 2015-16 and 2016-17, OP-2 procured more than 50% from these distilleries and OP-1, OP-2 and OP-4 procured between 30 to 55% from them. ☝ Such trend of procurement by OP-1 to OP-4 **shows that they are giving preference to these two distilleries over other distillers/ manufacturers**. ☝ The OPs have **NOT been able to provide any plausible justification for according such preferential treatment.** § **With respect to the contention of the OPs that a distillery is required to place request for indent on an OP which is the wholesale license holder of that zone"** ☝ It is observed that the data provided by the OPs regarding their procurement of country liquor from various distilleries itself contradicts their argument. ☝ Thus, in light of foregoing facts, the Commission is of the view that the reasons given by the **OPs appear to be merely an attempt to subvert (i.e. manipulate) the fact that procurement from various distillers**/manufacturers **was being made by them in an arbitrary and discriminatory manner**. ☝ It would **resulting in denial of market access to certain distillers/manufacturers like the Informant**.
Decision	§ **The CCI decide the case in favour of the Informant.** § The Commission is of the opinion that the conduct of the OPs is prima facie in contravention of the provisions of Section 4, particularly Section 4(2) (a) (i) and 4(2) (c) of the Act. § Accordingly, the DG is directed to cause an investigation into the matter and submit this report within a period of 60 days from the receipt of this order.

123. XYZ v. INDIAN OIL CORPORATION LTD. & ORS [CCI]

Hint: The case pertains to alleged **joint tendering/collusive tendering by the OPs** i.e. the Oil Marketing Companies (IOCL, BPCL and HPCL) **while procuring the services of the Tank Trucks for transportation of the LPG Cylinders**. The Informants have alleged **these to be in the nature of price fixing, limitation/restriction of output/services and market allocation thereby in contravention of Section 3 of the Act**. Further, the Informants have also alleged **abuse of dominant position collectively by the OPs. Whether an act of anti-competitive restriction and abuse of dominance?**

Decision:

- ☆ The CCI decide the case in favour of the Opposite Party.
- ☆ The CCI held that the aforesaid discussion **does NOT suggest that OPs is involved in any competitive agreement**.
- ☆ The CCI also held that **the existence of two strong players in the market is indicative of competition between them**, **unless they have agreed NOT to compete, which also can be only be looked into under Section 3 of the Act, NOT Section 4.**

Fact of the Case	☆ The case pertains to alleged **joint tendering/collusive tendering by the OPs** i.e. the Oil Marketing Companies (IOCL, BPCL and HPCL) **while procuring the services of the Tank Trucks for transportation of the LPG Cylinders**. ☆ The Informants have alleged **these to be in the nature of price fixing, limitation/restriction of output/services and market allocation thereby in contravention of Section 3 of the Act**. ☆ Further, the Informants have also alleged **abuse of dominant position collectively by the OPs.**

Legal Principles held –	The CCI consider the following facts before passing the order: **1.** In the beginning, it may be highlighted **that collective dominance is NOT recognised by the Act**. However, **the existence of two strong players in the market is indicative of competition between them**, **unless they have agreed NOT to compete**, **which also can be only be looked into under Section 3 of the Act, NOT Section 4**. **2.** Thus, the Commission notes that **the allegation of the Informants related to collective dominance does NOT hold good** under the provisions of Section 4 of the Act and **requires no further deliberation**. **3.** With regard to Section 3 of the Act, the Commission notes that the Informants have alleged an existence of a buyer/purchase cartel. However, **generally cartels are comprised of the sellers who agree to fix prices and/or output and since such agreement is to raise the price above the competitive levels or bring the output below the competitive levels, the same is considered to be anti-competitive**. It needs to be **recognised that the creation of 'buyer power' through joint purchasing agreements may rather lead to direct benefits for consumers** in the form of lower prices bargained by the buyers. Thus, **though the Act covers buyers' cartel within the purview of Section 3(1) read with Section 3(3) of the Act, treating buyers' arrangement/cartel at par with sellers' cartel may not be appropriate**. **4.** For assessment of such cases, **it is imperative to first look at the potential theories of harm and then the conditions necessary for infliction of competitive harm need to be examined**. Accordingly, the Commission has analysed the allegations of the Informants in order to **ascertain whether a case of anti-competitive cartel conduct is made out**. **As pointed out by the OPs that they have not fixed the prices but only prescribed a price band within which the bidders can compete. Such price band is calculated upon incorporation of cost of various necessary components and includes a profit margin**. The bidders get a window of around 10% to give their quotations. **5.** The **OPs clarified that they suggest a price floor to ensure that the bidders do NOT unnecessarily quote an unviable quotation which may lead to delay or irregular services in future**. **6.** The OPs **have also submitted that it is the prerogative of bidder to quote within the said price band which gives them enough margin to compete with other bidders.** **7.** With regard to the fleet/loyalty card, **the Commission notes that the issuance of such cards comes with commercial justification as well as advantages, not only for the OPs but also for the TT owners/drivers**. Further**, such fleet/ loyalty cards come with various benefits e.g. secured parking, cooking facilities, rest room and accommodation facilities, laundry and drying facilities, health check-ups including eye check-ups, loyalty rewards, accident insurance etc**. Also, **such cards deal with the problem of the substantial lapse of time between the fuel cost incurred by transporter and the final receipt of reimbursement**. **8.** Thus, the facts or material on record does not suggest any anti- competitive element involved in the issuance of such fleet/loyalty cards by the OPs.

	9. Further, the Commission **finds no merit in the allegation regarding a preference given to tank trucks registered in a particular State for participating in tenders in that State**. **10.** Under the impugned tenders, **there is NO bar on quoting bids for TTs that are registered in a State other than the State for which tender is floated**, i.e. the location of the bottling plant. **11.** It only states that TTs registered in the State where the tender is floated will be given preference provided bids are in the lower rate of price band for that State. Such **condition does not appear to be arbitrary as long as registration in one State does not restrict from participation in the tender process in other States**. **12.** The OPs have clarified that **no such restriction has been placed on the bidders and the only objective of the preferential treatment accorded to State registered TTs is to discourage registrations clustered in a particular State like Nagaland**.
Decision	✫ The CCI decide the case in favour of the Opposite Party. ✫ The CCI held that the aforesaid discussion **does NOT suggest that OPs is involved in any competitive agreement**.

124. In Re: CARTELISATION BY BROADCASTING SERVICE PROVIDERS v. ESSEL SHYAM COMMUNICATION LTD & ORS [CCI]

Hint: The present case emanated from a Lesser Penalty Application filed by Globecast India Private Limited (OP-2) and Globecast Asia Private Limited (OP-3) [OP-2 and OP-3 collectively referred to as Globecast], **providing information in relation to its Cartel & bid- rigging arrangement with Essel Shyam Communication Limited (OP-1/ ESCL) in the market for provision of broadcasting services**. The question arise before the CCI, whether CCI grant lesser penalty in pursuance of section 46 of the Competition Act, 2002 (Act) read with the Competition Commission of India (Lesser Penalty) Regulations, 2009? **YES**

Decision: Based on the aforesaid evaluation of the evidences and information furnished by Globecast and ESCL, the **Commission decides to grant 100% reduction in leviable penalty** to Globecast and **30% reduction in leviable penalty** to ESCL.

Fact of the Case	✫ The present case emanated from a Lesser Penalty Application filed by Globecast India Private Limited (OP-2) and Globecast Asia Private Limited (OP-3) [OP-2 and OP-3 collectively referred to as Globecast], **providing information in relation to its bid- rigging arrangement with Essel Shyam Communication Limited (OP-1/ ESCL) in the market for provision of broadcasting services**. ✫ As per the information received, **there was exchange of commercial and confidential price sensitive information between ESCL and Globecast through Mr. Bharat K. Prem (OP-4/ Bharat), an employee of OP-2, which resulted in bid rigging of tenders for procurement broadcasting services** of various sporting events, especially during the year 2011-12. ✫ It was alleged that OP-4 had clandestinely (i.e. in a secretive and illicit way) entered into a Consultancy Agreement with ESCL, **under which Bharat, though an employee of OP-2, used to work for ESCL for a fixed remuneration and a share in profits from the contracts obtained through bid rigging**. ✫ Jason Yeow (OP-5/ Jason), an employee of OP-3, **was also alleged to be involved with ESCL and Bharat in this case**.
Legal Principles held –	**The CCI consider the following facts before passing the final order:** **1.** Globecast and ESCL were **ostensibly competing** with each other for provision of broadcasting services for these events. However, **there was exchange of**

commercially sensitive information related to bidding between the two, which enabled them to co-ordinate their bids.

2. As a result, **they did NOT effectively compete in the bidding process and gave a pretence of competition to the broadcasters**. Such conduct **adversely affected and manipulated the competitive process for bidding by eliminating/reducing the competition for bids**. It is observed that **for all events the exchange of commercially sensitive information related to bidding took place through Bharat of Globecast and Mr. Lalit Jain, Mr. Atul Gupta and Mr. M. N. Vyas of ESCL**.
3. In case of all events, except IPL 2012 (Sony's Feed - India Rights) **where Globecast had entered into a teaming arrangement with ESCL on a profit sharing basis**, Globecast has averred (i.e. substantiate) that **Bharat was not authorised to share the bidding information with any person and that he did so in his personal capacity in breach of his employment contract**. Further, during the period **when bid rigging took place Bharat had entered into a consultancy agreement with ESCL**.
4. On this aspect, the Commission finds that **although Bharat played a key role in the exchange of information of Globecast, the fact remains that he was an employee of Globecast and was authorised to act on its behalf in participating in the bidding process. Globecast has also admitted this fact**.
5. If there was any breach of contractual obligation by Bharat, **Globecast always had the option to initiate separate proceedings against him**. In fact, **it is noted from the records that Globecast had initiated such proceedings in India against Bharat and against Jason in Singapore**. During the hearing, Globecast submitted that such proceedings were no longer being pursued.
6. The Commission finds that as **Bharat was an employee of Globecast at the time of contravention of the provisions of the Act and was responsible for submission of bids on its behalf, Globecast is liable for the conduct that took place through Bharat and which resulted in bid rigging**.
7. Globecast contends that out of fourteen events **that were investigated by the DG, it won only two events, while ESCL won ten events**. Even if sub-contracts are included, **Globecast provided services for four events**, while **ESCL provided services for eleven events showing that ESCL primarily benefited from the conduct under investigation**.
8. On the other hand, **ESCL has submitted that Globecast preferred to take only those contracts where there was no risk of payment and where Globecast could sell its own satellite bandwidth on its own terms**. The profits/amounts **involved in contracts bagged by Globecast were much more than profitability/amount involved in the contracts won by ESCL. It has been submitted by ESCL that Globecast through a well devised strategy** ensured that ESCL acted as per its (Globecast's) design.
9. The Commission finds that the above arguments of ESCL and Globecast are irrelevant, particularly, in light of the fact that in case of IPL 2012 (Sony's Feed - India Rights), **there is a categorical admission from both parties that they entered into a teaming arrangement for 50-50 profit sharing which was NOT made known to the broadcasters**. A collusion for even one event is **sufficient for the purposes of establishing contravention of the provisions of the Act by ESCL and Globecast and when collusion is established, it is immaterial which OP derived higher benefit from the collusion**.

	10. In any case, in the instant matter, **both OPs have derived benefit from the cartel and won contracts for one or more events**. **11.** In view of the foregoing analysis, **the Commission is of the opinion that ESCL and Globecast operated a cartel in the above sporting events held during the period 2011-2012. They exchanged information and quoted bid prices as per their arrangements from July 2011 to May 2012. As a result, they have committed an infringement of the provisions of Section 3(3) (d) read with Section 3(1) of the Act during this period**. **<u>Request for Lesser Penalty by Opposition Party</u>:** **1.** The Commission has considered the above mitigating factors **elaborated upon by ESCL and Globecast**. It is noted that **at the outset, both ESCL and Globecast have contended that as they approached the Commission under the lesser penalty provisions and made a complete and true disclosure extending full cooperation with the Commission/ DG's investigation, their conduct should be considered as a mitigating factor**. It is observed that **all such submissions relate to grant of lesser penalty under the Lesser Penalty Regulations**. Accordingly, th**e same have been taken into consideration while evaluating the lesser penalty applications of ESCL and Globecast in succeeding Para 127 to 132 of this order**. **2.** Apart from stating such factors, **ESCL has contended that setting up of compliance programme after the conduct should be considered as a mitigating factor**. In this regard, it **is pertinent to mention that the existence of a compliance programme and violation occurring inspite of a vibrant compliance programme is normally considered as a mitigating factor**. In the instant case, **what is argued is initiation of a compliance programme, which is NOT eligible as a mitigating factor**. **3.** Moreover, although subsequent conduct can be considered a mitigating factor, it cannot absolve the infringing entity from liability. Also, **carrying out a forensic audit after receipt of DG notice cannot be considered as mitigating factor**. **4.** With respect to Globecast, it is noted that apart from making assertion of cooperation and full disclosure under Lesser Penalty Regulations, **the other factors contended as mitigating factors are the factum of its liability arising from the conduct of its employee and not directly and benefit of cartel being derived by ESCL and not Globecast**. **5.** Further, it is pointed out that mere fact that a party is being investigated for the first time by the Commission and **has NOT previously contravened the Act cannot be considered as a mitigating factor, as has been claimed by Globecast**. **6.** Thus, considering the totality of facts and circumstances of the present case, **the Commission decides to impose penalty** on ESCL and Globecast by taking into consideration **their total profit as per the financial statements filed by them at 1.5 times of the profit for the period of contravention**. **7.** As mentioned earlier, the Commission received Lesser Penalty Applications from ESCL as well as Globecast in the present matter. Keeping in view the sequence in which they approached the Commission, **First Priority Status to Globecast and Second Priority Status to ESCL is granted**.
Decision	✫ Based on the aforesaid evaluation of the evidences and information furnished by Globecast and ESCL, the **Commission decides to grant 100% reduction in leviable penalty** to Globecast and **30% reduction in leviable penalty** to ESCL.

125. RAJENDRA AGARWAL v. SHOPPERS STOP LIMITED [CCI]

Hint: Informant was not allowed to redeem the discount coupons at the time of payment due to requirement of minimum purchase is not fulfilled. **The Informant has alleged that the conduct of the OP is in contravention of the provisions of Section 3 of the Act and that the OP has resorted to unfair trade practices**.

Decision: The CCI decide the case in favour of Opposite Party. The Commission is o**f the prima facie opinion that the present dispute is a consumer dispute** and **does not raise any competition concern.**

Fact of the Case	§ The Informant had purchased a gift item from OP and pursuant to the said transaction, **the Informant was offered two discount coupons of Rs. 500/- each by the OP, which could be redeemed/used in a subsequent purchase**. § However, while offering the said discount coupons, the OP did not convey to the Informant **that in order to redeem such coupons, the amount of the subsequent purchase should be at least of Rs. 4000 (Rs. Four Thousand)**. § The Informant subsequently visited the OP along with his wife where they made purchases worth Rs. 1,404/-. At the time of making the payment, **the Informant was not allowed to redeem the said discount coupons and was compelled by the OP to pay the entire amount of Rs. 1404/-**. § Based on the above, **the Informant has alleged that the conduct of the OP is in contravention of the provisions of Section 3 of the Act and that the OP has resorted to unfair trade practices**.
Legal Principles held—	§ From the facts and circumstances of the present case, the Commission observes that the said dispute between the Informant and the OP regarding non redemption of two discount coupons is an individual consumer dispute rather than a matter of competition concern and the same also does not cause any adverse effect on competition. § In this regard, it is apposite to mention that the Commission has earlier dealt with issues related to individual consumer disputes in plethora of cases and has ordered closure of the same. The Commission in Case no. 17 of 2012, ☞ **Sanjeev Pandey vs. Mahindra & Mahindra**: In this case, the CCI held that **delay in delivery of vehicle in a specific state cannot be termed as a violation of the provisions of the Act**. ☞ **Subhash Yadav vs. Force Limited & Ors:** The CCI has categorically stated that **the main object of the Act is to prevent practices having adverse effect on competition and to promote competition**.
Decision	§ The CCI decide the case in favour of Opposite Party. § The Commission is o**f the prima facie opinion that the present dispute between the Informant and the OP is a consumer dispute** and **does not raise any competition concern**. § Hence, no prima facie case is made out against the OP under Section 3 of the Act. Thus, the instant case is ordered to be closed under Section 26(2) of the Act.

126. IN RE: ANTICOMPETITIVE CONDUCT IN THE DRY-CELL BATTERIES MARKET IN INDIA AGAINST PANASONIC CORPORATION, JAPAN & ORS [CCI]

Hint: The present case was initiated by the Commission **suo motu pursuant to receiving a leniency application ("LP Application")** from Panasonic Corporation, Japan ["OP-1"] filed by it. In the LP Application, it was disclosed by the Applicants **that there existed a bi-lateral ancillary cartel** between OP-2 and Geep Industries (India) Private Limited (hereinafter "OP-3") **in the institutional sales of dry cell batteries**.

Decision:

- ☆ The **Commission finds that OP-2 and its representatives had provided genuine, full, continuous and expeditious cooperation during the course of investigation**.
- ☆ On the basis of the foregoing, **the Commission decides to grant 100% reduction in the penalty amount leviable under the Act, to OP-2 and its Directors, officers and employees identified above to be liable under the provisions of Section 48 of the Act**.

Fact of the Case	☆ The present case was initiated by the Commission **suo motu pursuant to receiving a leniency application ("LP Application")** from Panasonic Corporation, Japan ["OP-1"] filed by it. In the LP Application, it was disclosed by the Applicants **that there existed a bi-lateral ancillary cartel** between OP-2 and Geep Industries (India) Private Limited (hereinafter "OP-3") **in the institutional sales of dry cell batteries**. ☆ This **cartel existed from at least 2013** till late 2015 to early 2016. ☆ OP-2 was the supplier of batteries to OP-3, as part of its institutional sales. OP-2 had a primary cartel with Eveready Industries India Ltd. (hereinafter "Eveready") and Indo National Limited (hereinafter "Nippo") **whereby the three of them co-ordinated the market prices of zinc-carbon dry-cell batteries**. ☆ Hence, OP-2 had the fore-knowledge about the time of price increase to be affected by this primary cartel. **This fore- knowledge was used by OP-2 as leverage to negotiate and increase the basic price of the batteries being sold by it to OP-3**. ☆ OP-2 would lead OP-3 to believe that the Market Operating Price (hereinafter "MOP") and Maximum Retail Price (hereinafter "MRP") **of all the major manufacturers would increase in the near future**, and **OP-3 would be in a position to pass on the increase in the basic price to the consumers by such increased MOP/ MRP**. ☆ Also, it was disclosed that OP-2 and OP-3 **used to agree on the market price of the batteries being sold by them**, **so as to maintain price parity** in the market. ☆ They used to monitor the MOP of each other and of other manufacturers, and **inform each other in cases of any discrepancy noticed**. **Such price parity was in consonance with the prices determined by the primary cartel**. ☆ E-mail communications between OP-2 and OP-3 **with regard to such monitoring were provided by the Applicants with their submissions**. ☆ Also, **such an understanding between the two of them was recorded in Clause 4.3 of the agreement entered into between OP-2 and OP-3 on 01.10.2010**, a copy of which was given. ☆ Further, it was disclosed that as per Clause 2 of the afore-said agreement, **OP-2 used to pack the batteries as per instructions of OP-3** and make supplies. Such **packaging had to be changed whenever the MRP increased**. The **dates on which the packaging was changed by OP-2 for OP-3 when compared with a corresponding list for OP-2's own products shows that price increase in OP-3's products were even within one month of price increase in OP-2's products**. Such simultaneous price increase **is also evident of a premeditated arrangement**. ☆ Based on the fore-going, **the Applicants submitted that contravention of Section 3 (3) read with Section 3 (1) of the Act has been committed by OP-2 and OP-3**.
Legal Principles held –	☆ In view of the foregoing, **the Commission holds that OP-2 and OP-3 have contravened of the provisions of Section 3 (3) (a) read with Section 3 (1) of the Act by indulging in cartelisation**.

- ☆ For such contravention, Mr. S. K. Khurana and Mr. Parimal Vazir of OP-2 and Mr. Jainuddin Thanawala, Mr. Joeb Thanawala and Mr. Pushpa M. of OP-3 **are also liable under Section 48 of the Act**.
- ☆ Therefore, in terms of Section 27 (b) of the Act, **the Commission is empowered to impose appropriate penalties upon such companies as well as their persons**.
- ☆ In the case of OP-2, **penalty of up to three times of its profit for each year of the continuance of the cartel may be imposed as the said figure is HIGHER** while in case of OP-3, **penalty of up to 10% of its turnover for each year of the continuance of the cartel may be imposed as the said figure is HIGHER**.
- ☆ Thus, the Commission decides to impose upon OP-2, **penalty @ 1.5 times the profit for each year of the continuance of the cartel** which amounts to Rs.73,93,25,600/-. On the other hand, with regard to OP-3, **there is no gain saying that OP-3 was not entitled to breach the law even on the plea of compulsion as taken before the DG**.
- ☆ However, keeping in mind that OP-2, being the manufacturer of dry-cell batteries and supplier of OP-3, **was in the position to influence and dictate the terms of the anti-competitive PSA to OP-3 and OP-3, being a very small player having insignificant market share in the market for dry-cell batteries was NOT in a bargaining/ negotiating position vis-a-vis OP-2, the Commission decides to impose upon OP-3, penalty @ 4% of the turnover for each year of the continuance of the cartel which amounts to Rs. 9,64,06,682/-**.
- ☆ As far as the persons held liable under Section 48 of the Act are concerned, the Commission may impose upon them, **a penalty of up to 10% of the average of their income for the three preceding financial years**.
- ☆ Keeping all the factors in mind, the Commission, in the present case, **deems it appropriate to impose penalty @ 10 % of the average of their income for the three preceding financial years, upon such persons, which is calculated as under**:

<u>**CCI grant 100% reduction in penalty levied on OP-2 and its representative:**</u>

- ☆ At this stage, **the Commission takes into account the fact that OP-1, on behalf of itself, OP-2 and their Directors, officers and employees had filed an LP Application in the matter**.
- ☆ The Commission observes that in the LP Application, **vital disclosures had been made by submitting evidence of the alleged cartel which enabled the Commission to form a prima facie opinion regarding existence of the cartel.** At the time the LP Application was filed, **the Commission had no evidence to form such an opinion**.
- ☆ Further, through the application**, the Commission could get vital evidences which disclosed the modus operandi of the cartel such as the PSA and the e-mail communications exchanged between OP-2 and OP-3**.
- ☆ These evidences were found crucial in establishing contravention of the provisions of Section 3 of the Act in the matter.
- ☆ The **Commission finds that OP-2 and its representatives had provided genuine, full, continuous and expeditious cooperation during the course of investigation**. Thus, **full and true disclosure of information and evidence and continuous co-operation so provided, not only enabled the Commission to order investigation into the matter, but also helped in establishing the contravention of Section 3 of the Act**.

	✩ On the basis of the foregoing, **the Commission decides to grant 100% reduction in the penalty amount leviable under the Act, to OP-2 and its Directors, officers and employees identified above to be liable under the provisions of Section 48 of the Act**.
Decision	Leniency Petition was allowed.

127. M/S COUNFREEDISE v. TIMEX GROUP INDIA LTD [CCI]

Hint: Informant file allegation against the OP such as failed to provide after-sale services to the customers who purchased the wrist watches of the OP from the Informant through online platform, file a frivolous suit against Informant saying that Informant is engaged in manufacturing of counterfeit wristwatches of the OP, the agreements entered into between the OP and its dealers/distributors are having AAEC etc.
Decision: The CCI decide the case in favour of OP.

Fact of the Case	§ M/s Counfreedise (hereinafter, the 'Informant') has filed the present information under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the 'Act') against Timex Group India Limited (hereinafter, the 'OP'), alleging contravention of the provisions of Sections 3 and 4 of the Act. § The Informant is engaged **in the business of purchasing lifestyle products** such as belts, wallets, sunglasses, fashionable jewelleries, wrist watches, etc. either directly from the concerned company or through their authorised distributors and thereafter, **selling the same products online**. § Apart from selling on ecommerce platforms such as Flipkart, Paytm Mall, the **Informant is a registered reseller on Amazon and sells under the trade name 'BUYMORE'. OP is one such company whose products the Informant sells online**. § The OP is the Indian subsidiary of the Timex Group Inc. USA. It is engaged in the designing, manufacturing and marketing of innovative timepieces such as wrist watches, table clocks, wall clocks and jewelleries globally. **It is stated that the OP has been operating in India for more than 20 years and is one of the largest manufacturers in the organised watch sector in India**. § The following allegation placed before CCI by the Informant against the OP: ☞ OP is **indulging in Resale Price Maintenance with its distributors** in contravention of Section 3 (4)(e) of the Competition Act, 2002. ☞ OP **discriminated the Informant against other e-commerce players by limiting the market for distribution of the OP and in violation of Sections 3(3)(a), 3(3)(b) and 3(3)(c)** of the Competition Act, 2002. ☞ **OP instructed its retailers/service centres against providing after-sale services to the wrist watches being sold by the Informant**, which resulted in the deprivation of consumer service in contravention of Section 3(4)(d) of the Act. ☞ OP has also been alleged to **file a frivolous suit against Informant saying that Informant is engaged in manufacturing of counterfeit wristwatches** of the OP. § In view of the foregoing, the Informant has alleged that the OP has abused its dominant position and the agreements entered into between the OP and its dealers/distributors are having appreciable adverse effect on competition in contravention of Sections 4 and 3 of the Act, respectively.
Legal Principles held –	On the basis of all material available on records, the Commission observed as under: § **With regard to Dominance of OP in relevant Market?**

- Presence of such a major player like Titan in the relevant market along with other reputed foreign brands, there seems to be enough competitive constraints upon the OP in the relevant market.
- Thus, the **OP does not appear to be a dominant player in the relevant market**. In the absence of dominance, **no case of contravention of Section 4 of the Act is made out.**

§ **The Informant has alleged that the OP has instituted false litigation against the Informant?**

- The Commission takes cognizance of the contentions of the OP that it is facing the menace of counterfeit products, especially on account of online retailers. After conducting its internal verification, the OP initiated legal action against such sellers, including the Informant, to restrain them from manufacturing and/or selling counterfeit products.
- The Commission o**bserves that the holder of an Intellectual Property has the right to protect it**, and therefore, **reasonable actions and restrictions imposed in this regard cannot be found at fault under the competition law.**
- Thus, **the Commission does NOT find substance in the allegation of the Informant that the OP has initiated sham litigation against the Informant on account of not abiding by RPM and/or discount policy of the OP**.

§ **With regard to Resale Price Maintenance?**

- The Commission observes that **mere mention of the term 'control discount' in a single isolated email to a single seller**, without any adverse consequence to the other online sellers including the Informant, **is NOT sufficient to infer any anti-competitive conduct on the part of the OP**.
- The Commission notes that for RPM to be effective in the form of discount control, it has to be imposed on all the online retailers and not just the Informant.
- The Informant has itself stated that the OP has not taken any action against entities **like Cloudtail and XL Retail for offering even more discounts on OP's product on the online platforms**. This also negates the contention of the Informant that the OP was indulging in RPM.
- Further, any agreement in the nature of RPM, in order to be termed as anti-competitive, has to meet the test of causing an appreciable adverse effect on competition (hereinafter, the 'AAEC'). The Commission **notes that even if a manufacturer controls the prices of its products in the market, such conduct would not result into an AAEC unless such a manufacturer holds significant market power**.
- The Commission observes that in the instant case, **the OP is just one of the many players in the wrist watch market in the organised sector and players like Titan etc. are way ahead of the OP**. Moreover, **the Informant is only one of the intermediaries of the OP in the online space, and online sales account for less than one-seventh of the total sales of the OP**.
- The Commission notes that the Informant has **failed to place on record any evidence to establish that the OP enforced RPM across the distribution channel so as to be able to cause an AAEC in the relevant market**.

	☞ Therefore, **the Commission does not find any merit in the allegations of the Informant that the OP has contravened the provisions of Section 3(4) (e) of the Act**. § **With regard to the contention of the Informant that it is a key player and refusal to deal by the OP with the Informant will cause AAEC in the relevant market?** ☞ The Commission observes that the sales by the OP to the Informant is not significant compared to the total sales of the OP. ☞ In addition, the revenue derived by the Informant from the sale of watches of the OP is also not significant to infer that the Informant is dependent on the OP. ☞ Thereafter, the allegations under Section 3(4) of the Act are examined on the basis of rule of reason approach, and ☞ The **Commission do not find that there is AAEC as a result of the OP's denial to deal with the Informant**, more so when the **OP is apprehensive of dilution of its brand as a result of counterfeits being sold in the online market**.
Decision	§ **The CCI decide the case in favour of OP.** § The Commission finds that no prima facie case of contravention of the provisions of either Section 3 or Section 4 of the Act is made out against the OP in the instant matter. Accordingly, the matter is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

128. RAJASTHAN CYLINDERS & CONTAINERS LTD v. UOI & ORS [SC]

Hint: In the present case, CCI insofar as **it found the appellants guilty of contravention of Section 3(3)(d) and also under Section 3(3)(a) [i.e. Cartelisation and bid rigging] of the Competition Act, 2002 after taken into consideration factors** like **Supply of gas cylinders to oil companies, Oligopoly market, Identical price or similar price quoted by cylinder suppliers**. Accordingly, **CCI imposed heavy penalty**. However in further appeal, COMPAT reduced the penalty. Whether it constitutes collusive bidding?

Decision:

- ✰ The SC decide the case in favour of the Appellant.
- ✰ The SC held that there is NO sufficient evidence to hold that there was any agreement between the appellants for bid rigging.
- ✰ The SC held that no penalty is payable.

Fact of the Case	✰ In the present case, the COMPAT upheld the findings of the CCI **that the appellants/suppliers of Liquefied Petroleum Gas (LPG) Cylinders to the Indian Oil Corporation Ltd. ('IOCL') had indulged in cartilisation**. ✰ As a result, the CCI imposed severe penalties in the form of fines. ✰ While maintaining the order of the CCI insofar as it found the appellants guilty of contravention of Section 3(3)(d) and also under Section 3(3)(a) of the Act, **the COMPAT has reduced the amount of penalty**. ✰ These suppliers have filed the appeals before the SC against the order of COMPAT **on the ground that there was NO cartilisation and they have NOT contravened the provisions of the Act**. ✰ On the other hand, **CCI has also come up in appeal challenging latter part of the order whereby penalties inflicted** on the suppliers stand **REDUCED**. ✰ For the sake of convenience, these suppliers will be referred to as the appellants hereinafter.

Applicable Law	**Section 3(3)(d) of the Companies Act, 2002** states that Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. **Explanation.—**For the purposes of this sub-section, **"bid rigging"** means any agreement, between enterprises or persons referred to in sub-section (3**) engaged in identical or similar production or trading of goods or provision of services**, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.
Legal Principles held—	The SC consider the following facts before passing the final order: **1.** All these appellants **are manufacturing gas cylinders of a particular specification having capacity of 14.2 kg** which are needed **for use by the three oil companies in India**, namely, IOCL, Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL) [**all public sector companies**]. **2.** In these appeals, the Court is concerned **with the alleged agreement entered into between the appellants falling in Section 3(3)(d)**, **which talks of bid rigging or collusive bidding**. **3.** Apart from the aforesaid three companies, **there are no other buyers for these appellants for the manufacturing gas cylinder**. **4.** Insofar as IOCL is concerned, it is a leading market player in LPG as its market share is 48%. Thus, **in case a particular manufacturer is NOT able to supply its cylinders to the aforesaid three companies**, there is **NO other market for these cylinders and it may force that company to exit from its operations**. **5.** Possibility of an agreement has been inferred by the CCI **on the grounds that identical bidding takes place thereafter and various suppliers gave such a bid despite varying cost and also that they have appointed common changes etc. as pointed out above**. **6.** It is clear that as far as CCI is concerned, **it has come to the conclusion that there was a cartelisation among the appellants herein and a concerted decision was taken to rig the bids which were submitted pursuant to the tenders issued by IOCL**. **7.** On the other hand, **the appellants argue that there was NO such agreement and even if the bids of many bidders were identical in nature**, the bids were **driven by market conditions**. **8.** Their plea is that **there was a situation of oligopsony** and the modus which was **adopted by IOCL in floating the tenders** and **awarding the contracts would**

show that the determination of price was entirely within the control of the IOCL.

9. As per them, **the way price was determined for supply of these cylinders**, it had become **an open secret known to everybody**. Therefore, **there was NO question of any competition and NO possibility of adversely affecting that competition by entering into any contract**.

10. We may say at the outset that if these factors are taken into consideration by themselves, **they may lead to the inference that there was bid rigging**. We may, particularly, emphasise the fact that **there is an active trade association of the appellants and a meeting of the bidders was held in Mumbai just before the submission of the tenders.**

11. Another very important fact is that **there were identical bids despite varying cost**. Further, **products are identical and there are small number of suppliers with few new entrants**. These have become the supporting factors **which persuaded the CCI to come to the conclusion that these are suggestive of collusive bidding**. However, that is only one side of the coin.

12. Thus, the appellants appear to be correct when they say **that all the participants in the bidding process were awarded contracts in some State or the other which was aimed at ensuring a bigger pool of manufacturers so that the supply of this essential product is always maintained for the benefit of the general public**. Had **IOCL left some manufacturers empty handed, in all likelihood, they would have shut their shops**.

However, **IOCL wanted all manufacturers to be in the fray in its own interest**. Therefore, it was necessary **to keep all parties afloat and this explains why all 50 parties obtained order along with 12 new entrants**.

13. The manner in which tendering process takes place would show that in such a competitive scenario, the bid which the different bidder would be submitting becomes obvious. It has come on record that just a few days before the tender in question, another tender was floated by BPCL and on opening of the said tender the rates of L-1, L-2 etc. came to be known. In a scenario like this, that **obviously becomes a guiding factor for the bidders to submit their bids**. When we keep in mind the aforesaid fact situation on the ground, those very factors on the basis of which the CCI has come to the conclusion that there was cartelization, in fact, **become valid explanations to the indicators pointed out by the CCI**.

14. We have already commented about the market conditions and small number of suppliers. We have also mentioned **that 12 new entrants cannot be considered as entry of very few new suppliers where the existing suppliers were only 50**. **Identical products along with market conditions for which there would be only three buyers, in fact, would go in favour of the appellants**. The factor of repetitive bidding, though appears to be a factor against the appellants, was also possible in the aforesaid scenario. The **prevailing conditions in fact rule out the possibility of much price variations and all the manufacturers are virtually forced to submit their bid with a price that is quite close to each other**. Therefore, it became necessary to sustain themselves in the market.

	15. Hence, the factor that **these suppliers are from different region having different cost of manufacture would lose its significance**. **It is a situation where prime condition is to quote the price at which a particular manufacturer can bag an order even when its manufacturing cost is more than the manufacturing cost of others**. The main purpose for such a manufacturing **would be to remain in the fray and not to lose out**. Therefore, it would be ready to accept lesser margin. This would answer **why there were near identical bids despite varying cost**. To recapitulate, the two prime factors against the appellants, which are discussed by the CCI, are that there was a collusive tendering, which is inferred from the parallel behaviour of the appellants, namely, **quoting almost the same rates in their bids**. On a holistic view of the matter, we find that **the appellants have been able to discharge the onus by referring to various indicators which go on to show that parallel behaviour was not the result of any concerted practice**. **16.** In Dyestuffs, the European Court held that **parallel behaviour does not, by itself, amount to a concerted practice**, **though it may provide a strong evidence of such a practice.** Nevertheless, **it is a strong evidence of such a practice**. However, before such an inference is drawn it has to be seen that this **parallel behaviour has led to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, size and volume of the undertaking of the said market**. Thus, we examine the matter from the **stand point of market economy where question of oligopsony assumes relevance**. Whenever there is a situation of oligopsony, **parallel pricing simplicitor would not lead to the conclusion that there was a concerted practice there has to be other credible and corroborative evidence to show that in an oligopoly a reduction in price would swiftly attract the customers of the other two or three rivals**, the effect upon whom would be so devastating that they would have to react by matching the cut. **17.** After taking note of the test that needs to be applied in such cases, which was laid down in Dyestuffs and accepted in Excel Crop Care Limited, **we come to the conclusion that the inferences drawn by the CCI on the basis of evidence collected by it are duly rebutted by the appellants and the appellants have been able to discharge the onus that shifted upon them on the basis of factors pointed out by the CCI**. **18.** However, at that stage, **the CCI failed to carry the matter further by having required and necessary inquiry that was needed in the instant case**. We are emphasising here that in such a watertight tender policy of IOCL which gave IOCL full control over the tendering process, it was necessary to summon IOCL. **19.** This would have **cleared many aspects which are shrouded in mystery and the dust has not been cleared**.
Decision	☆ **The SC decide the case in favour of the Appellant.**

	✩ **The SC held that there is no sufficient evidence to hold that there was any agreement between the appellants for bid rigging.** ✩ **The SC held that no penalty is payable.**

129. TAMIL NADU CONSUMER PRODUCTS DISTRIBUTORS ASSOCIATION v. FANGS TECHNOLOGY PVT LTD & ANR [CCI]

Hint: Informant put allegation against the Opposite Party such as Distributors are not allowed to sell mobile phones/smartphones directly to corporate customers, Distributorship Agreement prohibits the distributors from doing business in Oppo and Honor brand of mobile phones etc. as per the Informant, **the conduct of the OPs have contravened the provisions of Section 3 (4) and Section 4 of the Act**

Decision: The CCI decide the case in favour of OP.

Fact of the Case	§ **The informant put the following allegation against the Opposite Party:** **(1)** Distributors are not allowed to give any discount to the retailers and are forced to strictly comply with the pricing of OP-1, which is disclosed to the distributors from time to time. **(2)** Distributors are not allowed to sell mobile phones/smartphones directly to corporate customers and have to seek the prior intimation/written consent from OP-1 to undertake such sales. **(3)** Distributorship Agreement prohibits the distributors from doing business in Oppo and Honor brand of mobile phones, not only within the designated territory but also elsewhere. **(4)** While sales of OP-1 has grown by Rs. 100 Crores in a period of 2 years, the commission shared with the distributors has been reduced by 33%. § Based on the above submissions, the Informant has alleged that various clauses in the Distributorship Agreement **are causing appreciable adverse effect on competition, resulting in foreclosure of competition by creating barrier to new entrant**. Thus, as per the Informant, **the conduct of the OPs have contravened the provisions of Section 3 (4) and Section 4 of the Act.**
Legal Principles held—	§ **The CCI determine the dominance of the Opposite Party in the relevant Market:** ☝ While considering GFK Report for FY 2017-18, it was observed that the market for **smartphones in India is highly competitive with the presence of several competitors**. There **are several smartphone manufacturers** such as Samsung, Micromax, Intex, Redmi, Lava, Oppo, Gionee, Lenovo, Motorola, Apple, HTC, Microsoft / Nokia, Sony / Sony Ericsson, LG, Huawei / Honor, and Xiaomi / MI etc. **operating in the aforesaid relevant market**. ☝ Presence of such large number of players in the relevant market **along with reputed foreign brands**, there is **enough competitive constraints upon the OP-1 in the relevant market.** ☝ Accordingly, **OP-1 does not seem to have the ability to operate independently in the aforesaid relevant market and therefore, OP-1 does not seem to be dominant in the relevant market as delineated above**. ☝ In the absence of dominance, **NO case of contravention of Section 4 of the Act is made out against OP-1.** § **With regard to the allegation of resale price maintenance (RPM) under provisions of Section 3(4) of the Act, 2002:** ☝ The Commission observes that the Informant has not submitted any evidence to prove that OP-1 has imposed RPM on the members of the Informant.

	✋ The Commission **observes that the market share of OP-1 has declined from 14.4% to 12.1% during the period 2017 to 2018**. ✋ The **turnover of OP-1 seems to be lower when compared to its competitors**. Further, the presence of many smartphone brands in the relevant market defined supra indicates that the degree of inter-brand competition is intense. ✋ Taking into account the above mentioned aspects, **OP-1 does not seem to possess significant market power in order to impose competitive restraints vertically**. ✋ Therefore, **the Commission does not find any merit in the allegations of the Informant that OP-1 has contravened the provisions of Section 3(4) (e) of the Act**. § **With regard to restriction imposed on its distributors in doing business with Oppo and Honor:** ✋ OP-1 has submitted that this clause has been included in the Distributorship Agreement to **avoid leakage of intellectual property and technical know-how of Vivo**. ✋ OP-1 has also stated that the said restriction has been put only against the two aforesaid brands as **these brands are familiar with the know-how and functioning of Vivo and they are its competitors not only in China but also at the global level**. ✋ Further, OP-1 has submitted that **its distributors are free to do business with other competing brands and that several distributors** engaged by the OP-1 are dealing in other competing brands.
Decision	§ **The CCI decide the case in favour of OP.** § In view of the said submission of OP-1, the Commission is of the view that the conduct of OP-1 does not appear to be anti-competitive. Therefore, **the allegation of violation of the provisions of Section 3(4) (b) of the Act does NOT stand established**.

130. ALL INDIA ONLINE VENDORS ASSOCIATION v. FLIPKART INDIA PRIVATE LIMITED & ANR [CCI]

Hint: The Informant alleged that OP-1 sells goods to companies like WS Retail Services Private Limited, which was owned by founders of OP-2 till 2012, **at a discounted price.** Thereafter, these goods are sold on the platform operated by OP-2, **which practices amounted to preferential treatment to certain sellers**. Further, it was apprehended that **unfair trade practices are being carried and corporate veil on it is required to be lifted to assess the economic nexus and the wrongdoings being committed**.

Decision: The CCI decide the case in favour of OP.

Fact of the Case	§ The Informant Company is a group of more than 2000 sellers selling on e- commerce marketplaces such as Flipkart, Amazon, and Snapdeal etc. § OP-1, a company, is engaged in wholesale trading/ distribution of books, mobiles, computers and related accessories. § OP-2 is also a company engaged in e-commerce marketplace business under the brand name Flipkart.com. § The Informant alleged that OP-1 sells goods to companies like WS Retail Services Private Limited, which was owned by founders of OP-2 till 2012, **at a discounted price.** Thereafter, these goods are sold on the platform operated by OP-2, **which practices amounted to preferential treatment to certain sellers**.

	§ Further, it was apprehended that **unfair trade practices are being carried and corporate veil on it is required to be lifted to assess the economic nexus and the wrongdoings being committed**. § The Informant averred that **OPs have a direct conflict of interest with other manufacturers selling on their platform and their own brands like 'Smartbuy' and 'Billion**'. § Based on the above averments and allegations, **the present information** has been filed by the Informant against the Opposite Parties **alleging contravention of the provisions of Section 4 of the Act.**
Legal Principles held—	§ **What is Relevant Product Market?** Relevant Product Market in this case, "Services provided by online marketplace platforms" § **What is Relevant Market?** Resultantly, the relevant market in the instant case may be defined as "Services provided by online marketplace platforms for selling goods in India". § **With regard to the dominance of the OP in Relevant Market?** ☝ **Informant stated that the OPs holds over 40% market share**. However, it was observed that the **informant has not given any credible source** for the market share in India. Moreover, there are multiple players in the online marketplace platforms. ☝ As per the data available in the public domain, it appears that presently Flipkart and Amazon are the bigger competitors. Moreover, **there are other players like Paytm Mall, SnapDeal, Shopclues etc.** ☝ **No doubt, the size and resources of Flipkart are large; yet, it cannot be disputed that the closest competitor to Flipkart is Amazon, which has a valuation of around 700 billion dollars and has a global presence**. ☝ While considering present market construct and structure of online marketplace platforms market in India, **it does not appear that any one player in the market is commanding any dominant position at this stage of evolution of market**. ☝ CCI is of the view that Flipkart India is **not dominant in the relevant market of "Services provided by online marketplace platforms for selling goods in India"; therefore, the issue of abuse of dominant position does not arise.** § **With regards to entry barriers?** ☝ **It** has to be noted that 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**. ☝ However, Flipkart has pointed out that there are several new players, **which have entered or propose to enter the e-commerce segment, such as Paytm Mall, thus indicative of low entry barriers**. § The Commission also observes that so far as the issue of preferential treatment given by OP-1 to exclusive seller (WS Retail Services Private Limited) which is stated to be owned by OP-2, **suffice to point out that the Informant itself has admitted in the Information of such structural link between OP-2 and WS Retail existed only till 2012**. Hence, **NO such concern is present today**.

	§ On the other allegations also, **the Informant has NOT placed any material to substantiate the same**. § **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.
Decision	§ **The CCI decide the case in favour of OP.** § **The** Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the Opposite Parties and the Information is ordered to be closed forthwith.

131. MEET SHAH & OTHER v. UNION OF INDIA, MINISTRY OF RAILWAYS & ORS [CCI]

Hint: Informant put allegation against the Opposite that **the Opposite Parties round off the actual base fare to the nearest higher multiple of Rs.5 to arrive at the total base fare.** It amounts to abuse of dominant position in market for sale of tickets by railways in India"

Decision: The CCI decide the case in favour of the Informant. The Commission is of the view that the **practice of rounding off actual base fares to the next higher multiple of Rs. 5 by the Opposite Parties, prima-facie amount to an imposition of unfair condition in the market for sale of rail tickets in India, particularly for online booking of rail tickets, in contravention of provisions of Section 4 (2) (a) (i) of the Act.**

Fact of the Case	§ The Informants are stated to be the individuals residing in Ahmedabad and Rajkot, respectively. § The Opposite Party No.1 is the Ministry of Railways, which controls Indian Railways, a departmental undertaking of the GOI, which is administered by the Railway Board. § The Opposite Party No.2, IRCTC is a public sector and is stated to be an extended arm of Indian Railways. The Opposite Party No.2 **is engaged in online ticketing operations of Indian Railways**. § The Informants contends that **as per the pricing policy of the Opposite Parties published on the Official Website** states that rounding off **to the next higher multiple of Rs. 5 is included in base fare**. Base fare has two components, i.e. **(a)** Actual fare (the base fare arrived at before rounding off to the nearest multiple of Rs. 5) and **(b)** Total base fare (the base fare arrived at after rounding off to the nearest multiple of Rs.5). § Based on the above, the Informants **have alleged that the Opposite Parties round off the actual base fare to the nearest higher multiple of Rs.5 to arrive at the total base fare.** For example, as per the Official Website, the total fare per passenger of the Sleeper Class of Ashram Express from Ahmedabad to Delhi is Rs.475. The actual base fare for the aforesaid journey can be Rs.421, Rs.422, Rs.423 or Rs.424. **The total base fare for the said journey is 425 (after rounding off to the next multiple of 5).**
Legal Principles held—	§ **Relevant Market in the present case** "market for sale of tickets by railways in India"**.**

	§ The Commission has given a careful examination to the alleged conduct of the Opposite parties of rounding up of actual fares to the nearest higher multiple of Rs.5 which **according to the Informants is unfair and a discriminatory condition imposed on the Informants which merit examination as abuse of dominant position in the 'market for sale of tickets by railways in India'**. § **Commission consider the following facts that where opposite unable to explain**: **(a)** The Opposite Parties have not been able to convince the Commission as to why the policy of rounding off of actual base fares to the next higher multiple of Rs.5 is applicable to the sale of online tickets, when it may be possible for the Opposite Parties to transfer even one paisa electronically. **(b)** Further, during the preliminary conference, the Opposite Parties could not explain why rounding off is done separately for each passenger even when more than one tickets are booked through one account of the same time for a journey.
Decision	§ At this juncture, it appears that the Opposite Parties are rounding off the actual base fares for the online bookings without any plausible justification for the same. § The Commission is of the view that the **practice of rounding off actual base fares to the next higher multiple of Rs. 5 by the Opposite Parties, prima-facie amount to an imposition of unfair condition in the market for sale of rail tickets in India, particularly for online booking of rail tickets, in contravention of provisions of Section 4 (2) (a) (i) of the Act.** § The CCI decide the case in favour of the Informant and direct the DG to cause an investigation into the matter and submit his report within a period of 60 days from the receipt of this order.