

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

COMPETITION APPEAL (AT) NO.62 OF 2018

In the matter of:

Confederation of All India Traders,
Vyapar Bhawan,
925/1 Naiwalan,
Karol Bagh,
New Delhi-110005

Appellant

Vs

Competition Commission of India,
Hindustan Times House,
18-20 Kasturba Gandhi Marg
New Delhi-110001

2. Wal Mart International Holdings Inc
702 Southwest 8th St
Bentonville, Arkansas, 72716
United States of America

Respondents

For Appellant: Mr Abir Roy and Ms Prerana De, Advocates.
For Respondents: Mr. Prashanto Chandrasen, Sr. Advocate with Mr Balaji Subramanian and Ms Ishani Banerjee, Advocates for CCI.
Mr. Abhishek Manu Singhvi and Mr. Rajiv Nayar, Sr. Advocates with Mr. Anuj Berry, Mr Yaman Verma, Mr. Malak Bhatt, Ms Sonali Charak and Ms aakarshi Agarwal, Advocates for R2.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J

On 18th May, 2018, the Competition Commission of India (Commission) received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 given by Wal-Mart International Holdings, Inc. (Walmart), a subsidiary of Walmart Inc. for acquisition between 51% and 77% of the outstanding shares of Flipkart Private Ltd (Flipkart) and matters incidental thereto (Proposed Combination). The notice was given pursuant to the execution of a

Share Purchase Agreement on 9th May, 2018 by and among Walmart and certain shareholders of Flipkart (SPA) and a Share Issuance and Acquisition Agreement on the same day by and among Walmart and Flipkart (SIAA).

2. During the inquiry into the matter, the Commission received representations against the proposed combination from trade associations, traders/retailers including appellant, Confederation of All India Traders raising objections to the said transactions. The Competition Commission of India (Commission) after enquiry taking into consideration all relevant facts including the objections raised by the appellant, issued order dated 8th August, 20158 under sub-section (1) of Section 31 of Act 2002 approving the combination.

3. Learned counsel for the appellant submitted that the effect of the transaction in the relevant matter is anti-competitive and determined on non-preferential sellers, would be further accentuated post the combination takes effect. 2nd respondent (Walmart) would have effective control over the e-commerce platform and the web of preferential sellers. In such a situation, 2nd Respondent (Walmart) would definitely sell its inventory on platform of flipkart.com or through a web of associated preferred sellers and thus, preference would be given to the inventory of 2nd respondent (Walmart). Flipkart, through its web of preferential sellers are denying market access of non-preferential sellers which would be magnified post transaction. The augmentation of 2nd Respondent (Walmart)'s inventory can also be done by way of bulk purchases from online platform of Flipkart. A flowchart highlighting the effect of the transaction has also been given in Additional affidavit.

4. It is submitted that while the stance of 2nd Respondent (Walmart) is that they are only involved in B2B sales, evidence suggests that they have started indulging in B2C sales too.

5. Learned counsel for the appellant highlighted the network of preferred sellers and preferential listing as follows:-

a) Preferred discounts: Flipkart purchases goods and sells at discounted prices, while incurring a loss, to few preferential sellers like WS Retail, Retailnet, Omnitech Retail. These preferential sellers, in turn, then sell the same goods on the e-commerce platform of Flipkart at predatory rates. The appellant has also give a flowchart to demonstrate the modus operandi of Flipkart. It is submitted that some of these preferred sellers of Flipkart such as WS Retail, Omnitech Retail, Super.Com Net etc. are parties which have a relation with Flipkart through common investors, directors, employees, shareholders etc. Flipkart has also accept the same before Income Tax Appellate Tribunal that they engage in predation to capture the market.

b) Flipkart has a demonstrated history of entering into exclusive tie ups in the markets in which they have a high market shares. These goods in which there are exclusive tie ups (in mobile and fashion category where they have a high market share of more than 60%) are only sold via preferential sellers like WS Retails, Omnitech Retail etc. These goods with exclusive tie ups/best deals are not available to non preferential sellers. Further, Flipkart creates its own private labels/best discount deals which are ohnly sold via its web of preferential sellers only.

c) Further the goods sold by these preferential sellers are also given preferential listing on the webpages on Flipkart across all categories like television, washing machines, microwave, refrigerators etc. wherein Omnitech Retail dominates the top of the search results whereas identical products with same ratings by other sellers are pushed down in the search results and often to subsequent pages. Thus products of its preferred, related sellers in the first few pages of the search results and those of the non-preferred sellers having the same quality and ratings in later pages of the search results and there is no other basis such as payment of any price for such listing. Empirical evidence shows that customers would not look at products on subsequent pages and thus, sales of non-preferred traders, like members of the appellant are severally affected and in process, are effectively foreclosed from the market and denied market access. The appellant submits that a similar issue of search bias is before the Hon'ble NCLAT in the Google case, Competition Appeal (AT) No.18/2018. Flipkart also lends the term "assured" to sales made by its preferential sellers, thus creating a bias in minds of customers in favour of such products sold by such preferential sellers.

d) The small retailers/wholesalers have been forced to partner with Flipkart due to lack of options online and sufferinig due to Flipkart's deep discounting model and are being treated unfairly in comparison to the preferential sellers. There is no level playhing field which would be further accentuated post the transaction. The non-preferred sellers which includes members of the Appellant, are forced to partner with

Flipkart at highly discriminatory terms and conditions since they are blocked at times and their listings are being made inactive.

6. In so far as the relevant market is concerned, according to Learned counsel for appellant the market to be analysed is the B2C market in respect of the online market in India especially in each product markets where Flipkart already has a significant presence in India of more than 60% market share such as mobile phones and fashion. The Commission has also acknowledged that online market is a separate market in itself.

7. Learned counsel for 2nd Respondent (Walmart) submitted that the concern raised by appellant are not specific to the transaction in question. That the appellant has no locus standi to challenge the impugned order. Learned counsel submits that the right to appeal only accrues to a person who is aggrieved by an order of the Commission, and the Appellant has not shown how it is aggrieved by the impugned order. It has only argued that it was not given an oral hearing to air its concerns. However, there is no right to a hearing for a third party in the merger review process, and the principles of natural justice do not require that every third party be given a hearing before a combination that may impact its rights is approved. Requiring such a hearing would make the review process extremely cumbersome and it would not be possible to comply with the statutorily prescribed time limits. Rights of third parties are adequately protected by their ability to write to the Commission regarding any concerns they may have with a combination, and the Appellant in this case exercised this right. The Commission, in the detailed impugned order, has addressed the concerns raised by the appellant

and explained why they do not impact its review and approval of the transaction.

8. He further submitted that overlaps between the parties are insignificant to warrant intervention. The Commission's approval process for combinations relates to review of overlaps between the parties to determine if the transaction is likely to cause appreciable adverse effect on competition. In this regard the horizontal overlap between the parties is limited to the wholesale business to business (B2B) market in India. In the impugned order, the Commission has correctly observed that (i) Flipkart and Walmart are not close competitors in B2B sales; and (ii) their combined market share of less than 5% post Transaction does not raise competition concerns. Moreover the actual vertical overlaps between the parties is miniscule. These facts and figures have not been challenged by the appellant.

9. Further according to 2nd Respondent (Walmart) that under the existing Foreign Direct Investment Policy 2017 the Parties cannot engage in Business to Customer B2C sales whether offline or online on any end-consumer marketplace based e-commerce platform, including on Flipkart. Com. The appellant's concerns with potential vertical overlaps between the Walmart and Flipkart.com are predicted upon a presumption that: (i) Flipkart is in violation of the existing FDI Policy and already operates in the B2C space; and (ii) Walmart intends to violate the FDI Policy and operate in the B2C space by selling on Flipkart.com. There has never been a finding of violation of the FDI Policy against the parties, which indicates that the appellant's allegations are baseless. In any event, a violation of the FDI Policy is the subject matter of an entirely different legal regime. Thus the Commission has correctly limited

its enquiry to whether the Transaction would have an AAEC and ruled that it does not.

10. Learned counsel for the Commission relied on the impugned order to suggest that the Commission considered all aspects and order of approval was passed under Section 31(1) of the Act 2002.

11. The question as to how a notice on proposal of combination in terms of Section 6(2) was required to be considered came for consideration before this Appellate Tribunal in *TA(AT)(Competition) No.32 of 2017 (appeal No.43 of 2016), Piyush Joshi Vs Competition Commission of India reported in Maupatra MANU/NL/087/2019*. The Appellate Tribunal observed as under::

“20. In terms of Section 6, the proposal for combination is required to be given to the ‘Commission’ by way of notice in the form as may be prescribed with the fee, which reads as follows:

“6. Regulation of combinations— (1) *No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.*

(2) *Subject to the provisions contained in sub-section (1), any person or 13 enterprise, who or which proposes to enter into a combination, [shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the 14 proposed combination, within [thirty days] of –*

(a) *approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;*

(b) *execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or*

acquiring of control referred to in clause (b) of that section. 15

[(2A) No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.]

(3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Explanation - For the purposes of this section, the expression-

(a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961(43 of 1961);

(b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of section 10 of the Income-tax Act, 1961(43 of 1961)"

21. *From the aforesaid provisions, following facts emerge:*

- i. *Section 6 relates to 'Regulation of combinations'. Sub-section (1) of Section 6 prohibits a person or enterprise from entering into a*

combination which causes or is likely to cause an appreciable adverse effect on competition with the relevant market in India and if that be so, in such case, a combination shall be void.

- ii. As per sub-section (2) of sub-section (6), a person or enterprise, who or which proposes to enter into a combination is required to give notice to the 'Commission' in the form along with fee disclosing the details of the proposed combination within 30 days.*
- iii. Sub-section 2A prescribes the time period of maximum two hundred and ten days for passing an order under Section 31.*
- iv. Under sub-section (3), the Commission after receipt of notice under sub-section (2) is required to deal with such notice in accordance with the provisions contained in Sections 29, 30 & 31.*

22. Section 29 deals with 'Procedure for investigation of combinations', which reads as follows:

"29. Procedure for investigation of combination— (1)
Where the Commission is of the 49 [prima facie] opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

[1(A) After receipt of the response of the parties to the combination under subsection (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.]

(2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven

working days from the date of receipt of the response of the parties to the combination, 51 [or the receipt of the report from Director General called under sub section (1A), whichever is later] direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

(3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).

(4) The Commission may, within fifteen working days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.

(5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within fifteen days from the expiry of the period specified in sub-section (4).

(6) After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.”

23. From the aforesaid procedure, it is clear that where the ‘Commission’ is of the prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India then it is required to issue a notice to show cause to the parties to combination and further required to call for report from the Director General.

24. As per sub-section (2) of Section 29, the ‘Commission’ if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall within seven working days from the date of receipt of the response of the parties to the combination or the receipt of the report from Director General direct the

parties to the said combination to publish details of the combination in the manner as the time stipulated therein.

25. *As per sub-section (3) of Section 29, the 'Commission' may invite any person or member of the public, affected or likely to be affected by the Commission, to file his written objections, if any.*

26. *On plain reading of Section 6 with Section 29, it is clear that if a person or enterprise, who or which proposes to enter into a combination is required to give notice to the Commission and the Commission only if comes prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, is required to follow the procedure under Section 29 and Section 30 of the Act.*

27. *On the other hand, on receipt of notice from a person or enterprise, who or which proposes to enter into a combination, if the Commission forms opinion that no prima facie case emerges to hold that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, is not required to follow the procedure under Section 29 and Section 30 of the Act and required to pass order of approval under Section 31.....”*

12. From the impugned order we find that it is clear that the Commission considered the business activity of Flipkart India as well as 2nd Respondent (Walmart). On consideration of the same the assessment of the proposed combination was made to consider it pertinent to elaborate its legal mandate while assessing a combination as opposed to a conduct related to anti-competitive agreements and abuse of dominance. The Commission observed unlike anti-competitive agreements and abuse of dominance conduct, that are prohibited, combinations are only regulated under the Act for the purpose of provision of Section 6(1) i.e. combination which causes or is likely to cause an adverse effect on competition within the relevant market in India. It

considered the horizontal overlap and what is overlap. The Commission observed that both the parties are engaged in B2B sales and thus, there exists horizontal overlap between their businesses in the said segment. 2nd Respondent (Walmart) has proposed the relevant market as 'pan-India market for B2B sales', which is being characterized by intense competition among a very large number of competitors-both online and offline. The Commission observed that both the parties to the Proposed Combination are entities with foreign investments and are thus governed by the Foreign Director Investment Policy which explains B2b Sales as *"Cash and Carry Wholesale trading/Wholesale trading, would mean sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers. Wholesale trading would, accordingly, imply sales for the purpose of trade, business and profession, as opposed to sales for the purpose of personal consumption. The yardstick to determine whether the sale is wholesale or not would be the type of customers to whom the sale is made and not the size and volume of sales. Wholesale trading would include resale, processing and thereafter sale, bulk imports with export/ex-bonded warehouse business sales and B2B e-commerce.* This lays the boundaries of B2B sales within which the parties to the combination have to operate.

13. What is vertical overlap was also considered by Commission with respect to B2C sales. It noticed that 2nd Respondent (Walmart) has taken the plea that the FCI policy restricts the parties from engaging in business to consumer sales and thus, they are not engaged in the said segment. However,

there is no restraint on the parties to offer an online marketplace platform to facilitate sales between retailers and consumers. Flipkart operates such platforms in the name of Flipkart.com, Myntra.com, Jabong.com, etc. Presently 2nd Respondent (Walmart) is not engaged in any online market place business for B2C sales. Based on these, it has been further submitted that there is no vertical overlap between the businesses of the parties.

14. The Commission specifically and rightly came to a finding in absence of any evidence on record that the proposed combination is not resulting in elimination of any major player in the relevant market. The appellant has failed to show that any major player in the relevant market will be eliminated due to combination in question. On the other hand, the Flipkart marketplace platform will remain under the operation of 2nd Respondent (Walmart), thus not only preserving a successful ecommerce platform but also enhancing the financial strength of the platform. The aforesaid fact has been discussed in detail while dealing with the third party representation including the objection raised by the appellant.

15. This Appellate Tribunal in *Piyush Joshi case*, as noticed above, held that in absence of any prime facie opinion framed, that the combination is likely to cause or has caused appreciable adverse effect on the competition within the relevant market in India, the Commission is not required to following the procedure under Section 29 and Section 30 of the Act and is required to pass order of approval under Section 31. In the present case we find no prime facie case has been made out on the facts of the case or by appellant. We hold that there is no requirement on the part of the Commission to follow the procedure

under Section 29 and 30 of the Act and it rightly passed order of approval under Section 31 of the Act.

16. At this stage it is to be noted that though the allegation has been made against Flipkart but the Flipkart has not been impleaded as a party to the appeal, in such circumstances no specific finding can be given against the Flipkart in the present appeal. We find no merit in this appeal. It is accordingly dismissed.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

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