THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 30.03.2016

\+ **W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014**

TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) ..... Petitioner

versus

COMPETITION COMMISSION OF INDIA AND ANOTHER ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr T.R. Andhyarujina, Senior Advocate with Ms Prathiba M. Singh, Senior Advocate with Mr Chander M. Lall, Mr Anand S. Patak, Mr Ravishekhar Nair, Ms Saya Choudhary Kapur, Mr Ashutosh Kumar, Ms Archana Sahadeva, Ms Shivanghi Sukumar, Ms Sakshi Agarwal, Mr Akashay Nanda, Ms Rukma George, Mr Arjun Khera, Mr B. Prashant Kumar, Mr Aditya Jayraj, Mr Sahib Singh Chaddha and Ms Harita Sahadeva, Advocates.

For the Respondents : Mr A.N. Haksar, Senior Advocate with Mr Avinash Sharma, Advocate for R-1/CCI.

Mr Salman Khurshid, Senior Advocate with Mr J. Sai Deepak, Mr Sunil Dalal, Mr Rajiv K Chaudhary, Ms Savni Dutt, Ms Rachel Mamatha and Mr Avijit Sharma, Advocates for R-2.

Mr Aditya Narain, Amicus Curiae with Mr Arnav Narain Mr Shashank Bhushan, Ms Anushree Narain and Ms Anahita Varma, Advocates.

AND

+ **W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014**

TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) ..... Petitioner

versus

COMPETITION COMMISSION OF INDIA AND ANOTHER ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr C.S. Vaidyanathan, Senior Advocate, Ms Prathiba M. Singh, Senior Advocate with Mr Chander M. Lall, Mr Anand S. Patak, Mr Ravishekhar Nair, Ms Saya Choudhary Kapur, Mr Ashutosh Kumar, Ms Archana Sahadeva, Ms Shivanghi Sukumar, Ms Sakshi Agarwal, Mr Akashay Nanda, Ms Rukma George, Mr Arjun Khera, Mr B. Prashant Kumar, Mr Aditya Jayraj, Mr Sahib Singh Chaddha and Ms Harita Sahadeva, Advocates.

For the Respondents : Mr A.N. Haksar, Senior Advocate with Mr Pankaj Seth and Mr Shonik Mazumdar, Advocates for R-1/CCI.

Mr Arun Kathpalia, Advocate with Mr Vaibhav Gaggar, Mr Nitish Sharma, Mr Aaditya Vijay Kumar, Mr Abhimanyu Chopra, Mr Samaksh Goyal, Ms Neha Mishra, Ms Samali Verma and Mr Shaksham Dhingra, Advocates for R-2.

Mr Aditya Narain, Amicus Curiae with Mr Arnav Narain Mr Shashank Bhushan, Ms Anushree Narain and Ms Anahita Varma, Advocates.

CORAM:-
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. These petitions have been filed by Telefonaktiebolaget LM Ericsson (Publ), a company incorporated under the Laws of Sweden (hereafter also referred to as 'Ericsson'), *inter alia,* impugning orders dated 12th November, 2013 and 16th January, 2014 (hereafter referred to as the 'impugned order' or 'impugned orders') passed by the Competition Commission of India (hereafter 'CCI') under Section 26(1) of the Competition Act, 2002 (hereafter referred to as 'the Competition Act'). The impugned order dated 12th November, 2013 was passed pursuant to an information filed by Micromax Informatics Ltd. (hereafter 'Micromax') under Section 19(1)(a) of the Competition Act and the same is the subject matter of W.P.(C) No. 464/2014 (hereafter also referred to as the 'Micromax Petition') and the impugned order dated 16th January, 2014 was passed pursuant to an information filed by Intex Technologies (India) Ltd. (hereafter 'Intex') and is the subject matter of W.P. (C) No. 1006 of 2014 (hereafter also referred to as the 'Intex Petition').

2. The controversy raised in these petitions are similar and, therefore, these petitions were taken up together.

3. Both Micromax and Intex have alleged that Ericsson, which has a large portfolio of Standard Essential Patents (SEPs) in respect of technologies that are used in mobile handsets and network stations, has abused its position of dominance. The information filed by them before the CCI under Section 19 of the Competition Act has persuaded the CCI to pass the impugned orders directing the Director General (DG) CCI to investigate the matter regarding violation of the provisions of the Competition Act. The CCI has further directed that if DG finds that Ericsson has contravened the provisions of the Competition Act, he shall also investigate the role of persons who at the time of such contravention, were in-charge of and responsible for the conduct of Ericsson so as to fix the responsibility of such persons under Section 48 of the Competition Act. The substratal dispute between Ericsson and Micromax/Intex relate to Ericsson's demand for royalty in respect of SEPs held by Ericsson and which it claims has been infringed by Micromax and Intex.

4. According to Ericsson, the impugned orders passed by the CCI are without jurisdiction as it lacks the jurisdiction to commence any proceeding in relation to a claim of royalty by a proprietor of a patent (hereafter also referred to as a 'patentee'). Ericsson contends that any issue regarding a

claim for royalty would fall within the scope of Patents Act, 1970 (hereafter the 'Patents Act') and cannot be a subject matter of examination under the Competition Act. This, essentially, is the principal controversy involved in these petitions.

Introduction

5. Ericsson was founded in 1876 and is a flagship company of the Ericsson Group. Ericsson is engaged in developing and providing equipment and services relating to the information and communication technology. It is claimed that Ericsson is one of the largest telecommunications company in the world and the Ericsson Group designs and manufactures telecommunication equipment, setups and manages telecommunications network and is engaged in research and development of frontline technologies in the field of data communication and mobile networks. Ericsson claims that it has played a significant role in the growth and expansion of the telecommunications industry in India and its involvement in India dates back to 1903, when Ericsson supplied manual switch boards to the Government of India. It is claimed that Ericsson has a significant presence in India with around 20,000 employees across 25 offices located in various parts of the country.

6. Micromax is an Indian company and its registered office is situated in Gurgaon, Haryana. Micromax claims that it is the 12th largest mobile handset manufacturer in the world and is focused on providing innovative products catering to the needs of the Indian consumers. Micromax states that it has a product portfolio of more than 60 models of mobile phones.

7. Intex is a company incorporated under the Companies Act, 1956 and has its registered office in New Delhi. It has a pan-India presence and its product portfolio consists of over 250 items from 29 product groups including Mobile Phones, Multimedia Speakers, Desktops LED/LCD TVs CRT, DVD players, Computer UPS, Cabinets and Headphones. Intex claims that it offers products with innovative and high-end specifications at affordable prices. Intex claims that it has a Centre for market research and related design and development in Delhi, which is well-equipped and is manned by highly qualified personnel. The said centre is engaged in product development, bench marking, quality up-gradation, etc. Intex sources mobile devices - which are made to their design and specifications - from various countries and the same are marketed under its brand name. The mobile phones business of Intex contributes approximately 65% of Intex's revenues. Intex states that it provides approximately 35 models of

mobile phones in the price range of Rs.950/- to Rs.3,000/-. Intex also has a portfolio of smart phones in the price range of Rs.4,000/- to Rs.25,000/-. In addition, Intex also develops mobile phone applications for its mobile phones.

8. Ericsson holds several patents in India in respect of technologies relating to infrastructure equipment, including 2G, 3G and 4G networks as well as mobile phones, tablets, data cards and dongles etc. Some of the patents held by Ericsson are SEPs. Essentially, these are the technologies which have been accepted as standards to be uniformly accepted and implemented across various countries in order to ensure uniformity and compatibility for a seamless transmission of data and calls across the world.

9. The use of a standard technology ensures that there is a uniformity and compatibility in communications network across various countries. Thus, any technology accepted as a standard would have to be mandatorily followed by all enterprises involved in the particular industry. In order to accept and lay down standards, various Standard Setting Organizations' (SSOs) have been established. European Telecommunication Standard Institute (ETSI) is one such body, which has been set up to lay down the standards for the telecommunication industry and particularly 2G (GSM,

GPRS, EDGE), 3G (UMTS, WCDMA, HSPA) and 4G (LTE) standards. In cases where the technology adopted as a part of an essential standard is patented, the technology/patent is referred to as a Standard Essential Patent (hereafter 'SEP'). The implication of accepting a patented technology as a standard is that all devices/equipments compliant with the established standard would require to use the patented technology and its manufacture would necessarily require a licence from the patentee holding the SEP.

10. In order to ensure that a patentee cannot prevent access to SEP, clause 6.1 of the "ETSI Intellectual Property Rights Policy" expressly provides that:

> *"When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory ("FRAND") terms and conditions under such IPR to at least the following extent:*
>
> ● *MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;*
>
> ● *sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;*
>
> ● *repair, use, or operate EQUIPMENT; and*
>
> ● *use METHODS.*

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate."

Admittedly, Ericsson is bound by the aforesaid policy and in terms thereof, has undertaken to offer its SEPs on Fair, Reasonable And Non-Discriminatory (FRAND) Terms. The disputes between the parties relate to the patents concerning the technologies pertaining to 2G and 3G devices that are claimed by Ericsson to be SEP's for which Ericsson is bound to offer licences on FRAND terms.

Substratal Disputes

11. Ericsson alleges that the products manufactured and dealt with by Micromax and Intex violate its patents. Ericsson further claims that it made best efforts to negotiate a Patent Licencing Agreement (PLA) with Micormax and Intex on FRAND terms but its efforts were unsuccessful. Consequently, Ericsson was constrained to initiate proceedings for infringement of its patents.

12. The proceedings initiated by Ericsson against Micromax (CS(OS) No. 442/2013), including the course of events leading to initiation of the proceedings as well as filing of information by Micromax before CCI, is briefly outlined as under:

12.1. Ericsson sent a communication on 3rd November, 2009 to Micromax alleging that the products manufactured by Micromax were in violation of the patents held by Ericsson and invited Micromax to negotiate for a patent licence on FRAND terms. Ericsson also called upon Micromax to sign a Non-Disclosure Agreement (NDA) for commencing the negotiation process. Micromax replied by expressing its inability to respond to Ericsson's letter dated 03.11.2009 in absence of the requested details of the subject patents (Ericsson's SEPs).

12.2. Ericsson states that by a letter dated 5th February, 2010, it provided Micromax with certain examples of its SEPs in India and also with documents and mapping test results, which established that one of the Micromax's mobile device (X332) infringed Ericsson's SEPs. Ericsson reiterated its request for a meeting and once again called upon Micromax to execute an NDA, without which it expressed its difficulty in providing details pertaining to its claim of mapping.

12.3. Ericsson states that on 28th April, 2011, a meeting was held between the representatives of Ericsson and Micromax, at which Micromax demanded further information regarding Ericsson's patents. According to Ericsson, it supplied the necessary information pertaining to its patents as

well as further information in respect of infringement of Ericsson's patents by other products of Micromax; however, Micromax disputes that it received the necessary and relevant information.

12.4. Apparently, after a further meeting and much correspondence, Ericsson and Micromax executed an NDA on 16th January, 2012. However, the parties could not arrive at a consensus with respect to a PLA.

12.5. Consequently, on 4th March, 2013, Ericsson filed a patent infringement suit being CS(OS) No. 442/2013 in this Court. Ericsson has alleged that eight of the SEPs held by it, which related to the three technologies pertaining to 2G and 3G devices were infringed by Micromax. The three technologies are briefly described as under:-

A. Adaptive Multi-Rate (AMR) speech codec – a feature that conserves use of bandwidth and enhances speech quality; (AMR)

B. Feature in 3G phones-Multi service handling by a Single Mobile Station & A mobile ratio for use in a mobile radio communication system: (3G)

C. Enhanced Data Rates for GSM Evolution (EDGE) – A transceiving unit for block automatic retransmission request; (EDGE)

The eight patents claimed to be infringed by Ericsson are as under:-

AMR PATENTS

IN203034	:	Linear Predictive Analysis by synthesis encoding method and encoder.
IN203036	:	Apparatus for producing from an original speech signal a plurality of parameters.
IN234157	:	A method of encoding/decoding multi-codebook fixed bitrate CELP signal block.
IN203686	:	Method and system for alternating transmission of codec mode information.
IN213723	:	Method and apparatus for generating comfort noise in a speech decoder.

3G PATENTS

IN229632	:	Multi service handling by a Single Mobile Station.
IN240471	:	A mobile radio for use in a mobile radio communication system.

EDGE PATENT

IN241747	:	A transceiving omit unit for block automatic retransmission request.

12.6. On 6th March, 2013, this Court passed an *ad-interim* order directing the Custom Authorities to inform Ericsson as and when the consignments of mobile phones are imported by Micromax. This Court also directed the Custom Authorities to decide Ericsson's objections, if any, in accordance

with Intellectual Property Rights (Imported Goods), Enforcement Rules, 2007 till further orders. In addition, the Court also appointed a Local Commissioner to inspect the premises of Micromax and collect documents relating to sale and import of products that allegedly infringed Ericsson's patents.

12.7. Aggrieved by the aforesaid order, Micromax preferred an appeal being FAO(OS) No. 143/2013 before a Division bench of this Court which was disposed of by an order dated 12th March, 2013. The Division Bench further directed the Custom Authorities to decide Ericsson's objections, if any, in respect of the goods imported within the shortest possible time. The Court also observed that Micromax would have the right to file an application under Order XXXIX Rule 4 of the Code of Civil Procedure (hereafter 'CPC') and if such application was made, the mandate of law required that an endeavor be made to decide the same within a period of 30 days. The Court also clarified that its order would not be read as an expression of opinion in favour of either party.

12.8. Thereafter, Micromax filed an application under Order XXXIX Rule 4 of CPC seeking vacation of the *ex-parte* interim order passed by the learned Single Judge on 6th March, 2013. On 19th March, 2013, the Court

issued notice on the said application (being I.A No.4694/2013 IN CS(OS) No. 442/2013) and passed the following order with the consent of parties:

> "1. Ericsson and Micromax agree to negotiate a FRAND License Agreement for the next one month, based on FRAND terms.
>
> 2. Micromax/Customs shall intimate Ericsson's notified person or counsel for Ericsson whenever a consignment arrives at the Customs. Ericsson's representative or its counsel will, without any delay and within twenty-four hours, take inspection of the consignment.
>
> 3. Micromax shall then, pending final determination of royalties payable by the parties, agree to abide by the following interim payments as per term sheet enclosed with letter dated 05th November, 2012, purely as an ad-interim arrangement and subject to the final outcome of its negotiations with Ericsson.
>
> A. For phones/devices capable of GSM - 1.25% of sale price.
>
> B. For phones/devices capable of GPRS + GSM - 1.75% of sale price.
>
> C. For phones/devices capable of EDGE + GPRS + GSM - 2% of sale price.
>
> D. WCDMA/HSPA phones/devices, calling tablets - 2% of the sale price.
>
> E. Dongles, data cards - USD 2.50.
>
> Micromax undertakes to make a deposit of interim payments in Court, as set out above, within five working days of the intimation by Customs of the arrival of the consignment. Post inspection, Ericsson will forthwith inform the Customs that it has no objection

to the release of the consignment so that the consignment could immediately be handed over to Micromax.

Both the parties agree that the royalties, if any, for the past period will be negotiated as part of the final FRAND agreement that may be arrived at between the parties."

12.9. The aforesaid interim arrangement was extended by an order dated 10th April, 2013 and Justice A.P. Shah (Retired Chief Justice, High Court of Delhi) was appointed as a mediator. The Court further directed Ericsson to disclose to Micromax agreements entered into by it with similarly placed parties on the condition of confidentiality.

12.10. The efforts to resolve the disputes through mediation were unsuccessful and on 10th May, 2013, the Mediator filed a report informing the court about the failure of the mediation proceedings.

12.11. After failure of the efforts to mediate, on 24th June, 2013, Micromax filed information under Section 19(1)(a) of the Competition Act, before CCI, *inter alia*, accusing Ericsson of abusing its position of dominance in the relevant market. This was registered by the CCI as Case No. 50 of 2013.

12.12. The interim application filed by Ericsson (IA No. 3825/2013) as well as the application filed by Micromax under order XXXIX Rule 4 CPC (IA 4694/2013 in the suit CS(OS) No. 442/2013) was disposed of by the Court on 12th November, 2014; the Court modified the interim arrangement agreed to by the parties and directed Micromax to pay royalty at the following rates:-

From the date of filing of the suit till 12th November, 2015:-

> "i. For phones/ devices capable of GSM - 0.8% of net selling price;
>
> ii. For phones/ devices capable of GPRS + GSM - 0.8% of net selling price;
>
> iii. For phones/devices capable of EDGE + GPRS + GSM - 1% of net selling price;
>
> iv. WCDMA/HSPA phones/devices, calling tablets - 1% of the net selling price."

From 13th November, 2015 to 12th November, 2016:-

> "i. For phones/ devices capable of GSM - 0.8% of net selling price;
>
> ii. For phones/ devices capable of GPRS + GSM - 0.8% of net selling price;
>
> iii. For phones/devices capable of EDGE + GPRS + GSM - 1.1% of net selling price;

iv. WCDMA/ HSPA phones/devices, calling tablets - 1.1% of the net selling price."

From 13th November, 2016 to 12th November, 2020:-

"i. For phones/ devices capable of GSM - 0.8%) of net selling price;

ii. For phones/ devices capable of GPRS + GSM - 1% of net selling price;

iii. For phones/devices capable of EDGE + GPRS + GSM 1.3% of net selling price;

iv. WCDMA/ HSPA phones/devices, calling tablets - 1.3% of the net selling price."

12.13. A perusal of the abovementioned order indicates that Ericsson had produced twenty-six licence agreements which were perused by the Court and the royalty rates were fixed after perusing the said agreements and after hearing the parties. The Court had, however, clarified that the arrangement was an interim arrangement and was not a determination of the FRAND rates.

12.14. The learned counsel for Micromax informed this court that Micromax had sought a modification of the aforesaid order dated 12th November, 2014, which was not accepted and Micromax's application (IA No. 10933/2015) was disposed of by an order dated 7th July, 2105.

Micromax has appealed against the said order before a Division Bench of this Court (FAO No. 555/2105) which is stated to be pending.

12.15. On 7th July, 2015, the following issues were framed in CS(OS) No. 442 of 2013:

"1. Whether the plaintiff is the registered proprietor of the suit patents being IN203034, IN203036, IN234157, IN203686, IN213723, IN229632, IN240471 and In241747? OPP

2. Whether the suit patents being IN203034, IN203036, IN234157, IN203686, IN213723, IN229632, IN240471 and IN241747 are Standard Essential Patents? OPP

3. Whether the plaintiff has offered to Defendant No.2 a license on fair, reasonable and non-discriminatory (FRAND) terms and conditions? OPP

4. Whether the defendant No.2 is an 'unwilling licensee'? OPP

5. Whether the defendant No.2 has bonafidely negotiated with the plaintiff in order to take a license in respect of the plaintiff's Standard Essential Patents? OPD

6. Whether the defendant No.2 is infringing the suit patents being IN203034, IN203036, IN234157, IN203686, IN213723, IN229632, IN240471 and IN241747? OPP

7. Whether the suit patents being IN203034, IN203036, IN234157, IN203686, IN213723, IN229632, IN240471 and IN241747 are invalid in nature and are liable to be revoked in the light of the grounds raised by the defendant No.2 in its counter claims? OPD

8. Whether the plaintiff is entitled to damages/payment of royalties from the defendant No.2 for sales made by it of

devices working as per the plaintiffs patented technology and if so, since what period and for what amounts? OPP.

9. Relief."

13. A brief outline of the proceedings initiated by Ericsson against Intex (CS(OS) No. 1045/2014) including the course of events leading to initiation of the proceedings as well as filing of information by Intex before the CCI, is as under:

13.1. Ericsson sent a communication to Intex on 16th December, 2008 informing Intex of the infringement of its SEPs and requested for a meeting to discuss a PLA. Intex responded by stating that it was not aware of Ericsson's patents in India that were required to be complied with. Thereafter - during the period January, 2009 to November, 2009 - Ericsson and Intex held negotiations for an amicable resolution of the issues but the same were unsuccessful.

13.2. It appears that one of the principal issues raised by Intex concerned the execution of a NDA which included a covenant that the NDA would be governed by the substantive laws of Sweden and the disputes related thereto would be subject to the Swedish jurisdiction. In view of the reluctance on the part of Intex to subject itself to a laws and jurisdiction of

a foreign State, Ericsson proposed a modified NDA, which would be governed by the laws of Singapore and subject to the jurisdiction in that country.

13.3. On 26th March, 2013, Intex expressed its willingness to obtain a licence from Ericsson and sought commercial terms for the same. However, Ericsson expressed its inability to provide the same till an NDA was executed between the parties. Finally, an NDA was executed between Ericsson and Intex on 12th April, 2013.

13.4. Ericsson provided its commercial terms for a PLA to Intex on 23rd April, 2013 and the same were discussed between the parties at a meeting held on 23rd May, 2103, wherein Ericsson agreed to provide the revised terms. These were provided by Ericsson to Intex on 30th May, 2013. Intex made a counter-offer on 19th June, 2013, which, according to Ericsson was unfeasible.

13.5. On 23rd August, 2014, Intex filed revocation proceedings in respect of five SEPs held by Ericsson before the Intellectual Property Appellate Board (IPAB). Ericsson claims that this was not communicated to it and it continued to make efforts to resolve the impasse.

13.6. It appears that the negotiations between Ericsson and Intex continued thereafter. Admittedly, the licence offered by Ericsson to Intex included its entire portfolio of 2G and 3G SEPs. On 19th September, 2013, Ericsson explained to Intex that the licence offered by it would also include any new patent that may be granted to Ericsson in relation to the aforesaid technological standards. According to Intex, the offer made by Ericsson was unreasonable.

13.7. On 30th September, 2013, Intex filed a complaint (information) under Section 19(1)(a) of the Competition Act before the CCI, which was registered as Case no. 76 of 2013.

13.8. By an impugned order dated 16th January, 2014 passed under Section 26(1) of the Competition Act, CCI directed the DG to investigate whether Intex had violated the provisions of the Competition Act. This led Ericsson to file the Intex petition.

13.9. Thereafter, on 15th April, 2014, the Petitioner filed a patent infringement suit against Intex being CS(OS) No. 1045/2014, which was similar to the suit filed by Ericsson against Micromax (CS(OS) No. 442/2013) in all material aspects. The court has also passed an interim

order for payment of royalty at rates similar to that as directed in the case of Micromax. Intex has also not accepted the same and has preferred an appeal before a division bench of this court (FAO No. 138/2015) which is stated to be pending consideration.

Information filed by Micromax under Section 19(1)(a) of the Competition Act

14. On 24th June, 2013 Micromax filed a complaint/information under Section 19(1)(a) of the Competition Act before the CCI, *inter alia*, alleging that Ericsson had contravened the provisions of the Competition Act.

15. Micromax alleged that Ericsson had abused its dominant position by demanding an unfair royalty structure from Micromax in respect of its SEPs relating to the GSM Technology. It asserted that the royalty demanded by Ericsson was excessive and had no basis in the Indian commercial realities. Micromax contended that profit margin of Indian mobile companies was in the range of six to eight percent and if Micromax was called upon to pay royalties at the rate demanded by Ericsson, it's business would be rendered unviable.

16. It was further alleged that Ericsson had abused its position by using

the threat of interim injunction and custom seizures to coerce Micromax to accept the licence terms demanded by it.

17. Micromax also accused Ericsson of attempting to limit the development of technology relating to mobile phones in India to the prejudice of the Indian consumers by seeking excessive royalties for its technology. Micromax asserted that as a consequence of Ericsson's demand for excessive royalties, the Indian handset manufacturers were denied market access in respect of the GSM market.

18. Micromax referred to various notices issued by Ericsson in support of its claim that the conduct of Ericsson was threatening and inflexible. In particular, Micromax referred to a notice dated 29th June, 2011 whereby Ericsson had threatened to file an intimation with Securities Exchange Board of India (SEBI) in the context of Micromax's IPO (Initial Public Offer). Micromax also referred to Ericsson's notice dated 5th November, 2012, whereby, Micromax was called upon to sign the licence agreement based on the attached term sheets failing which Ericsson had threatened to pursue other available options.

Intex's Information under Section 19(1)(a) before the CCI

19. Intex also filed information under Section 19(1)(a) of the Competition Act, *inter alia*, alleging that Ericsson and its subsidiary in India, Ericsson India Pvt. Ltd., had abused its dominant position. The specific allegations made by Intex are summarized as under:-

19.1. That Ericsson was operating in India through its subsidiary Intex India Pvt. Ltd.

19.2. That Ericsson had abused its position of dominance by insisting on Intex obtaining licences without disclosing the patents that were alleged to have been infringed by Intex.

19.3. That Ericsson had insisted on execution of a NDA as a necessary pre-condition for informing Intex of the specifics of the alleged infringement. Intex further complained that Ericsson had compelled Intex to sign a NDA which contained several onerous clauses including one that compelled Intex to accept the jurisdiction and governing laws of Singapore as applicable in respect of the NDA. This, according to Intex, exposed it to potentially onerous legal costs. Further, the terms of the NDA also prevented Intex from sharing the information with the vendors, who had supplied the products to Intex on an express representation that the products

supplied by them did not infringe Intellectual Property Rights (IPRs) of any third party.

19.4. That Ericsson exerted pressure on Intex to conclude a PLA without providing complete details of the patents and on terms which were alleged to be *"grossly onerous, oppressive, unfair, unreasonable and discriminatory"*.

19.5. That the royalty rates demanded by Ericsson were exorbitant and excessive.

19.6. That the royalty rates were based at the end value of the mobile device rather than the components of the device using the patented technology. It was alleged that in this manner, Ericsson had sought to unfairly appropriate the value created by others in respect of the end-product.

19.7. That Ericsson was not only charging separate rates from SEP holding companies and non-SEP holding companies but was also offering different royalty rates and commercial terms to potential licensees from the same category. And, it was doing so with a view to make unreasonable gains. It was alleged that this had the effect of altering the conditions of

competition.

19.8. That Ericsson had failed to offer any objective basis for its royalty demands.

19.9. That Ericsson had offered its entire pool of patents as a bouquet and had refused to offer specific royalty rates in respect of each of the SEPs allegedly infringed by Intex. Thus, Ericsson was endeavoring to compel Intex to acquire licence for all its patents relating to 2G and 3G technologies without giving any choice to Intex to acquire the rights in respect of only some of the specific patents. This, according to Intex would amount to a practice of bundling and tying, which is proscribed under the Competition Act.

19.10. That the conduct of Ericsson was opaque and non-transparent and, in effect, sought to impose unfair and discriminatory terms/prices and restrict the provisions of goods and services.

The impugned orders dated 12th November, 2013 in Case No.50/2013 and 16th January, 2014 in Case No. 76/2013

20. The CCI passed the impugned order dated 12th November, 2013 under Section 26(1) of the Competition Act pursuant to an information filed

by Micromax. The CCI took note of the fact that Ericsson was a member of ETSI and held several SEPs which were recognized as standard by ETSI. The CCI also noted that as per clause 6 of ETSI IPR policy, the IPR holder/owner is required to give an irrevocable written undertaking that it would grant irrevocable licence on FRAND Terms to be applied fairly and uniformly to similarly placed parties. The CCI noted that Ericsson had declared that it had standard patents in respect of 2G, 3G and EDGE technologies, which were also accepted by the Department of Telecommunications, Ministry of Communications and Information Technology, Government of India. The 'Unified Access Service License' granted by the Government of India also required all GSM/CDMA network and equipments imported into India to meet the international standards of international telecommunication technology. In view of the fact that in case of SEPs, there is no possibility of using a non-infringing technology, CCI formed a *prima facie* view that Ericsson enjoyed complete dominance over its present and prospective licensees in the relevant product market.

21. CCI further concluded that the information provided by Micromax indicated that the practices adopted by Ericsson were discriminatory and contrary to FRAND terms. In particular, CCI noted that the royalty rates

charged by Ericsson had no link to the patented product and that was contrary to what was expected of a patentee holding SEPs; CCI was of the *prima facie* view that royalties linked with the cost of the end product were contrary to the FRAND obligations.

22. Insofar as the Ericsson's suit against Micromax was concerned, CCI held that the same was in respect of infringement of Ericsson's IPR rights and the pendency of the civil suit did not prevent the CCI from proceeding under the Competition Act and consequently, directed the DG to investigate any violation of the provisions of the Competition Act.

23. The impugned order dated 16th January, 2014 passed pursuant to the information filed by Intex is more or less similar to the impugned order dated 12th November, 2013 in Case No.50/2013. CCI specifically noted that it had already formed a *prima facie* opinion under Section 26(1) of the Competition Act on the information submitted by Micromax and had directed the DG to conduct an investigation. CCI was of the view that Intex's Case (Case No. 76/2013) be also clubbed with Case No. 50/2013 for causing an investigation under proviso to Section 26(1) of the Competition Act. Accordingly, the DG was also directed to investigate the matter by looking into the allegations made by Intex within the specified period.

Submissions on behalf of Ericsson

24. Mr C.S. Vaidyanathan, learned Senior Advocate appearing for Ericsson in Intex Petition (W.P (C) 1006 of 2014) contended that whereas the Patents Act is a special act and contains comprehensive provisions for addressing all the matters including protecting the interest of consumers and general public, the Competition Act has been enacted as a general law to promote and sustain competition in the market and to prevent practices having an adverse effect on competition. He referred to various provisions of the Patents Act - in particular Sections 83-90, 92 & 92A - to emphasize that the Patents Act contains provisions to adequately redress the grievances of any person in respect of non-availability of rights to use a patent on reasonable terms. He contended that the Controller General of Patents, Designs and Trade Marks (hereafter 'Controller' or 'Controller of Patents') and/or a Civil Court were vested with the function and the power to remedy any grievance relating to a patentee's demand for excessive or unreasonable royalty by grant of compulsory licence and the CCI, on the other hand, had no jurisdiction to grant such relief. He argued that the Patents Act being a special act also occupied the field in relation to anti-competitive practices by a patentee in relation to patents and, thus, the same

would be outside the scope of the Competition Act.

25. Mr Vaidyanathan next contended that Section 4 of the Act was not applicable in respect of licensing of patents for the following reasons:-

(a) That a patentee insofar as grant of patent license is concerned, is not an 'enterprise' within the meaning of Section 2(h) of the Act.

(b) That the patentee insofar as licensing of patent is concerned, is not engaged in purchase or sale of goods or services.

(c) A patents are not a goods or services and a licence for a patent is also not goods or services. Thus, licensing of patent would also not fall within the scope of sale of goods or sale of services.

26. Mr Vaidyanathan then referred to various legislative amendments made in laws applicable in United Kingdom and in India. He contended that various provisions to address the anti-competitive practices were incorporated in the antitrust laws applicable in United Kingdom. However, in India, similar provisions were introduced in the Patents Act and not in the Competition Act. On the strength of the aforesaid legislative amendments, he contended that the intention of the Parliament was that the issues regarding abuse of dominance by a patentee in respect of patent licensing be addressed under the Patents Act and not under the Competition

Act.

27. Mr Vaidyanathan further contended that that in any event CCI was not competent to effectively redress the grievance voiced by Intex as CCI would have no power to direct grant of licence for a patent but could only pass a cease and desist order or levy penalty; neither of which were effective remedies. He then referred to Section 60 & 61 of the Competition Act which indicated that no Civil Court would have the jurisdiction to entertain any suit or proceedings in respect of which CCI was empowered to determine under the Competition Act. On the strength of the aforesaid provisions, he contended that the jurisdiction of the Civil Court was not ousted in respect of various matters relating to patent and in particular, grant of injunction under Section 48 of the Patents Act; determination of fair terms for licensing of a patent; and determination of damages. He contended that since the principal grievance of Intex related to non-grant of licence and/or Ericsson's threat to enforce its right as a patentee, the same were expressly covered within the scope of the Patents Act. This, in turn, implied that CCI would have no jurisdiction to determine those issues as by virtue of Section 61 of the Competition Act, the jurisdiction of Civil Courts was ousted in respect of matters falling within the domain of CCI under the

Competition Act.

28. He next submitted that Ericsson had already filed a suit for enforcement of its rights and referred to the interim orders passed in the suit by this court for payment of royalty. He also referred to the issues framed by the High Court in Civil Suit No. 442/2013 and the interim orders passed therein, which clearly indicated that the Court was in seisen of the dispute regarding fixing of licence fee and, therefore, any grievance in respect of the rates of royalty or terms of licence was squarely covered under the proceedings before the High Court. He submitted that in the circumstances, CCI would have no jurisdiction to entertain any proceedings in regard to the very same issues that were under consideration of this Court. He further submitted that the exercise of rights by Ericsson under the Patents Act could by no stretch be considered an abuse of dominance so as to warrant any investigation under the Competition Act.

29. Mr T.R. Andhyarujina, Learned Senior Advocate, appearing on behalf of Ericsson in Micromax Petition (W.P.(C) No. 464 of 2014) also contended that the Patents Act was a special statute which allowed monopoly by granting a patent and at the same time also contained provisions for controlling the abuse of such monopoly. He then referred to

Sections 27 and 28 of the Competition Act, which provides for the relief that can be granted in cases where it is found that an enterprise has abused its dominant position, and submitted that none of these provisions would apply for grant of a licence on reasonable terms; thus, the grievance raised by Micromax could not be addressed under the Competition Act. Mr T.R. Andhyarujina referred to the complaint filed by Micromax and drew the attention of this Court to para 5.25 of the said complaint whereby Micromax had specifically contended that the licence terms must be 'reasonably affordable' under Section 84(1)(b) of the Patents Act. He then drew the attention of this Court to the reliefs sought by Micromax which included referring the issue to the Controller General of Patents to fix reasonable royalty rates for patents applicable to Indian handset manufacturers. He contended that the expression 'reasonably affordable' would require the patentee to be sensitive and responsible to the commercial realities of the market and the issues sought to be agitated by Micromax as well as the reliefs sought fell squarely within the scope of the Patents Act and were, thus, outside the jurisdiction of CCI. He also contended that the High Court has the jurisdiction to decide all issues pertaining to patents, which included, the issue of grant or non-grant of

injunctions to prevent infringement of a patent; the terms on which such injunctions could be granted, if any; enforcement of other remedies such as customs inspections etc.; and issues regarding validity and fixing of reasonable fees and damages. He submitted that the Competition Act did not provide any remedy to prevent anti-competitive practices in relation to patent rights and, therefore, the only recourse for redressal of grievances regarding demand of excessive licence fee would be under the Patents Act and not under the Competition Act.

30. He next contended that the test of abuse of dominant position as set out under Section 4 of the Competition Act could not be applied to exercise of rights under the Patents Act which conferred a monopoly to a patentee for exploitation of the patented technology and prevented competition for a limited period of 20 years.

31. He referred to the decision of the Supreme Court in ***General Manager Telecom v. M. Krishnan & Anr.***: **JT (2009) 11 SC 690** and ***Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council*** : **(1995) 2 SCC 479** in support of his contention that the Patents Act was a specific law and a complainant could not resort to provisions of the Competition Act for any alleged abuse of dominant position by a

patentee.

32. Mr T.R. Andhyarujina referred to Section 60 of the Competition Act which provided that the Act would apply notwithstanding anything inconsistent contained in any other law. On the strength of the aforesaid Section, he submitted that since the Competition Act did not provide for grant of a compulsory licence or for determination of a royalty, there was no inconsistency between the Competition Act and the Patents Act. He referred to the decision of the Supreme Court in ***Basti Sugar Mills Co. Ltd. v. State of U.P. & Anr.***: **AIR (1979) SC 262** in support of his contention that '*inconsistency would mean mutual repugnancy where acceptance of one would imply abrogation or abundance of the other'*. He next contended that since CCI had no jurisdiction to determine the reasonableness of the royalties in respect of the patented technologies, it would not have the jurisdiction to entertain any complaint in that regard particularly when a suit in regard to the same subject matter was pending before this Court.

33. Lastly, Mr T.R. Andhyarujina contended that the impugned order dated 12th November, 2013 passed by CCI was also invalid inasmuch as it made observations which were adjudicatory and determinative in nature even prior to the conduct of investigation by the DG. He submitted that the

order passed by CCI had been modified after it was uploaded on the website, which according to him also indicated that the impugned order was arbitrary.

34. Ms Singh, learned Senior Advocate appearing for Ericsson supplemented the submissions made by Mr C.S. Vaidyanathan and Mr T.R. Andhyarujina. She submitted that the abuse of dominance and anti-competitive behavior as alleged by Micromax and Intex related solely to the royalty sought by Ericsson for use of its patented technology. According to her, this issue was outside the jurisdiction of CCI as the Patents Act provided an adequate mechanism to address all issues/reliefs. She further submitted that the order passed by CCI was without application of mind. CCI had failed to consider any of the contentions regarding the challenge to its jurisdiction while passing the impugned orders. She further submitted that the relevant market described by CCI in the impugned order dated 12th November, 2013 as initially uploaded on the website indicated the relevant market to be "*market of GSM and CDMA technology in India*", This was palpably erroneous and also clearly indicated that the CCI had not understood the subject of the SEPs for which royalty was claimed by Ericsson.

35. Ms Singh further contended that the allegations made by Micromax and Intex did not by any stretch indicate abuse of dominance as Ericsson had only exercised its statutory right and therefore, the orders passed by CCI were wholly without jurisdiction.

Submissions on behalf CCI

36. Mr Haksar, learned Senior Advocate, appearing for CCI submitted that the impugned orders were not amenable to judicial review under Article 226 of the Constitution of India as the said orders did not amount to a final expression of opinion on merit. He drew the attention of this Court to paragraph 19 and 20 of the impugned order dated 16th January, 2014 which expressly recorded the above and further directed the DG to conduct the investigation uninfluenced by any observations made in the impugned orders. He strongly relied on the decision of the Supreme Court in ***Competition Commission of India v. Steel Authority of India Ltd. & Anr.***: **(2010) 10 SCC 744** in support of his contention. In particular, he drew the attention of this Court to paragraph 37 & 38 of the said decision wherein the Supreme Court had held an order under Section 26(1) of the Competition Act to be an administrative direction akin to an inter-departmental communication which did not involve entering into an

adjudicatory process. The Supreme Court had also observed that an order under Section 26(1) of the Competition Act did not entail any civil consequences in light of the strict confidentiality required to be maintained by CCI in terms of Section 57 of the Competition Act and Regulation 35 of the Competition Commission of India (General) Regulations, 2009.

37. Mr Haksar next contended that the function of CCI is inquisitorial and regulatory. He referred to the decision of the Supreme Court in ***M. Krishna Swami v. Union of India & Ors.***: **(1992) 4 SCC 605** for the meaning of the expression "inquisitorial". He next contended that CCI was not required to give any notice or hear the parties before passing an order under Section 26(1) of the Competition Act as an order under Section 26(1) only required formation of a *prima facie* opinion and the Competition Act provided sufficient safeguards by affording the parties an opportunity to be heard at a subsequent stage. He next referred to the decision of the Allahabad High Court in ***Namrata Marketing Pvt. Ltd. v. Competition Commission of India***: **AIR 2014 (All.) 11,** wherein the Court had, following the decision of the Supreme Court in ***Steel Authority of India*** (*supra*), held that an order under Section 26(1) of the Competition Act was in the nature of a show cause notice against which a writ petition was not

maintainable. Mr Haksar then referred to the decision of Bombay High Court in ***Aamir Khan Production Pvt. Ltd. v. Union of India***: **2011(1) Bom. C.R. 802** in support of his contention that CCI had the power to determine whether a preliminary state of facts exists on which further exercise of jurisdiction depends.

38. Countering the arguments that CCI did not have the jurisdiction to investigate issues regarding payment of royalty in respect of patents registered under the Patents Act or in respect of any allegation relating thereto, Mr Haksar submitted that the provisions of the Competition Act were in addition to and not in derogation of any other law. He further referred to Section 60 of the Competition Act which expressly provided the provisions of the Competition Act to have effect notwithstanding anything inconsistent contained in any other law. On the strength of the aforesaid provisions, he contended that the CCI was not concerned with any other aspect regarding grant or exercise of any right pertaining to a patent except to ensure the compliance with Section 3 and 4 of the Competition Act. He referred to the decision of this Court in the ***Union of India v. Competition Commission of India & Anr.***: **AIR 2012 (Del.) 66** in support of its contention that the functions and powers of CCI were for addressing

specific contraventions as mentioned under the Competition Act. He then referred to the decision of the Supreme Court in ***M/s Fair Air Engineers Pvt. Ltd. v. N.K. Modi*** **: (1996) 6 SCC 385** wherein the Supreme Court had interpreted the provision similar to Section 62 of the Competition Act in the context of the Consumer Protection Act, 1986 and held that recourse to the provisions of the said Act were available even though an arbitration agreement existed between the parties thereto.

39. Mr Haksar further submitted that there was no conflict between the Competition Act and the Patents Act as both the said legislations were independent in their respective spheres. He referred to the decision of the Supreme Court in ***Gujarat Urja Vikash Nigam Ltd v. Essar Power Ltd*****: (2008) 4 SCC 755** in support of its contention that both, the Competition Act as well as the Patents Act must be interpreted harmoniously and it is only in cases where there is irreconcilable inconsistency that the question of which act or provision had an overriding effect would have to be considered.

40. Mr Haksar controverted the submission advanced on behalf of Ericsson that it was not an enterprise within the meaning of Section 2(h) of the Competition Act. He submitted that the said definition was wide

enough to include any person engaged in any activity relating to production and supply of articles or goods. He stressed on the expression 'relating to' and submitted that Ericsson's SEPs had a co-relation with production, distribution and control of articles or goods. He contended that it was not necessary that an enterprise be directly engaged in production of goods and an enterprise engaged in controlling the technology for production of goods would also fall within the scope of Section 2(h) of the Competition Act.

Submissions on behalf of Intex

41. Mr Arun Kathpalia, learned Advocate appearing for Intex, at the outset, challenged the maintainability of the present petition on the strength of the decision of the Supreme Court in ***Steel Authority of India*** (*supra*). He submitted that a High Court would exercise its supervisory jurisdiction in respect of orders passed by the Tribunals only where an order suffered from a serious error of law manifest on the face of the record. He further submitted that a Tribunal would also have the jurisdiction to determine questions regarding its own jurisdiction. If such questions involved contentious issues and if the complaint was not self evident and required long drawn arguments, it could not be said to be an error apparent on the face of the record and a writ of certiorari would not ordinarily be issued. He

contended that in the present case, none of the conditions for issuing a writ of certiorari existed as there was no lack of inherent jurisdiction with the CCI to issue the impugned orders.

42. He next contended that the question regarding the jurisdiction of CCI would have to be considered in the light of the information disclosed by Intex. He then referred to the information filed by Intex under Section 19(1)(a) of the Competition Act and submitted that the same clearly alleged that Ericsson was placed in a position of dominance by virtue of being a patentee in respect of SEPs. The complaint further disclosed that (a) Ericsson had abused its position of dominance as Ericsson had attempted to bundle SEPs held by Ericsson which were not required by Intex; (b) royalty demanded was unfair, unreasonable and discriminatory; (c) necessary information was sought to be obfuscated; and (d) that royalty was demanded on the price of the end product and not on the basis of the value of the component that used or housed the relevant SEP. It is contended that the aforesaid allegations *prima facie* disclosed violation of Section 4 of the Competition Act and, therefore, fell within the exclusive jurisdiction of CCI.

43. Mr Kathpalia also countered the submissions made on behalf of

Ericsson that the Patents Act was a special act and the Competition Act was a general enactment and, therefore, the provisions of the Patents Act would prevail in case of any repugnancy between the two enactments. He submitted that this contention was erroneous as (a) Section 60 of the Competition Act expressly stated that the Act would have effect notwithstanding anything inconsistent therewith in other laws; (b) there was nothing in the Patents Act which would either impliedly or expressly oust the jurisdiction of CCI; (c) the Competition Act was a later enactment; and (d) the scope and substance of the Competition Act and the Patents Act was different. He then referred to the decision of the Supreme Court in ***Union of India v. G.M. Kokil***: **AIR 1984 SC 1022** in support of his contention that a *non-obstante* clause was a well recognized device for giving the overriding effect to certain legislative provisions.

44. Mr Kathpalia also drew the attention of this Court to Section 84(6) and Section 90(1)(ix) of the Patents Act and submitted that the said provisions clearly indicated that the CCI would have the jurisdiction in respect of anti-competitive practices or abuse of dominance by patentees.

45. Insofar as the contention that CCI lacked the technical competence to examine issues relating to patents, Mr Kathpalia referred to Section 21A of

the Competition Act and on the strength of the provisions, argued that in cases where CCI required any inputs from the Controller of Patents, it could always make a reference to the Controller of Patents and seek its opinion.

46. Mr Kathpalia next submitted that the reliance placed by Ericsson on the provisions of Section 3(5) of the Competition Act was misplaced as the complaint made by Intex did not relate to anti-competitive agreements under Section 3 of the Competition Act but alleged abuse of dominance which fell within the scope of Section 4 of the Competition Act. He also contended that the plain language of Section 3(5) of the Competition Act could also not be read to mean that jurisdiction of CCI was ousted.

47. Mr Kathpalia referred to the report of February 2007 of the 'Working Group on Competition Law, Planning Commission, Government of India' which indicated that while exclusions from the applicability of Section 3 had been provided in certain cases, CCI would be empowered to look into the reasonableness of the restraints while exercising Intellectual Property Rights. Mr Kathpalia also controverted the contention that the SEPs were not 'goods'. He submitted that intellectual property rights also fell within the expression 'goods' under the Sales of Goods Act and referred to the

decision in the case of ***Tata Consultancy Services v. State of AP***: **AIR 2005 SC 371** in support of his contention.

48. Mr Salman Khurshid, learned Senior Advocate appearing on behalf of Micromax also contested the submissions made on behalf of Ericsson on by advancing arguments similar to those advanced by Mr. Haksar and Mr. Kathpalia.

49. Mr Aditya Narain, Amicus Curiae, submitted that the subject matter of disputes related to negotiation of licences for SEPs. Thus, CCI, at the threshold, had to consider whether Ericsson could be considered as an 'enterprise' within the meaning of Section 2(h) of the Competition Act; but, CCI had failed to consider the aforesaid issue while passing the order under Section 26(1) of the Competition Act. According to him, the expression 'any activity' as used in Section 2(h) of the Competition Act would not include negotiation of patent licences and, therefore, Ericsson could not be considered as an enterprise for the purposes of Section 4 of the Competition Act. He further submitted that the impugned orders also did not indicate whether Micromax and/or Intex could be considered as consumers within the meaning of Section 2(f) of the Competition Act and; apparently, CCI had also failed to consider the same.

50. Mr Narain further submitted that in the present case, CCI had issued notice to Ericsson and had further taken the written submissions of Ericsson on record. However, CCI had failed to address the issue as to its jurisdiction; thus rendering the permission granted to Ericsson to intervene and file written submissions illusory. He contended that it was necessary for the CCI to have considered the challenge laid by Ericsson to its jurisdiction while passing the impugned orders.

Submissions made on behalf of Ericsson in Rejoinder

51. In rejoinder, Mr C.S. Vaidyanathan and Ms Pratibha M. Singh, learned Senior Advocates submitted that the jurisdiction of the High Court under Article 226 of the Constitution of India could not be curtailed and, therefore, any order, whether administrative or judicial, passed by any authority without jurisdiction would be amenable to the judicial review under Article 226/227 of the Constitution of India. They relied upon the decision of the Supreme Court in ***S.P. Sampath Kumar & Ors. v. Union of India & Ors.***:**(1987) 1 SCC 124** and ***L. Chandra Kumar v. Union of India and Ors.***: (**1997**) **3 SCC 261**. It was further submitted that it was the exclusive function of the Supreme Court and High Court to interpret statutes to determine the limits of jurisdiction of any Tribunal or statutory

authority.

52. Ms Pratibha M. Singh and Mr C.S. Vaidyanathan reiterated their submission that the impugned order passed by the CCI was without jurisdiction. It was next argued that the orders passed by CCI though termed as, *prima facie*, had a determinative flavor and were prejudicial to Ericsson. It was submitted that the impugned orders were being used not only in India but also in litigations in other jurisdictions. The impugned orders had been widely published, causing enormous damage to the goodwill and reputation of Ericsson. It was contended that various other licensees were also seeking to avoid payment of royalty on the basis of the proceedings commenced by CCI. Ms Singh then referred to various observations and findings made in the impugned orders, which she contended were *ex-facie* incorrect and baseless. Ms Singh thereafter referred to the two impugned orders and contended that the relevant market had been defined differently. She pointed out that the order passed in the Micromax's case, which was first uploaded on the website on 27th November, 2013, defined relevant market as *"market of GSM and CDMA technology in India"*. This was modified and the certified copy subsequently received described the relevant market to be *"the SEPs in*

GSM compliant mobile communication devices in India". In the case of Intex, the impugned order dated 16th January 2014, described the relevant market as "market of SEPs for 2G, 3G and 4G technologies in the GSMs Standard compliant mobile communication devices". According to Ms. Singh, these varying description indicated CCI's complete lack of understanding of the subject prior to directing investigation against Ericsson.

53. Ms Singh also sought to dispute Mr Kathpalia's interpretation of proviso of clause (iv) to Section 86 of the Patents Act. She submitted that a bare reading of the said proviso would indicate that the Controller of Patents would have the power to award a compulsory licence in case where the patentee had indulged in an anti-competitive practice without insisting on the condition of the applicant making reasonable attempts to obtain a licence from the patentee. Ms Singh thereafter listed out various alleged acts, which were alleged as an abuse of Ericsson's dominant position and reiterated that the remedies for the same were available under the Patents Act.

54. Ms Singh, emphatically, reiterated her contention that none of the allegations made by Micromax/Intex could remotely be considered as abuse

of dominance as Ericsson was only exercising its statutory rights. She urged that filing suits/or warning of legal action against infringement could not be construed as abuse of dominance.

55. Insofar as the contention that the Controller of Patents did not have the power to grant a compulsory licence prior to the expiry for a period of three years from the grant of patent, Ms Singh contended that such condition was not absolute and in certain cases - such as indicated in Section 92 of the Patents Act - compulsory licence could be granted even prior to the expiry of the period of three years. She further contended that the period of three years had been provided by the legislature to enable a patentee to work its patent and such legislative intent could not be defeated by resorting to the provisions of the Competition Act.

Whether the petition is maintainable – Scope of judicial review

56. First and foremost, it is necessary to examine the challenge to the maintainability of the present petition and the scope of judicial review of orders passed under Section 26(1) of the Competition Act.

57. The Supreme Court in the case of ***Steel Authority of India*** (*supra*) had examined the scheme of the Competition Act and had concluded that a

direction under Section 26(1) of the said Act to conduct an investigation is an administrative direction issued by CCI to one of its own wings without entering upon any adjudicatory process. The Court reasoned that such direction did not determine the rights and obligations of any party, and therefore, no appeal against the said direction was provided under the Competition Act. The court was of the view that such a direction is akin to departmental proceedings which did not entail any civil consequences for any person. Further, the Court was of the view that since the procedure did not contemplate any adjudicatory function at that stage, CCI was not expected to give any notice to either the informant or the affected parties or hear them at length before forming its opinion. The Court held that the function at the stage of issuing a direction for investigation is of a preliminary nature and did not at that stage condemn any person so as to warrant the application of the rule of *audi alteram partem.*

58. In view of the decision of the Supreme Court in ***Steel Authority of India Limited*** (*supra*), the nature of a direction issued by CCI to the DG to conduct an investigation, is beyond the pail of controversy. The question whether a direction passed under Section 26(1) of the Competition Act is appealable is also no longer *res integra*. However, the decision in the case

of ***Steel Authority of India Limited*** *(supra)* cannot be read as an authority for the proposition that a direction passed under Section 26(1) of the Competition Act is outside the scope of judicial scrutiny under Article 226 of the Constitution of India.

59. CCI is a body established under Section 7 of the Competition Act and performs the functions as mandated under Chapter IV of the Competition Act. CCI being a creature of the statute has to perform its functions and exercise its powers within the confines of the statute. Clearly, any function performed or any order or direction passed by CCI must be in accordance with the provisions of the Competition Act. It also follows that any direction or order issued by CCI that is not in accordance with the provisions of the Competition Act or is outside the scope of its function and authority as specifically enacted, would be unsustainable.

60. I have reservations as to merits of the contention that a direction under Section 26(1) of the Competition Act to conduct an investigation does not prejudice the party being investigated in any manner, as it does not amount to a final determination of the allegations made. Indisputably, a direction to conduct an investigation may not involve an adjudicatory process and does not foreclose or in any manner affect the defence that is

available to the party being investigated. But, nonetheless, it does have the effect of subjecting a party to an inquisitorial process at the hands of DG. The DG is obliged to carry out the directions of CCI and conduct an investigation into any contravention regarding provisions of the Competition Act. By virtue of Section 42(2) of Competition the Act, the DG has the same powers as conferred upon the CCI under Section 36(2) of the Act. Section 36(2) of the Competition Act expressly enacts that CCI will have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 while trying a suit, in respect of matters of, (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commission for the examination of witnesses or documents; and (e) requisitioning any public record or document or copy of such record or document from any office. It is apparent that such powers are extensive.

61. Section 43 of the Competition Act also provides for imposition of penalty upon any person who fails to comply with the directions issued by the DG under Section 41(2) of the Competition Act. Any person subjected to an investigation would also have to endure the attendant inconvenience

and, depending on the extent of investigation, would probably have to commit significant resources for complying with the demands for supply of information as well as for production of evidence including examination of persons employed or associated with the enterprise being investigated.

62. By virtue of Section 41(3) of the Competition Act, the provisions of Sections 240 and 240A of the Companies Act, 1956 would also apply to an investigation made by the DG, or any person investigating under his authority, as they apply to an Inspector appointed under the Companies Act, 1956. Section 240 of the Companies Act, 1956 enjoins all officers and other employees and agents of a company being investigated (a) to preserve and produce to an inspector, all books and papers of, or relating to, the company or as the case may be relating to the other body corporate, which are in their custody or power; and (b) otherwise give to the inspector all assistance in connection with the investigation which they are reasonably able to give. By virtue of Sub-section (1B) of Section 240 of the Companies Act, 1956, the Inspector also has the power to retain any book and paper produced for a period of six months.

63. Section 240A empowers an Inspector to apply for an order of seizure of books and papers relating to a company or managing director or manager

of such company which he has reasonable grounds to believe would be destroyed, mutated, altered falsified or secreted. Inspector has the power to retain the books and papers seized till the conclusion of the investigation. It is also relevant to refer to Section 2(8) of the Companies Act, 1956 which provides an expansive definition for the expression 'book and paper' or 'book or paper'. In terms of the said definition 'book or paper' includes "acts, deeds, voucher, writings and documents". Thus, the DG or any person acting under his authority would have an unmitigated access to any document available with the enterprise being investigated. Obviously, such documents may also include confidential and sensitive information and even though the DG may keep the same as confidential, it can hardly be disputed that an enterprise furnishing sensitive information to DG would run the risk of the information being leaked or disclosed. It also cannot be overlooked that the fact that an enterprise is being investigated in respect of allegations of its anti-competitive conduct may also result in loss of reputation and goodwill.

64. In the facts of the present case, the Ericsson has produced communications from the DG which require Ericsson to produce *"(i) certified copies of all email communication during the period January 2011*

to March 2013 by the executives or Ericsson who are or have been related to the discussion/negotiation with Indian companies. The executives include Sh. Harish Sharma, Mr. Max Olofsson, Mr. Alex Fasell, Mr. Chris Houghton and other senior executives from Ericsson global". Ericsson had also placed letter dated 15th June, 2015 addressed to the Additional Director General, CCI which indicates that the Ericsson had received four probe notices (till 15th June, 2015) and was called upon to submit the detailed facts regarding Ownership and Shareholding pattern of Ericsson; copies of audited statements of accounts; details of patents relating to mobile telecom standardisation held by Ericsson; claim-chart mapping with Standards, list of SEPs of Ericsson, basis for charging licence fees as percentage of final product, illustrative rate charged to similarly placed parties; cost incurred etc. Further, certain senior employees of Ericsson have also been summoned to record their statement on oath before the DG.

65. The submission made on behalf of Ericsson that impugned orders were being used in litigations by various parties not only in India but also in other jurisdictions was not controverted. Mr Haksar also did not controvert Ms. Singh's contention that CCI had published the impugned orders in official newsletters and its officers had further publically spoken about such

orders in several domestic and international seminars and the same was liable to adversely affect Ericsson's reputation.

66. In the aforesaid circumstances, it could hardly be disputed that the commencement of investigation against Ericsson would certainly prejudice Ericsson. In the given facts, I am unable to accept that Ericsson's challenge to the impugned orders should be rejected at this stage solely on the ground that it does not affect Ericsson's right and, therefore, Ericsson cannot agitate any grievance in that regard.

67. A Division Bench of this Court in the case of ***Google Inc. & Ors. v. Competition Commission of India & Anr.***: **2015 (150) DRJ 192** had also examined the sweeping powers of DG under the Competition Act and concluded that the investigation by a DG ordered by CCI stand on a different pedestal from a show cause notice or from an investigation/enquiry conducted pursuant to an FIR.

68. In the aforesaid view, it is next to be examined as to whether the impugned orders passed under Section 26(1) of the Competition Act can be subjected to judicial review under Article 226 of the Constitution of India. Indisputably, scope of Article 226 of the Constitution of India is very wide.

69. In ***Dwarka Nath v. Income Tax Officer***: **1965 57 ITR 349 (SC)** had explained the scope of Article 226 of the Constitution of India as under:-

> "This article is couched in comprehensive phraseology and it ex-facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England ; but the use of the expression 'nature'' for the said expression does not equate the writs that can be issued in India with those in England, but only draws analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to set the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

70. It is also well settled that although, the High Court does not sit as an Appellate Court to correct every error but in cases where an authority has acted outside the scope of its jurisdiction, the High Court would interfere under exercise of its jurisdiction under Article 226 of the Constitution of India. It is well recognised that the High Court would interfere in orders

passed by any authority or subordinate court where *"(1) there is an error manifest and apparent on the fact of the proceedings such as when it is based on clear misreading or utter disregard of the provisions of law and (2) a grave injustice or gross failure of justice has occasioned thereby."* (See: ***State of Andhra Pradesh v. P.V. Hanumantha Rao (D) thr. and Anr.***: **(2003) 10 SCC 121**).

71. In ***Reliance Airport Developers Pvt. Ltd v. Airport Authority of India and Ors*****: (2006) 10 SCC 1**, the Supreme Court referring to an earlier decision in ***State of UP and Ors v. Renusagar Power Co. and Ors*****: AIR 1988 SC 1737**, reiterated the aforesaid view and observed that *"It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in exercise of such power or the exercise of power is manifestly arbitrary".*

72. The Supreme Court in the case of ***Chandigarh Administration and Anr. Etc. v. Manpreet Singh and Ors.***: **(1992) 1 SCC 380** had explained that although Article 226 of the Constitution of India does not contain any restrictive words, the courts have evolved certain self-constraints over the years. The Court further observed that:-

> "21. While this is not the place to delve into or detail the self-constraints to be observed by the Courts while exercising the jurisdiction under Article 226, one of them, which is relevant herein, is beyond dispute viz., while acting under Article 226, the High Court does not sit and/or act as an Appellate Authority over the orders/actions of the Subordinate Authorities/Tribunals. Its' jurisdiction is supervisory in nature. One of the main objectives of this jurisdiction is to keep the government and several other authorities and Tribunals within the bounds of their respective jurisdiction. The High Court must ensure that while performing this function it does not overstep the well-recognized bounds of its own jurisdiction."

73. In ***State of Tamilnadu v. State of Karnataka***: **1991 Supplement 1 SCC 240**, the Supreme Court was called upon to consider controversy whether in view of Section 11 of the Interstate Water Disputes Act, 1956, it had the jurisdiction to entertain an appeal against an order passed by the Cauvery Water Dispute Tribunal constituted under that Act. Section 11 of said Act expressly provided that *"notwithstanding anything contained in any other law, neither the Supreme Court nor any other Court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act"*. In the aforesaid context, the Supreme Court held as under:-

> "The Tribunal is a statutory authority constituted under an Act made by the Parliament and this Court has jurisdiction

> to decide the judiciary i.e. the courts alone that have the function of determining authoritatively the meaning of a statutory enactment and to lay down the frontiers of jurisdiction of any body or Tribunal constituted under the statute."

74. Having stated the above, it is also necessary to state that the scope of judicial review of the directions issued under Section 26(1) of the Competition Act is limited and does not extend to examining the merits of the allegations.

75. As stated hereinbefore, this Court cannot sit as an Appellate Court in exercise of its powers under Article 226 of the Constitution of India. The Supreme Court in the case of ***Veerappa Pillai v. Raman & Raman Ltd. And Others***: **(1952) 1 SCR 583** had observed that *"However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."*

76. In ***Tata Cellular vs Union of India***: **AIR 1996 SC 11**, the Supreme Court held that:

"The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,
2. Committed an error of law,
3. Committed a breach of the rules of natural justice,
4. Reached a decision which no reasonable tribunal would have reached or,
5. Abused its powers."

77. The question, whether in the given facts the CCI has the jurisdiction to pass directions under Section 26(1) of the Competition Act for causing an investigation and whether such directions are in terms of the statute would clearly fall within the scope of judicial review under Article 226 of the Constitution of India.

78. In terms of Section 26(1) of the Competition Act, a direction to cause an investigation can be made by CCI only if it is of the opinion that there exists a *prima facie* case. Formation of such opinion is *sine qua non* for exercise of any jurisdiction under Section 26(1) of the Competition Act. Thus, in cases where the commission has not formed such an opinion or the opinion so formed is *ex- facie* perverse in the sense that no reasonable person could possibly form such an opinion on the basis of the allegations made, any directions issued under Section 26(1) of the Competition Act

would be without jurisdiction and would be liable to be set aside.

79. Any direction under Section 26(1) of the Competition Act could also be challenged on the ground - as is sought to be contended in the present case - that the subject matter is outside the pail of the Competition Act. However, it must be added that a challenge to the jurisdiction of the CCI to pass such directions under Section 26(1) of the Competition Act must be examined on a demurrer; that is, the information received under Section 19 must be considered as correct; any dispute as to the correctness or the merits of the allegations - unless the falsity of the allegations is writ large and *ex facie* apparent from the record - cannot be entertained in proceedings under Article 226 of the Constitution of India. Equally, in cases where the direction passed is found to be *malafide* or capricious, interference by this Court under Article 226 of the Constitution of India would be warranted.

80. In the present case, Ericsson has contested the jurisdiction of CCI to entertain any complaint regarding the rates of royalty in respect of SEPs as according to Ericsson, the same is outside the scope of the Competition Act. Since this issue relates to the jurisdiction of CCI, it would clearly fall within the limited scope of judicial review as available in respect of directions passed by the CCI under Section 26(1) of the Competition Act.

In addition, Ericsson has also contested the impugned directions as being perverse and without application of mind. It is trite law that no authority has the jurisdiction to pass perverse orders and, therefore, this challenge would also fall within the limited scope of judicial review.

81. As I see it, the decision of Supreme Court in ***Steel Authority of India Limited*** *(supra)* must be read in reference to its context. In that case, the Supreme Court was considering the question whether an order passed under Section 26(1) of the Competition Act directing investigation was an appealable order. The Supreme Court explained the scheme of the Competition Act and held that a direction to the DG to investigate was not appealable at that stage. The party concerned would have to await the final determination - that is, an order appealable under Section 53A(a) of the Act - before filing an appeal before the Competition Appellate Tribunal (COMPAT). However, if the CCI refused to direct an investigation, an appeal would lie against the said order. It is, thus, amply clear that Ericsson does have an alternative remedy of preferring an appeal but that remedy would be available only on a final determination. However, the fact that an alternate remedy by way of appeal is available to a party would not denude the jurisdiction of this Court under Article 226 of the Constitution of India.

There are several instances - particularly when the jurisdiction of an authority or a Tribunal to pass any directions or orders is challenged - where Courts have exercised their jurisdiction under Article 226 of the Constitution of India despite availability of an alternate remedy. In ***The State of Uttar Pradesh v. Mohammad Nooh*: AIR 1958 SC 86**, the Supreme Court referred to various authorities and held that:

> "If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned."

82. In view of the aforesaid, the fact that Ericsson had an alternative remedy, albeit at a later stage, would not in any manner disable this court from entertaining the present petition.

83. In view of the above, the contention that the present petition is not maintainable, is without merit. However, the validity of the impugned orders can be examined only from the perspective of: (a) whether

allegations made by Intex and Micromax could form the subject matter of proceedings under the Competition Act; and (b) whether the impugned orders are perverse?

Jurisdiction of CCI to entertain the complaints of Micromax and Intex under the Competition Act, 2002

84. The central challenge in these petitions is to the jurisdiction of the CCI to entertain complaints filed by Micromax and Intex in relation to what is described as Ericsson's exercise of rights granted under the Patents Act. It is Ericsson's case that by virtue of being granted the subject patents under Section 48 of the Competition Act, it has the exclusive right to prevent third parties from making, using, offering for sale, selling or importing the products using Ericsson's patents without its consent. Ericsson asserts that the patents in question are SEPs and in accordance with its obligations to the SSO's it has offered licences for its SEPs to Intex and Micromax on FRAND terms. It is urged that having so complied with its commitments to SSO, Ericsson was well within its rights to seek injunctions restraining Ericsson and Intex from infringing its SEPs.

85. It is further claimed that the allegations made could not possibly

constitute abuse or misuse of dominance and, therefore, the impugned orders passed by the CCI are wholly without jurisdiction.

86. It is also Ericsson's case that the Patents Act not only provides for the rights of a patentee but also the framework within which such rights may be exercised as well as provisions to remedy any abuse of the rights granted. According to Ericsson, the substratum of the complaints in question are to be addressed under the provisions of the Patents Act and not under the Competition Act. Essentially, Ericsson asserts that since the Patents Act is a special Act and provides for redressal of the grievances agitated by Intex and Micromax, a recourse to the Competition Act would be barred. Micromax and Intex on the other hand assert that the provisions of the Competition Act are in addition to and not in derogation of the Patents Act and, therefore, CCI would have jurisdiction to entertain their complaint notwithstanding the remedies available to Micromax and Intex under the Patents Act.

87. Ericsson's challenge to the jurisdiction can - as is apparent from the submissions made by the counsel - be considered under the following broad heads:

(i) Ericsson is not an enterprise within the meaning of Section 2(h) of the Competition Act and, therefore, Section 4 of the Competition Act is wholly inapplicable in any matter relating to its exercise of its rights as a proprietor of its SEPs.

(ii) The Patents Act is a special Act *vis-à-vis* the Competition Act and therefore it shall prevail over the provisions of the Competition Act; consequently, insofar as exercise of patent rights are concerned, proceedings under the Competition Act would not be competent and outside the scope of that Act.

(iii) The allegations made by Micromax and Intex in their complaints cannot by any stretch constitute abuse of dominance under the Competition Act and, therefore, impugned orders passed by CCI are without jurisdiction.

(iv) The disputes between parties – alleged demand for excessive royalty, breach of FRAND assurances, imposition of unreasonable terms for licencing etc. – are subject matter of proceedings in the suits filed by Ericsson and, therefore, outside the scope of the Competition Act.

(v) The complaints made by Micromax and Intex are not maintainable as they have denied Ericsson's claim for infringement and Intex has also initiated proceedings for revocation of Ericsson's SEPs and, therefore cannot allege abuse of dominance by Ericsson as the same is premised on Ericsson being the proprietor of the subject SEPs. Micromax and Intex are unwilling licensees and therefore, their complaints with regard to licensing terms could not be entertained.

(vi) In the given facts and circumstances of the case, CCI's view that a prima facie case is made out is perverse and thus the impugned order is wholly without jurisdiction.

(i) Ericsson is not an 'enterprise' within the meaning of Section 2(h) of the Competition Act:

88. The next issue to be examined is whether Section 4(1) of the Competition Act - which is alleged to have been violated by Ericsson - could have any application inasmuch as it is contended that Ericsson is not an 'enterprise' within the meaning of Section 2(h) of the Competition Act.

Section 4(1) of the Competition Act expressly mandates that "*no enterprise or group shall abuse its dominant position*".

89. Mr Vaidyanathan contended that a patentee is not an 'enterprise' within the meaning of Section 2(h) of the Competition Act in respect of licensing of a patent. It was further asserted that neither patents nor licences for such patents are 'goods or services'. The implication of Mr Vaidyanathan's contention is that the question whether an entity is an enterprise or not for the purposes of Section 4(1) of the Competition Act, must be ascertained only in the context of the activity which is sought to be made the subject matter of Section 4(2) of the Competition Act. And, since according to Ericsson neither patents nor licences for patents are 'goods or services', a patent holder cannot not be considered as an enterprise in the context of any allegation of demand of excessive royalty or imposition of unfair and unreasonable terms for grant of patent licences.

90. A plain reading of Section 4(1) of the Competition Act indicates that it proscribes any enterprise from abusing its dominant position. Thus, for the purposes of Section 4(1) of the Act, an enterprise must be the one which is in a 'dominant position'. The expression 'dominant position' is defined under Explanation (a) to Section 4 of the Competition Act to mean "*a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces*

prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour;" It, plainly, follows that alleged abuse of dominance would have to be considered in the context of the relevant market in which an enterprise is found to be in a dominant position. The alleged acts or activities which constitute abuse, will not be dispositive of the issue whether a person is an 'enterprise' or not. That question would depend entirely on whether the person or entity falls within the scope of Section 2(h) of the Competition Act, which defines the expression 'enterprise' and reads as under:-

> "2(h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.
>
> *Explanation*.—For the purposes of this clause,—
> (a) "activity" includes profession or occupation;
> (b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes—
(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
(ii) any branch or office established for the provision of any
service;"

91. It is apparent from the plain reading of the definition of 'enterprise' that it would include any person engaged in any activity, relating to production, storage, supply, distribution, acquisition or control of articles or goods.

92. Section 2(i) of the Competition Act defines 'goods' as under:-

" (i) "goods" means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—
(A) products manufactured, processed or mined;
(B) debentures, stocks and shares after allotment;
(C) in relation to goods supplied, distributed or controlled in
India, goods imported into India;"

.

93. The question whether Ericsson is an enterprise within the meaning of Section 2(h) of the Competition Act would, thus, have to be answered by ascertaining whether it is engaged in any activity relating to production, supply, distribution, acquisition or control of articles or goods. Admittedly,

Ericsson has a large portfolio of patents and is, *inter alia*, engaged in developing technologies and acquiring patents. Thus, if patents are held to be goods, Ericsson would indisputably fall within the definition of 'enterprise' within the meaning of Section 2(h) of the Competition Act, since it is admittedly engaged in activities which entail acquisition and control of patents.

94. This brings us to the question whether patents are 'goods' as defined in the Sale of Goods Act, 1930. Sub-section 7 of Section 2 of the Sale of Goods Act, 1930 defines 'goods' as under:-

> " (7) "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;"

95. As is apparent from the above, the definition of goods is extremely wide and takes within its fold every kind of movable property. The word 'property' is defined by virtue of Section 2(11) of the Sale of Goods Act to mean "*the general property in goods, and not merely a special property*;".

96. The expression 'movable property' has not been defined under the Sale of Goods Act, 1930. Thus, in absence of such definition, one would

have to turn to the General Clauses Act, 1897 which defines 'movable property' to mean "*property of every description, except immovable property*". Section 3(26) of the General Clauses Act, 1897 defines 'immovable property' to *"include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth"*.

Thus, plainly, the word 'goods' would encompass all kinds of property other than land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

97. Next, it is necessary to examine the nature of patent rights. Grant of a patent, essentially, provides the grantee, the right to exclude others from using the patented invention for the specified period; it does not provide the grantee (patentee) the right to use the patent but merely a right to restrain others from doing so.

98. In ***Bayer Corporation and Ors. v. Cipla, Union of India (UOI) and Ors.*: 162 (2009) DLT 371**, this Court had described "patents" as under:-

> "Patents are monopoly rights granted to those who invent or discover new and useful processes, products, articles or machine of manufacture, or composition of matter, or any new and useful improvement of any of those. It is not an

> affirmative right to practice or use the invention; it is a right to exclude others from making, using, importing, or selling patented invention, during its term. They are property rights granted by states, to inventors in exchange with their covenant to share its details with the public."
>
> (underlining for emphasis)

99. The US Supreme Court has described the right to exclude as "*one of the most essential sticks in the bundle of rights that are commonly characterized as property*" (***Kaiser Aetna v. United States***: **444 U.S. 164, 176 (1979)**. In United States, the status of patents as a property is now well established by a number of decisions. The US Patents Act now expressly states that "*patents shall have the attributes of personal property*" (35 U.S. Code § 261).

100. Insofar as tangible property is concerned, the ownership carries with it, the right to use that property and to that extent, patent rights are different inasmuch as they only grant a right to exclude without further right to use. In the case of real or personal property, the right to exclude others essentially follows from the proprietor's right to fully enjoy that property, but in case of a patent, the right to exclude is the only substantive right that is granted to the patentee. However, this distinction between real property and patents does not detract from the fact that patents are property. Adam

Mossoff, Associate Professor of Law at George Mason University, School of Law, in an article captioned "Exclusion and Exclusive Use in Patent Law" published in Harvard Journal of Law & Technology Volume 22, Number 2 Spring 2009 states the above in the following words:-

> "In other words, patents are conceptually differentiated from land, not due to any supposed categorical imperative about the alleged uniqueness of propertized inventions, but because of seemingly important doctrinal differences between the enforcement of tangible and intangible property entitlements."

101. In ***Vikas Sales Corporation v. Commissioner of Commercial Taxes***: **(1996) 4 SCC 433**, the Supreme Court while considering the issue whether import licences (replenishment licences/export-import licences) issued under the relevant export policy would be goods under the Sales Tax enactments of the States of Tamil Nadu, Karnataka and Kerala noticed that whereas the definition of 'goods' under the Sale of Goods Act, 1930, used the expression "every kinds of movable property", the definition of 'goods' under the Tamil Nadu General Sales Tax Act, 1956, the Karnataka Sales Tax Act, 1957 and Kerala General Sales Tax Act, 1963, used the expression "*all kinds of movable property*". The Court then proceeded to examine the meaning of 'property' as well as 'movable property'. The Court

referred to the definition of 'property' in Black's Law Dictionary, Sixth Edition; Dictionary of Commercial Law by A.H. Hudson (published by Butterworths) and noticed the expansive meaning in which the expression 'property' is understood. The Supreme Court also referred to the Law of Property, in Salmond's Jurisprudence (Twelfth Edition, 1956) and observed that the expression 'property' would include immaterial things such as patents, copyrights and trademarks which along with leases, servitudes and securities were described as 'incorporeal property' and the expression 'movable property' included corporeal as well as incorporeal property. The Court then proceeded to hold that import licences were 'goods'. The relevant extract from the said judgment is quoted below:-

> "19. In Black's Law Dictionary (6th Edition, 1990), the expression 'property' has been given the following meanings:
>
> > "Property.-That which peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. *Fulton Light, Heat & Power Co. v. State*, 65 Misc. Rep 263, 121 NYS 536. The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over

particular things or subjects. The exclusive right of possessing, enjoying, and disposing of a thing. The highest right a man can have to anything; being used to refer to that right which one has to lands or tenements, goods or chattels, which in no way depends on another man's courtesy.

The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments, and includes every invasion of one's property rights by actionable wrong. *Labberton v. General Cas. Co. of America*, 53 Wash 2d 180, 332 P 2d 250, 252, 254.

Property embraces everything which is or may be the subject of ownership, whether a legal ownership, or whether beneficial, or a private ownership. *Davis v. Davis*, Tax Civ. App. 495 S W 2d 607, 611. Term includes not only ownership and possession but also the right of use and enjoyment of lawful purposes. *Hoffmann v. Kinealy*, Mo, 389 S W 2d 745, 752.

Property, within constitutional protection, denotes group of rights inhering in citizen's relation to physical thing, as right to possess, use and dispose of it. *Cereghino v. State by and Through State Highway Commission*, 230 Or., 439 370 P 2d 694, 697.

Goodwill is property, *Howell v. Bowden*, Tex Civ App, 368 S W 2d 842, 848; as is an insurance policy and rights incident thereto, including a right

to the proceeds, *Harris v. Harris*, 83 N M 441, 493 P 2d 407, 408."

The Dictionary further says "property is either: real or immovable; or, personal or movable". It then proceeds to give the meaning of the expression "absolute property", "common property", "intangible property", movable property", "personal property" "private property" and "public property" among others. The above definition shows the wide meaning attached to the expression. It is said to extend to every species of valuable right and interest. It denotes everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal it includes "everything that has an extendable value". It extends to every species of valuable right and interest.

20. To the same effect is the definition in the *Dictionary of Commercial Law* by A. H. Hudson (published by Butterworths, 1983). It reads:

> "Property.- In commercial law this may carry its ordinary meaning of the subject-matter of ownership, e.g. in bankruptcy referring to the property of the debtor divisible amongst creditors. But elsewhere as in sale of goods it may be used as a synonym for ownership and lesser rights in goods. The Sale of Goods Act, 1979, Section 2 (1) makes transfer of property central to sale. Section 61(1) provides that 'property' means the general property in goods, and not merely a special property. 'General Property' is tantamount to ownership; bailees who have possession and not ownership and others with limited interests are said to have a 'special property' as their interest,"

21. Jowitt's Dictionary of English Law (Sweet & Maxwell Limited, 1977) Vol. I also sets out the meaning of the expression 'property' as well as the meaning of the expression "general property" and "special property". We may set them out:

> "property (Norm. Fr. Proprete; Lat. Proprietas; proprius, one's own), the highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattel which does not depend on another's courtesy.
>
> In its largest sense property signifies things and right considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates, and interest in corporeal things, but also rights such as trade marks, copyrights, patents, and rights in personam capable of transfer or transmission such as debts.
>
> Property is of two kinds, real property (q.v.) and personal property (q.v.).
>
> Property in reality is acquired by entry, conveyance, or devise; and in personality, by many ways, but most usually by gift, bequest, or sale. Under the Law of Property Act, 1925, Section 205, 'property' includes anything in action and any interest in real or personal property. There must be a definite interest; a mere expectancy as distinguished from a conditional interest is not a subject of property.
>
> 'Property' also signifies a beneficial right in or to a thing. Sometimes the term is used as equivalent to ownership; as where we speak of the right of property as opposed to the right of possession (q.v.) or where we speak of the property in the goods of a deceased person being vested in his executor. The term was chiefly used in this sense with reference to chattels (Finch, Law 176).

> Property in this sense is divided into general and special or qualified.
>
> *General property* is that which every absolute owner has (Co. Litt 145-b.), *See* OWNERSHIP.
>
> *Special property* has two meanings. First, it may mean that the subject-matter is incapable of being in the absolute ownership of any person. Thus a man may have a property is deer in a park, hares or rabbits in a warren, fish in a pond, etc.; but it is only a special or qualified property, for if at any time they regain their natural liberty his property instantly ceases, unless they have animus revertendi (2 Bl. Comm. 391). *See* ANIMALS FERAE NATURAE...."

This definition also shows that the expression signifies "things and rights considered as having a money value". Even incorporeal rights like trade marks, copyrights, patents and rights in personam capable of transfer or transmission, such as debts, are also included in its ambit. The meaning given to "general property" and "special property" are self-explanatory and need no emphasis at our hands. It is worth recalling that movable property means "property of every description except immovable property" - the definition in all the General Clauses Acts.

22. The above material uniformly emphasises the expansive manner in which the expression "property" is understood. The learned counsel for the petitioners brought to our notice the meanings of the term "property" set out in Chapter 13, "The Law of Property", in *Salmond's Jurisprudence* (12th Edition, 1966). In this chapter, several meanings attributed to 'property' are discussed in *extenso*, to all of which it may not be necessary to refer. Suffice to say that property is defined to include material things and immaterial things (*jura in re propria*) and leases, servitudes

and securities etc. (*jura in re aliena*). The material things are said to comprise land and chattels while immaterial things include patents, copyrights and trade marks, which along with leases, servitudes and securities are described as incorporeal property. The expression "movable property" is stated to include (p. 421) corporeal as well as incorporeal property. Debts, contracts and other choses-in-action are said to be chattels, no less than furniture or stock-in-trade. Similarly, patents, copyrights and other rights *in rem* which are not rights over land are also included within the meaning of movable property. We are unable to see anything in the said Chapter 13, which militates against the meanings ascribed to the said expression in the judicial dictionaries referred have above. Indeed, they are consistent with each other.

102. In ***Rustom Cavasjee Cooper v. Union of India***: **(1970) 1 SCC 248,** the Supreme Court, while considering the scope of the expression "property" as appearing in Entry 42 of List III of the Seventh Schedule of the Constitution of India, observed as under:

> "Under that entry "property" can be compulsorily acquired. In its normal connotation "property" means "highest right a man can have to anything, being that right which depend on another's courtesy: it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copyrights, patents and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with injured". The expression "undertaking" in s.4 of Act 22 of 1969 clearly means a going concern with all its rights, liabilities and assets-as distinct from the various rights and assets which compose it. In Halsbury's Laws of England, 3rd Edn. Vol. 6, Art. 75 at p. 43, it is stated that "Although various ingredients go to make up an undertaking,

> the term describes not the ingredients but the completed work from which the earnings arise.
>
> ..... The expression "property" in Entry 42 List III has a wide connotation and it includes not only assets, but the Organisation, liabilities and obligations of a going concern as a unit."
>
> (underlining for emphasis)

103. As noted above, the nature of patent rights - right to exclude without the right to use - does not in any manner exclude patent rights from the scope of 'goods' as defined under the Sale of Goods Act, 1930. All kinds of property (other than actionable claims, money and immovable property) would fall within the definition of 'goods' and this would also include intangible and incorporeal property such as patents.

104. In view of the above, the issue whether patents are goods is no longer *res integra* and Mr Vaidyanathan's contention that patents are not goods cannot be accepted. Consequently, Ericsson would fall within the definition of 'enterprise' under Section 2(h) of the Competition Act.

105. The question whether licences for patents are goods is a contentious one. Since grant of licence does not extinguish the rights of a patent holder in the subject matter, it may not amount to sale of goods. There may be

some merit in the contention that a case for abuse of dominant position under clause (a) of Section 4(2) of the Competition Act has not been made out. However, I do not propose to examine that question in these proceedings. The disputes as to whether Ericsson has fallen foul of any of the clauses of Section 4(2) of the Competition Act are as yet open and have not been finally adjudicated. Suffice it to say that the proceedings initiated by the CCI for violation of Section 4(1) of the Act cannot, at the threshold, be held to be without jurisdiction on account of Ericsson not being an enterprise within the meaning of Section 2(h) of the Competition Act.

(ii) Whether the Patents Act as a special Act would prevail over the Competition Act.

106. The next issue to be addressed is whether the CCI would have the jurisdiction to entertain complaints regarding abuse of dominance in view of the specific provisions under the Patents Act enacted to address the issue of abuse of dominance by a patent holder. It is contended on behalf of Ericsson that the Patents Act provides for an adequate mechanism to prevent any abuse of patent rights granted under that Act. It is urged that any issues regarding abuse of patent rights including abuse of dominance as contemplated under Section 4 of the Competition Act, are required to be

addressed under the provisions of the Patents Act and, thus, the applicability of the Competition Act in certain matters regarding patents is ousted. It is contended that the Patents Act is a special Act which contains comprehensive provisions relating to grant of patents rights as well as for remedying any abuse thereof; and, on the other hand, the Competition Act is a general law enacted with a view to ensure freedom of trade and to promote and sustain competition in the market. It is, thus, urged that the Patents Act would prevail over the Competition Act and the CCI would have no jurisdiction to entertain the complaints in question.

107. The key question is whether provisions of the Patents Act exhausts all remedies that are available in respect of abusive conduct by a patentee or whether an abuse of dominant position by a patentee could also be subject matter of proceedings and orders under the Competition Act. The aforesaid issue has to be addressed bearing in mind the objective, express provisions and the operative legislative fields of the two enactments.

108. As discussed earlier, patent rights are, essentially, statutory grants that make it unlawful for any person to exploit or use the patent without the consent of its proprietor (the patentee). These rights are property rights and granted to inventors in exchange of their covenant to share its details with

the public [see ***Bayer Corporation*** (*supra*)]. The entire purpose and object of granting patents is based on the rationale of rewarding invention to promote and encourage advancement in technology and industry.

109. On the other hand, the focus of the Competition Act is "*to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India*".

110. Thus, whereas patent laws are concerned with grants of rights enabling the patent holder to exclude others from exploiting the invention, and in that sense promoting rights akin to a monopoly; the competition law is essentially aimed to promote competition and, thus, fundamentally opposed to monopolization as well as unfair and anticompetitive practices that are associated with monopolies.

111. At this stage, in order to address the controversy whether the provisions of the Patents Act oust the applicability of the Competition Act, it is necessary to briefly, examine the legislative history and scheme of the two enactments - particularly in the context of anti abuse provisions.

Competition Act

112. The Monopolies and Restrictive Trade Practices Act, 1969, was

enacted to curb monopolies and restrictive trade practices. On 25th October, 1999, the Government of India constituted a High Level Committee to examine the then existing provisions of the Monopolies and Restrictive Trade Practices Act, 1969 for shifting the focus of the law from curbing monopolies to promoting competition. The Committee was requested "*to suggest a modern competition law in line with international developments to suit Indian conditions*". The terms of reference required the Committee to recommend as under:-

> "(a) a suitable legislative framework, in the light of international economic developments and the need to promote competition, relating to competition law, including law relating to mergers and demergers. Such a legislative framework could entail a new law or appropriate amendments to the MRTP Act, 1969:-
>
> (b) changes relating to legal provisions in respect of restrictive trade practices after reviewing the existing provisions and ensuring clear demarcation between the jurisdiction of the MRTP Commission and the Consumer Courts under the Consumer Protection Act, 1986 so as to avoid any overlapping of jurisdiction; and
>
> (c) suitable administrative measures required in order to implement the proposed recommendations including restructuring the MRTP Commission and the location of Benches outside Delhi for expeditious disposal of cases pending before the Commission."

113. The High Level Committee, under the Chairmanship of Sh. S.V.S.

Raghavan, submitted its report to the Central Government on 22nd May, 2000. Based on the recommendations as well as the other suggestions, the Competition Bill, 2001 was introduced in the Parliament and the Competition Act, 2002 was enacted. The Competition Act received the assent of the President on 13th January, 2003 and the provisions of the Act came into force on different dates as notified. The first such set of provisions came into force on 31st March, 2003. The Competition Act has been subsequently amended by the Competition (Amendment) Act, 2007 and the Competition (Amendment) Act, 2009.

114. The Preamble of the Competition Act reads as under:-

> "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.
>
> BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—"

115. The Statement of the Objects and Reasons for introducing the Competition Bill, 2001 indicates that the Competition Act was enacted to ensure fair competition in India by prohibiting trade practices which cause

appreciable adverse effect on competition in the markets in India and the CCI was established as a quasi-judicial body for the said purpose. The Statement of Objects and Reasons further indicates that the CCI would also undertake competition advocacy for creating awareness and imparting training on competition issues.

116. Chapter II of the Competition Act contains provisions for prohibition of certain agreements, abuse of dominant position and regulation of combinations. Section 3 of the Competition Act prohibits any enterprise or any association of enterprises or person or association of persons to enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 4 of the Competition Act prohibits any enterprise or group from abusing its dominant position. Section 5 of the Competition Act outlines the scope of a 'combination' and Section 6 of the Competition Act prohibits any person or enterprise from entering into a combination, which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and expressly declares such combinations to be void.

117. Section 7 of the Competition Act provides for establishment of CCI and Section 8 provides for its composition. Section 16 of the Competition Act provides for appointment of Director General for the purposes of assisting CCI and Section 17 of the Act provides for appointment of Secretary, experts, professionals and officers and other employees of CCI.

118. Section 18 of the Competition Act provides that the duty of CCI would be to *"eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers, and ensure freedom of trade carried on by other participants, in markets in India"*. The function to administer and execute the Act vests pre-dominantly with the CCI and it has a pivotal role under the Competition Act.

Patents Act

119. The Indian Patents and Designs Act, 1911 was enacted for the grant of patents and for protection of inventors. After independence, a need was felt to review this law. By a Resolution of the Government of India passed on 1st October, 1948, a Committee was constituted to review the patent laws in India to ensure that patent laws are more conducive to national

interest. This Committee presided by Dr. Bakshi Tek Chand, a Retired Judge of the High Court of Lahore, submitted an interim report suggesting amendments in the then existing law with a view to counteract misuse or abuse of patent rights and recommended enacting provisions for providing compulsory licences. These recommendations were accepted and the Patents and Designs Act, 1911 was amended by Act 32 of 1950. Subsequently, the Patents Bill, 1953, which was based on the United Kingdom Patents Act, 1949, was introduced in the Parliament. However, the same was not proceeded with and it lapsed. Thereafter, the Government of India appointed Justice N. Rajagopala Ayyangar for making recommendations for revision of the Patent laws. Justice Ayyangar submitted his report on the revision of the patents law in September, 1959 and notably, he flagged the issue regarding monopoly abuses, restrictive trade practices and monopolistic combinations in relation to patents. He stated that while making his recommendations on the topic of compulsory working of a patent, he had kept the following three factors in mind, namely, "*(1) the reward to the inventor so as to stimulate and accelerate invention, (2) ensuring of freedom from competition so that venture capital would be forthcoming to exploit the invention and (3) the interest of the*

community that inventions are worked in the country within as short a time as possible after the grant, and on as full and ample a scale as practicable—and that if they are not so worked, but are utilised to secure a monopoly of importation, they are promptly enabled to be revoked.". In addition, he further pointed out various types of abuse of patent rights and pointed out that Indian Patents and Designs Act, 1911 did not contain provisions for countering various such misuses. A bill based on the recommendations made by Justice Ayyangar was moved in the Parliament, but could not be proceeded with and eventually lapsed with the dissolution of the Third Lok Sabha on 3rd March, 1967.

120. Thereafter, the Patents Act, 1970 was enacted to consolidate the patents laws in India and, apart from certain provisions, came into force on 20th July, 1972.

121. After its enactment, the Patents Act, has been subjected to three sets of substantial amendments by three Acts: The Patents (Amendment) Act, 1999 (17 of 1999); The Patents (Amendment) Act, 2002 (38 of 2002); and The Patents (Amendment) Act, 2005 (15 of 2005). These sets of amendments - apart from seeking to simplify and make the Patents Act a modern legislation - were enacted to comply with India's obligations as a

signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereafter 'TRIPS').

122. By virtue of the Patents (Amendment) Act 2002, Section 48 of the Act, which specifies the rights granted to a patentee, was substituted to read as under:

> "**48. Rights of patentees.**- Subject to the other provisions contained in this Act and the conditions specified in section 47, a patent granted under this Act shall confer upon the patentee-
>
> (a) where the subject matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;
>
> (b) where the subject matter of the patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India:
>
> Provided that the product obtained is not a product in respect of which no patent shall be granted under this Act."

The proviso was subsequently deleted by Act 15 of 2005. Section 48 of the Act, as is in force today is worded similar to Article 28 of the TRIPS Agreement.

123. India is also a signatory to the Paris Convention and both Paris Convention as well as the TRIPS Agreement enable the signatory countries to provide for measures to prevent abuse of intellectual property rights.

124. Article 5(A)(2) of the Paris Convention provides as under:-

> "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

125. Similarly, Article 8.2 of the TRIPS Agreement reads as under:-

> "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders."

126. Article 31 of the TRIPS Agreement also enables a signatory country to enact laws to permit use of the patent without authorisation and reads as under:-

> ***"Article 31***
>
> ***Other Use Without Authorization of the Right Holder***
>
> Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the

right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the

circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent."

127. In conformity with the TRIPS Agreement, the Patents Act now contains provisions for grant of compulsory licences in certain cases. Chapter XVI of the Patents Act, as its caption indicates, provides for working of patents, compulsory licence and revocation. Section 84(1) of the Act provides that any person interested may, at any time after expiry of three years from the date of the grant of patent, apply to the Controller of Patents for grant of a compulsory licence on the following grounds:-

"(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

(b) that the patented invention is not available to the public at a reasonably affordable price, or

(c) that the patented invention is not worked in the territory of India."

128. Section 83 of the Patents Act specifies the following principles that are required to be considered while exercising powers conferred under Chapter XVI of the Patents Act:-

"**83. General principles applicable to working of patented inventions**. - Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely;-

(a) that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;

(b) that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;

(c) that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;

(d) that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio-economic and technological development of India;

(e) that patents granted do not in any way prohibit Central Government in taking measures to protect public health;

(f) that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and

(g) that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public."

It is seen that the aforementioned general considerations - in particular clause (b), (c) and (f) - are directed to prevent what could be described as an abuse of patent rights.

129. Sub-section (7) of Section 84 of the Patents Act lists out situations where the reasonable requirements of public are deemed not to have been satisfied. The said Sub-section reads as under:-

"(7) For the purposes of this Chapter, the reasonable requirements
of the public shall be deemed not to have been satisfied-

(a) if, by reason of the refusal of the patentee to grant a licence or licences on reasonable terms,-

(i) an existing trade or industry or the development thereof or the establishment of any new trade or industry in India or the trade or industry in India or the trade or industry of any person or class of persons trading or manufacturing in India is prejudiced; or

(ii) the demand for the patented article has not been met to an adequate extent or on reasonable terms; or

(iii) a market for export of the patented article manufactured in India is not being supplied or developed; or

(iv) the establishment or development of commercial activities in India is prejudiced; or

(b) if, by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of any trade or industry in India, is prejudiced; or

(c) if the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention to challenges to the validity of patent or coercive package licensing; or

(d) if the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable; or

(e) if the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by-

(i) the patentee or persons claiming under him; or

(ii) persons directly or indirectly purchasing from him; or

(iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement."

130. A plain reading of various clauses of Sub-section 7 of Section 84 of

the Patents Act also indicates that the Legislature was cognizant that in certain cases, patents rights may be misused - such as where the patentee refuses to grant licences on reasonable terms to the prejudice of trade and/or industry - and, therefore, in conformity with the TRIPS Agreement, it enacted provisions for remedying the same by issuance of compulsory licences.

131. However, the provisions of Section 84 of the Patents Act would not be applicable where a period of three years from the grant of licence has not elapsed. In other words, the proprietors of patents enjoy a larger degree of protection during the first three years of the grant of the patent. The Parliament in its wisdom thought it fit to grant this minimum period for a patentee to reasonably ensure that its patent is worked in India and the patented invention is available at reasonable and affordable prices. This protection is further diluted by virtue of Section 92 of the Patents Act which provides that in case of national emergency or in circumstances of extreme emergency or in case of public non-commercial use, the Central Government, if satisfied that it is necessary to grant a compulsory licence, is empowered to make a declaration to that effect and on such declaration, the Controller of Patents would be empowered to entertain applications for

grant of compulsory licence, notwithstanding that a period of three years has not elapsed from the grant of patent.

132. Section 85 of the Patents Act provides for revocation of patents, if even after two years of the grant of compulsory licence, the patent invention has not been worked in the territory of India or that reasonable requirement of the public with respect to the patented invention has not been satisfied or that patented invention is not available to the public at a reasonably affordable price.

133. Section 140 of the Patents Act expressly proscribes that it shall not be lawful to insert certain restrictive conditions in a contract in relation to a sale or lease of a patented article or in a licence to manufacture a patented article or to work any patented process. Sub-section (1) of Section 140 of the Patents Act reads as under:-

> "**140 Avoidance of certain restrictive conditions.**-(1) It shall not be lawful to insert-
>
> (i) in any contract for or in relation to the sale or lease of a patented article or an article made by a patented process; or
>
> (ii) in license to manufacture or use a patented article; or
>
> (iii) in a licence to work any process protected by a patent, a condition the effect of which may be-

(a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor or his nominees, or to prohibit him from acquiring or to restrict in any manner or to any extent his right to acquire from any person or to prohibit him from acquiring except from the vendor, lessor, or licensor or his nominees any article other than the patented article or an article other than that made by the patented process; or

(b) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee, to use an article other than the patented article or an article other than that made by the patented process, which is not supplied by the vendor, lessor or licensor or his nominee; or

(c) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee to use any process other than the patented process,

(d) to provide exclusive grant back, prevention to challenges to validity of Patent & Coercive package licensing, and any such condition shall be void."

134. Chapter XVIII of the Patents Act contains provisions regarding suits for infringement of patents. Section 106 of the Patents Act enables any person, aggrieved by threats of proceedings for infringement of a patent, to file a suit for seeking; *"(a) a declaration to the effect that the threats are*

unjustifiable; (b) an injunction against the continuance of the threats; and (c) such damages, if any, as he has sustained thereby." Section 108 of the Patents Act provides for the reliefs that may be granted in a suit for infringement. Sub-section (1) of Section 108 provides that the reliefs would include injunction and, at the option of the plaintiff, either damages or an account of profits; Sub-section (2) of Section 108 further provides that the court may also pass orders that infringing goods shall be seized, forfeited or destroyed, as the court deems fit without payment of any compensation.

135. Section 107 of the Act provides for the defences that may be taken in a suit for infringement. Sub-section (1) of Section 107 expressly provides that every ground for revocation of a patent as available under Section 64 of the Act would be available as a ground for defence in a suit for infringement.

136. It is clear from the above that certain specific remedies have been provided under the Patents Act in respect of certain practices that may constitute abuse of dominance or may be considered as anti-competitive. In certain cases, as indicated above, the compulsory licences can be granted by the Controller of Patents. Thus, enabling the manufacturer to manufacture patented articles or use of patented process without the

consent of the proprietor of the patent. Further restrictive conditions as specified under Section 140(1) of the Patents Act are expressly declared to be void and, thus, unenforceable.

137. Insofar as the allegations contained in the complaints are concerned - that is, demand of excessive licence fee, unreasonable and anti-competitive licensing terms, and breach of FRAND obligations - the Patents Act does provide a remedy by way of compulsory grant of licences. The question is whether provision of such remedies excludes the applicability of the Competition Act to certain abuse of patent rights - such as demand for excessive royalty and imposition of unreasonable terms for grant of patent licences.

138. As mentioned earlier the Patents Act was amended to make it TRIPS compliant. The TRIPS Agreement, as mentioned above, obliges the signatory countries to recognise intellectual property rights but does not disable member countries to enact laws, consistent with the TRIPS Agreement, for restricting and curbing its use in certain cases. Article 8.2 of the TRIPS Agreement expressly permits measures required to prevent abuse of intellectual property rights by right holders. Similarly, Article 31 of the TRIPS Agreement recognises that laws of member states could

permit use of patents without authorisation by the rights holder, however, it enjoins the member states to respect certain parameters which are articulated in Article 31 of the TRIPS Agreement.

139. The High Level Committee constituted by the Government for recommending the legal framework for competition law (Sh. S.V.S. Raghvan Committee) was also cognizant that with the opening of the economy and with India implementing the WTO Agreements certain competition law issues would arise in respect to intellectual property rights. Paras 5.1.6, 5.1.7 and 5.1.8 of their report as accepted by the Government are relevant and are quoted below:-

> "5.1.6 Intellectual Property Rights
>
> India is a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS Agreement covers nine categories of Intellectual Property:
>
> - Copyright and related rights
> - Trade marks including service marks
> - Geographical indications
> - Industrial designs
> - Lay-out designs of integrated circuits
> - Trade secrets
> - Patents
> - Patenting of micro-organisms and
> - New plant varieties (seeds and other propagating material)

5.1.7 All forms of Intellectual Property have the potential to raise Competition Policy/Law problems. Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of human creativity, which needs to be encouraged and rewarded, Intellectual Property Right needs to be provided. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is a need to curb and prevent anti-competition behavior that may surface in the exercise of the Intellectual Property Rights.

5.1.8 There is, in some cases, a dichotomy between Intellectual Property Rights and Competition Policy/Law. The former endangers competition while the latter engenders competition. There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/Law."

140. Even though the High Level Committee had flagged the issue of intellectual property rights being used to the detriment of consumer interest or public interest, no specific provisions were enacted in the Competition Act to address such issues. On the other hand, the Government of India, fully mindful of implementing its WTO obligations, substituted chapter XVI of the Patents Act to redress non-use and certain misuse of patent

rights. The Parliament also introduced sub clause (d) to Clause (iii) of Sub-section (1) of Section 140 of the Patents Act to declare clauses in licences and contracts the effect of which may be *"to provide exclusive grant back, prevention to challenges to validity of Patent and Coercive package licensing"*, as void. These provisions for safeguarding national and public interest from any adverse effect of grant of patent rights are permissible under the TRIPS agreement and were enacted *inter alia* to avoid any ambiguity as to India's obligations there under. This is also apparent from the opening remarks of the Minister of Commerce and Industry made while introducing the Patents (Amendment) Bill, 2002. The relevant extract of which is quoted below:-

> "Hon. Chairman, Sir, my brief introduction of this Bill to further amend the Patent Act, 1970 must begin with an acknowledgement of the uniquely constructive debate and support during the passage of the Bill in the Upper House. The Government's sensitivity to all issues and its responsiveness to suggestions for improvement was equally matched by an appreciation of the need to honour international obligations and chart a clear path for R&D driven economic development.
>
> The Members are aware that the agreement on TRIPS is an integral part of the "take-it-or-leave-it" package finalised in the GATT Uruguay Round and the Draft Final Act signed in December 1993. The Pact itself was signed in Marrakesh on 15th April, 1994. The text of the TRIPS has been described as a masterpiece of ambiguity, couched in the language of

diplomatic compromise, resulting in a verbal tight-rope walk, with a prose remarkably elastic and capable of being stretched all the way to Geneva.

Be that as it may, we are required to meet some time-bound obligations in the area of intellectual property protection. The proposed changes in patent law are overdue by nearly two and half years.

In order to do this we must, firstly, carve out a law without permitting any ambiguity under the TRIPS agreement to come in our way so as to safeguard our national security, national interests, public health as also ensure availability of medicines at affordable prices, which is one of the human rights.

Secondly, we need to design a system for a new era of explosions of state-of-the-art technologies, since internationally approved patent protection regime has become the measuring rod of a country's technological and industrial progress and the protective shield for a knowledge driven economy.

Thirdly, we must take note of the awakening of the conscience of the humanity, which was helplessly watching while millions died and while millions more continued to suffer in silence because of HIV/AIDS. In mobilising this international public opinion, India, along with Brazil and about 55 African countries, took the lead and the result was the path-breaking Doha Declaration on TRIPS and Public Health. This Declaration provides flexibilities and there is a need to make use of them to the fullest possible extent in our law.

And lastly, we have to make the administrative system more user-friendly to facilitate knowledge and creativity driven wealth-creation, economic progress and betterment of life.

I am happy to say that the Bill before the House seeks to meet these objectives.....

xxxx xxxx xxxx xxxx

The Committee has reinforced the flexibilities already provided in the legislation with a view to address national and public interest requirements/concerns, especially those relating to public health and nutrition. More importantly, the Committee has fully restructured the existing provisions relating to public interest, compulsory licensing, Government use, national security, protection of traditional knowledge and protection of public health and nutrition as contained in Chapter XVI (Working of Patents, Compulsory Licences and Revocation) of the Patents Act.

xxxx xxxx xxxx xxxx

There are provisions in the Bill providing a wide-ranging and powerful weapon to the Government to extinguish the patentee's exclusive right immediately and acquire it if the occasion warrants. Let any crisis situation be visualised; the present Bill covers all contingencies.

xxxx xxxx xxxx xxxx

Critics have asserted that vis-à-vis TRIPS the Bill does too much; others have observed that it does too little. If anything, these criticisms confirm the fine balance which the Bill strikes between meeting our international obligations and all of our national concerns. I would categorically state that all aspects and relevant provisions of TRIPS, the Paris convention and other Conventions, post-TRIPS patent laws of different countries and the Doha Declaration have been taken on board. All ambiguities have been removed and available flexibilities are made use of to the maximum to protect the varied interests of our nation."

141. If one now views the amendments to the Patents Act as introduced in 2002 and 2005, in the above perspective, it would be clear that the

amendments made were not only for recognizing the rights of patent holders in terms of Article 28 of the TRIPS Agreement but also to restrict the rights granted to the patents holders to *inter alia* curb any misuse of those rights.

142. The Patents (Amendment) Act, 2002 received the Presidents' assent on 20th May, 2003. Thus, in so far as the Amendments to the Patents Act introduced by the aforesaid Amendment Acts of 2002 and 2005 are concerned, the same would be construed as later enactments. This rationale was also applied by the Supreme Court in ***Shri Ram Narain v. The Simla banking & Industrial Co. Limited*****: AIR 1956 SC 614** wherein the Court while applying the principle that a later Act would override the earlier Act, held that the Banking Companies (Amendment) Act 1953 must be treated as a later Act and that would override the provisions of the earlier Displaced Persons (Debts Adjustments) Act, 1951.

143. Thus, the provisions of Chapter XVI of the Patents Act which were substituted with effect from 20th May, 2003 would be considered as a later enactment. As discussed earlier, Chapter XVI of the Patents Act provides for grant of compulsory licences as well as revocation of patents in certain cases including in cases where the reasonable requirements of the public as

specified under Section 84(7) of the Patents Act have not been satisfied. Section 84(7) of the Patents Act as pointed out earlier, is couched in wide terms and takes within its sweep instances where a refusal by a patentee to grant licence on reasonable terms results in prejudicing the existing trade or industry or any person or class of persons trading or manufacturing in India. Plainly, Section 84(7) would also include instances of abuse that are proscribed under Section 4 of the Competition Act. Section 140 of the Patents Act also postulates certain restrictive conditions to be void.

144. As discussed above, the Patents Act not only provides for a statutory grant of Patent rights but also contains provisions relating to the exercise of and enforcement of those rights. Further, the Patents Act also includes provisions for redressal in the event of abuse of Patents rights. On the other hand, the Competition Act proscribes certain anti-competitive agreements and abuse of dominance in addition to regulating combinations to avoid concentration of market power in general. Undoubtedly, the Competition Act and Patents Act are special acts operating in their respective fields, however, viewed in the aforesaid perspective the Patents Act would be a Special Act, *vis-à-vis*, the Competition Act in so far as patents are concerned. The Patents Act is a self contained code.

145. It is now well settled that an enactment may be considered as special in relation to one Act and yet be considered as general enactment in relation to another statute. In ***Life Insurance Corporation of India v. D.J. Bahadur*: (1981) 1 SCC 315**, the Supreme Court had observed:-

> "…..for certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law."

In a later judgment - ***Allahabad Bank v. Canara bank and Another*: (2000) 4 SCC 406** - the Supreme Court has explained the above principle by giving an example of Rent Control Acts which may be special statutes as compared to the Civil Procedure Code but would be construed as a general statute *vis-à-vis* an Act permitting eviction from public premises or some special class of buildings.

146. It is also relevant to notice Section 62 of the Competition Act which reads as under:-

> "The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

147. It is evident from the above provision that the intention of the Parliament in enacting the Competition Act was not to curtail or whittle

down the full scope of any other law and, therefore, it is expressly stated that the Competition Act would be in addition to, and not in derogation of any other Act. Notably, while it has been argued on behalf of the Respondents that the proceedings initiated under the Competition Act are maintainable, none of the counsels even remotely suggested that the Provisions of the Patents Act must yield to the provisions of the Competition Act. Although, counsel for the Respondents referred to the *non-obstante* provision of Section 60 of the Competition Act, the same was only in support of their arguments that the jurisdiction of the CCI must not be curtailed.

148. Thus, in my view Section 60 of the Competition Act, which provides for the provisions of the said Act to have an effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, must be read harmoniously with Section 62 of the Competition Act and in the context of the subject matter of the Competition Act. As discussed earlier, the Competition Act is directed to prohibit certain anti-competitive agreements, abuse of dominant position and formation of combinations which cause or are likely to cause appreciable adverse effect on competition. Plainly, agreements which may otherwise be lawful and

enforceable under the general law - such as the Indian Contract Act, 1872 - may still be anti-competitive and fall foul of Section 3 of the Competition Act. Similarly, a practice or conduct which may be considered as an abuse under Section 4 of the Competition Act may otherwise but for the said provision be legitimate under the general law. Equally, mergers and amalgamations that are permissible under the general law may result in aggregation of market power that may not be permitted under the Competition Act. Section 60 of the Competition Act must be read in the aforesaid context.

149. It is well settled that the provision of any statute must be read in the context of the statute as a whole. A *non-obstante* clause is a well known legislative device used to give an overriding effect to certain provisions over the others which are inconsistent with those provisions; in the present case, Section 60 of the Competition Act expressly provides that the provisions of the Competition Act shall have effect notwithstanding anything inconsistent in any other law. However, the said provision must be read in the context of the Competition Act as a whole and the mischief that is sought to be addressed by the Competition Act. Thus, in my view, Section 60 is enacted only to restate and emphasize that notwithstanding

agreements, arrangements, practices and conduct which may otherwise be legitimate under the general laws would nonetheless be subject to the rigors of the Competition Act. Section 60 cannot be read to curtail or whittle down the provisions of other statutes; this interpretation would also be in sync with provisions of Section 62 of the Competition Act as indicated above.

150. In any case, in the event of any irreconcilable inconsistency between the two legislations, the later special statute would override the prior general statute, even though the earlier general statute contains a *non-obstante* clause. In ***Damji Valji Shah and Another v. Life Insurance Corporation of India & Ors.***: **AIR 1966 SC 135**, the Supreme Court considered the question whether the provisions of Life Insurance Corporation Act, 1956 would override certain provisions of the Companies Act, 1956. Under Section 446(2) of the Companies Act, 1956, the Company Court would have jurisdiction to entertain any suit or proceeding or claim against a company which is being would up. Section 446 of the Companies Act, 1956 contains a *non-obstante* clause and its provisions would, thus, override other laws. The Life Insurance Corporation Act, 1956, on the other hand, did not contain a *non-obstante* clause. However,

the Supreme Court held that the Life Insurance Corporation Act being a special Act would override the provisions of the Companies Act and the Tribunal constituted under the Life Insurance Corporation Act, would have the jurisdiction to entertain any claim of Life Insurance Corporation against erstwhile life insurance companies.

151. Thus, if there are irreconcilable differences between the Patents Act and the Competition Act in so far as anti-abuse provisions are concerned, the Patents Act being a special act shall prevail notwithstanding the provision of Section 60 of the Competition Act.

152. This brings up the next issue, that is, whether there is any irreconcilable conflict between the Competition Act and the Patents Act and whether both the Acts could be construed harmoniously in the context of the Patents Act.

153. It is well established that an inconsistency or repugnancy in statutes cannot be readily inferred and any interpretation that leads to such conflict must, as far as possible, be avoided. In ***Municipal Council, Palai v. T.J. Joseph*: (1964) 2 SCR 87**, the Supreme Court observed that there is a presumption against repeal by implication. The Court reasoned that

legislature while enacting a law has complete knowledge of the existing laws and, therefore, where an express provision for repeal of an earlier statute is not provided, it must be presumed that the legislature did not intend to repeal the existing statute. Unless it is concluded that the provisions of the two of legislations cannot co-exist, the question of reading the provisions of a statute to have been impliedly repealed does not arise.

154. In ***Kunter v. Phillips*****: (1891) 2 Q.B. 267**, it was observed as under:-

> "It is only when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one then only the two cannot stand together and the earlier stands abrogated by the later".

155. The above principle was reiterated by the Supreme Court in ***R.S. Raghunath v. State of Karnataka and Anr.*****: (1992) 1 SCC 335**, in the following words:-

> "30. It is further observed that such a presumption can be rebutted and repeal by necessary implication can be inferred only when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act, that the two cannot stand together."

156. The provisions of the Patents Act which can be construed as dealing with a subject matter which is common with the Competition Act are

essentially provisions of Chapter XVI and Section 140 of the Patents Act. Section 84 of the Patents Act provides for grant of compulsory licences in certain cases where reasonable requirement of public with respect to the patented inventions have not been satisfied or where the patented invention is not available to the public at a reasonably affordable price or where the patented invention is not worked in the territory of India.

157. Sub-section (7) of Section 84 lists out different instances where the requirements of public shall be deemed not to have been satisfied. Section 85 of the Patents Act provides for Revocation of patents where even after expiry to two years from the date of grant of compulsory licence the patented invention has not been worked in the territory of India or where reasonable requirements of public with respect to the patented invention have not been satisfied. In addition, Section 92 of the Patents Act also provides grant of compulsory licences.

158. Undisputedly, several of the instances listed out in Section 84 (7) could be construed, in certain circumstances, as an abuse of dominance if grant of patent rights places the right holder in a position of dominance. Remedy in cases as specified under Section 84(7) of the Patents Act is grant of compulsory licences and a possible revocation of licence

thereafter. Section 89 of the Patents Act specifies the general purposes for granting compulsory licences and provides that the powers under Section 84 shall be exercised with a view to secure:

> "(a) that patented inventions are worked on a commercial scale in the territory of India without undue delay and to the fullest extent that is reasonably practicable;
>
> (b) that the interests of any person for the time being working or developing an invention in the territory of India under the protection of a patent are not unfairly prejudiced."

159. It is relevant to note that in terms of Section 84 (4) of the Patents Act, the Controller is empowered to settle the terms on which the compulsory licence is to be granted. Section 90 of the Patents Act provides guidelines to the Controller for settling the terms of a compulsory licence. It is apparent that the only remedy that is available under the Patents Act, to a willing prospective licensee who has been denied a licence on reasonable terms is a compulsory licence under Section 84 of the Act on such terms as may be settled by the Controller.

160. Although, it has been argued that such defence - that is, the patent holder has refused to grant licence on reasonable terms or has violated the FRAND assurances - is also available to willing licensee to defend a suit

for infringement, I have some reservations regarding this proposition. However, in the present case, Micromax and Intex have taken such defence in the infringement suits filed by Ericsson and issues have been struck by the court; therefore, I am refraining from dilating on this aspect any further as this aspect would be best debated in the suits filed by Ericsson.

161. Section 4 of the Competition Act, which is relevant for the purposes of these petitions, concerns abuse of dominant position. Sub Section (1) of Section (4) prohibits such abuse and Sub-section (2) of Section 4 provides for what constitutes an abuse of dominant position. In certain cases, denial of market access by an enterprise placed in a position of strength in the relevant market may constitute an abuse of dominant position. If an enterprise falls foul of Section 4 and it is so established after due investigation, the CCI is empowered to pass all or any of the orders as indicated under Section 27, which reads as under:-

> "(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
>
> (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. 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:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) [***]

(g) pass such other order or issue such directions as it may deem fit:

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the *Explanation* to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group. "

162. It is clear from the above that the remedies as provided under Section 27 of the Competition Act for abuse of dominant position are materially different from the remedy as available under Section 84 of the Patents Act.

It is also apparent that the remedies under the two enactments are not mutually exclusive; in other words grant of one is not destructive of the other. Thus, it may be open for a prospective licensee to approach the Controller of Patents for grant of compulsory licence in certain cases. The same is not inconsistent with the CCI passing an appropriate order under Section 27 of the Competition Act.

163. It is also relevant to refer to Section 21A of the Competition Act which was introduced by the Competition (Amendment) Act, 2007 with effect from 20th May, 2009. The said Section enables CCI to make a reference to any statutory authority, which is charged with implementation of any Act, if it proposes to make any decision contrary to the provisions of the Act and an issue in this regard is raised by any party. Section 21A of the Competition Act reads as under:-

> **"21A. Reference by Commission.-**(1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this (sic) [recte any] Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:
>
> Provided that the Commission, may, *suo motu*, make such a reference to the statutory authority.

(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefore on the issues referred to in the said opinion."

164. It is apparent from the above that the Competition Act also contemplates a situation where an order by CCI may be contrary to another statute being administered by another authority. Similarly, Section 21 of the Competition Act provides for a statutory authority to make a reference to the CCI if it proposes to take a decision which may be contrary to the provisions of the Competition Act. Section 21 of the Competition Act is reproduced as under:

"Reference by statutory authority

21. (1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission:

Provided that any statutory authority, may, suo motu, make such a reference to the Commission.

(2) On receipt of a reference under sub-section (1), the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give

its findings recording reasons therefor on the issues referred to in the said opinion."

165. The above provisions also indicate that the intention of the Parliament is not that the Competition Act impliedly repeal other statutes or stand repealed by other statues that present any inconsistency; but that it be worked and implemented in addition to and in not in derogation of other statues. Therefore, the Competition Act expressly contemplates that statutory orders passed - either by CCI under the Competition Act or by any other statutory authority under any other statute, - be made after the concerned authority has taken into account the opinion of the other statutory authority.

166. In the aforesaid context, clause (ix) of Sub-section (1) of Section 90 of the Patents Act may also be noticed. The said clause provides that the Controller General of Patents may also permit export of the patented product under a compulsory licence in cases where the licence is issued to remedy a practice that has been determined to be anti-competitive after a judicial or an administrative process. The relevant clause reads as under:-

"(1) In settling the terms and conditions of a licence under section 84, the Controller shall endeavour to secure-

xxxx xxxxx xxxx xxxx

(ix) that in case the licence is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, the licensee shall be permitted to export the patented product, if need be."

The above clause also indicates the legislative intention that the Competition Act and the Patents Act be worked harmoniously. Thus, it is mandated that the Controller take into account any finding of anticompetitive practice, that is returned after a judicial or administrative process including by the CCI under the Competition Act, while settling the terms of a compulsory licence issued to remedy such practice.

167. It is important to reiterate that an order inconsistent with other enactments does not necessarily imply a repeal or abrogation of other enactments. It merely implies that the order shall be given effect to and to that extent the provisions of other statutes that are inconsistent shall be bypassed. In ***Harishankar Bagla and Anr. v State of Madhya Pradesh*: (1955) 1 SCR 380**, a Constitution Bench of the Supreme Court, while considering a challenge to the provisions of the Essential Supplies (Temporary Powers) Act, 1946 and an order passed under Section 3 of the said Act, considered the effect of Section 6 of the said Act, which expressly

provided that "any order made under Section 3 of the said Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other that this Act or in any instrument having effect by virtue of any enactment other that this Act." The Court held that:

> "the effect of Section 6 certainly is not to repeal any one of those laws or abrogate them. The object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946 or the orders made thereunder. In other words, the orders made under Section 3 would be in operation in regard to essential commodity covered by the Textile Control order where ever there is repugnancy in this Order with the existing laws and to that extent, the existing laws with regard to those commodities will not operate. By-passing a certain law does not necessarily amount to repeal or abrogation of that law"

168. The provisions of Sections 21 and 21A of the Competition Act, read in the aforesaid context, indicate that the intention of the Parliament was not to abrogate any other law but to ensure that even in cases where CCI or other statutory authorities contemplate passing orders, which may be inconsistent with other statutes, the opinion of the concerned authority is taken into account while passing the such orders. The plain intention being that none of the statutory provisions are abrogated but only bi-passed in certain cases. These provisions - Sections 21 and 21A of the Competition

Act - clearly indicates that the intention of the Parliament was that the Competition Act co-exist with other regulatory statues and be harmoniously worked in tandem with those statues and as far as possible, statutory orders be passed which are consistent with the concerned statutory enactments including the Competition Act.

169. It is also necessary to bear in mind that whereas Section 84 of the Patents Act provides specific remedy to the person seeking relief, the orders passed by CCI are *in rem*. Thus, the operative width of the two enactments is different.

170. It is not necessary that any particular relief be granted to the person who provides information under Section 19 of the Competition Act; the focus of the Competition Act is to ensure that the offending anti competitive agreements, conduct and combinations are terminated and such conduct is not repeated.

171. At this stage, one may also refer to Section 3 of the Competition Act which prohibits a person, enterprise or association of persons/enterprises from entering into certain anti-competitive agreements which cause or are likely to cause appreciable adverse effect on competition within India.

There does not appear to be any provision(s) of such wide import under the Patents Act. Sub-section (5) of Section 3 of the Competition Act expressly provides that Section 3 would not restrict the right of any person to impose reasonable conditions for protecting its right, *inter alia*, under the Patents Act. The relevant extract of sub-section (5) of Section 3 of the Competition Act is reproduced below:-

> "(5) Nothing contained in this section shall restrict--
>
> (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:
>
> (a) xxx xxx xxxx
>
> (b) the Patents Act, 1970 (39 of 1970);
>
> (c) xxxx xxx xxxx"

172. It follows from the above that whilst an agreement which imposes reasonable condition for protecting Patent Rights is permissible, an anti competitive agreement which imposes unreasonable conditions would not be afforded the safe harbor of Section 3(5) of the Competition Act and would fall foul of Section 3 of the Competition Act. The question as to whether a condition imposed under the agreement is reasonable or not would be a matter which could only be decided by the CCI under the

provisions of the Competition Act. Neither the Controller of Patents discharging his functions in terms of the Patents Act, nor a Civil Court would have any jurisdiction to adjudicate whether an agreement falls foul of Section 3 of the Competition Act. This is so because the Controller of Patents cannot exercise any powers which are not specifically conferred by the Patents Act and by virtue of Section 61 of the Competition Act, the jurisdiction of Civil Courts to entertain any suit or proceedings in respect of any matter which the CCI or the COMPAT is empowered to determine, stands expressly excluded. Thus, in so far as the scope of Section 3 of the Competition Act is concerned, there does not appear to be any overlap or inconsistency with the Patents Act.

173. Facially, it may appear that the gravamen of the two enactments are intrinsically conflicting; however, when one views the same in the perspective that patent laws define the contours of certain rights, and the anti-trust laws are essentially to prevent abuse of rights, the prospect of an irreconcilable conflict seems to reduce considerably.

174. In my view, there is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. And, in absence of any irreconcilable conflict between the two legislations, the jurisdiction of CCI

to entertain complaints for abuse of dominance in respect of Patent rights cannot be ousted.

175. The decision of the Supreme Court in ***Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council*** (*supra*), which was relied upon by the learned counsel for Ericsson has no application in the facts of the present case. In that case, the question involved before the Supreme Court was whether a claim for compensation in respect of motor vehicle accidents could be entertained under the Consumer Protection Act, 1986. In that context, the Court had noted that the Motor Vehicles Act, 1988 contains specific provisions for adjudicating claims of compensation in respect of motor vehicles accidents. Clearly, the claims for compensation under both the Acts could not be made simultaneously and, therefore, the inconsistency between the two Acts was apparent. The Supreme Court further noted that the Motor Vehicles Act was a special Act while the Consumer Protection Act which dealt with extending protection to consumers in general was a general Act. The Court then proceeded to examine the provisions of both the Motor Vehicles Act, 1988 and Consumer Protection Act, 1986 and concluded that a claim for compensation for a fatal injury resulting from a motor vehicle accident

would fall squarely within the ambit of Section 165 of the Motor Vehicles Act, 1988 and not within the scope of the Consumer Protection Act, 1986. The Court held that "*ordinarily the general law must yield to the special law*" and the Motor Vehicles Act, 1988 being a special law would prevail over a general law but further observed that having come to a conclusion that the disputes in question did not fall within the scope of Consumer Protection Act, 1986 that question did not arise for consideration. As discussed hereinbefore, in the present case, the provisions of the Competition Act do not abrogate the provisions of the Patents Act and in absence of any irreconcilable repugnancy, the question of applying the principle of an implied repeal would not be apposite.

176. Before parting with this issue, a reference must be made to the proviso to clause (iv) of Sub-section (6) of Section 84 of the Patents Act which was subject of much debate during the proceedings before this court. Sub-section (6) of Section 84 of the Patents Act further specifies certain considerations required to be taken into account by the Controller while considering an application for compulsory licence. Clause (iv) of Sub-section (6) of Section 84 reads as under:-

"(iv) as to whether the applicant has made efforts to obtain a licence from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit:

Provided that this clause shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anti-competitive practices adopted by the patentee, but shall not be required to take into account matters subsequent to the making of the application."

177. It is apparent from the above that a prospective licensee who applies for a compulsory licence is expected to have made, prior to his application, efforts to obtain a licence on reasonable terms. However, it further specifies that this consideration would not be relevant where the conduct of a patentee is found to be anti-competitive. Mr Katpalia had contended that the above-quoted proviso to Section 84(6)(iv) also refers to anti-competitive practices adopted by a patentee and such practices could only be established under the provisions of the Competition Act. In my view, the aforesaid proviso to Section 84(6)(iv) cannot be read to mean that a patentee's anti-competitive conduct would have to be first established in proceedings under the Competition Act before the Controller could take that into account. Sub-section (6) of Section 84 only indicates certain

factors that would be required to be taken into account by the Controller and the question whether a patentee had adopted anti-competitive practices could also be considered by the Controller. However, if CCI has finally found a patentee's conduct to be anti-competitive and its finding has attained finality, the Controller would also proceed on the said basis and - on the principle akin to issue estoppel - the patentee would be estopped from contending to the contrary.

178. In view of the aforesaid discussion, the contention that the jurisdiction of CCI under the Competition Act is ousted in matters relating to patents cannot be accepted.

(iii) Whether the allegations made could be construed as an abuse of dominance

179. At the outset, it must be mentioned that since the disputes relate to the jurisdiction of CCI to entertain the complaints made by Micromax and Intex, the same must be addressed on a *demurrer*. In other words, all allegations made in the complaints be accepted as true to determine whether Micromax/Intex are entitled to any relief on that basis.

180. A perusal of the complaints in question indicate that both Micromax

and Intex allege that Ericsson demanded exorbitant royalty rates and sought to impose unfair terms for licensing its patents. Intex has further claimed that Ericsson's demand for payment of royalty at an *ad valorem* rate based on the value of the product instead of the component that uses the said technology is patently unfair as it amounts to Ericsson claiming part of the value of the product that is attributable to other features and innovations which are unconnected with the technology claimed to be patented by Ericsson. It is further alleged that the products in question use several patented technologies and unreasonable demand of royalties by patent holders would result in 'royalty stacking'. It is alleged that excessive demands of royalty by Ericsson amounts to a 'patent holdup' and, thus, prevents supply of products to the consumers.

181. In addition, both Micromax and Intex have complained that Ericsson's conduct and demands were an abuse of Ericsson's dominant position as SEP holder and violate Ericsson's FRAND assurances. It is further alleged that Ericsson has attempted to conduct FRAND negotiations in an opaque, non-transparent and a high handed manner. It has used threat of litigation to coerce the complainants to agreeing to Ericsson's terms for licensing. This, it is alleged, is the most egregious violations of FRAND

obligations. In addition, Micromax complains that Ericsson has also used threats of complaints to SEBI to effectively derail Micromax's public offering and thereby harm its business interest. It is contended that Ericsson has issued the threats solely with the object to coerce Micromax to succumb to Ericsson's demand for excessive royalty in respect of its patents. This according to Micromax constitutes Ericsson's violation of its FRAND obligations. Further Intex has also complained that Ericsson had indulged in "bundling and tying licensing" which according to Intex is anti-competitive and proscribed under the Competition Act.

182. Ericsson, on the other hand, not only contests the above allegations but also disputes the jurisdiction of CCI in what is described as its legitimate exercise of rights granted under the Patents Act. As stated earlier, for the purpose of determining whether the CCI would have the jurisdiction to entertain such allegations, the same must be accepted as true and correct.

183. Ericsson is a member of various Standard Setting Organizations (SSOs) including European Telecommunications Standards Institute (ETSI) which is responsible for setting standards and specifications in the field of telecommunications. Setting such industry-wise standards is necessary in

the field of communications as all market participants involved in the industry must necessarily work on technologies that are compatible for seamless communication. Products and equipments used in the telecommunication industry must conform to the standard set to ensure inter-operability. This is to ensure that information is transmitted through various products (such as handsets and networks) used by various industry participants and customers.

184. Universal Mobile Telecommunication System (hereafter 'UMTS') standard which has been set by ETSI, has also been accepted in various other countries including by TRAI in India. Clearly, an inclusion of a patented technology in a standard such as UMTS could place the patent holder in a position of substantial market power. Clearly, an SEP holder such as Ericsson would be in a position to demand supra-competitive royalties from all implementers of the standard (entities dealing in products using the patented technology accepted as SEP). Ericsson claims to hold a large number of SEPs including the eight, which are the subject matter of litigation between Ericsson and Micromax/Intex. It is indisputable that as an SEP holder, Ericsson is in a position of dominance and significant bargaining power in relation to the other implementers of that technology

who have no other option but to conform to the standards which include technologies patented by Ericsson. It is also well recognised that a patent holder of a technology accepted in a standard would be in a position to hold up the other market participants implementing the said technology. It is to mitigate against the possibility of such conduct that an SEP holder is normally required to commit to licence their patents on FRAND terms. This requires the SEP holder to licence technologies on fair, reasonable and non-discriminatory terms. Concededly, in terms of Rule 6 of ETSI policy, the proprietor of a patented technology, which is included as a part of a standard is obliged to licence its technologies on FRAND terms.

185. Concededly, Ericsson being a member of ETSI is bound to offer its SEPs on FRAND terms. It has been argued on behalf of Ericsson at length that it has acted in accordance with its FRAND assurances and had sought injunctive reliefs only after exhausting all possible avenues for licensing its SEPs on negotiated FRAND terms. According to Ericsson, both Micromax and Intex are unwilling licensees and have effectively declined to accept the licences on FRAND terms. This is seriously disputed by both Micromax and Intex, as a brief narration of the complaints filed by Micromax and Intex indicates.

186. In the aforesaid backdrop, one of the principal issues to be addressed is whether the allegations made in the complaint indicate an abuse of Ericsson's dominant position. A patent holder is granted a statutory right to prevent third parties from making, using, offering for sale, selling or importing the patented products and if the patent is a process then the patent holder would have the right to prevent the third parties from using or in any manner dealing with the said patent. The only manner in which a patent holder can exercise his rights is by refusing a licence permitting a third party to exploit its patent and it would be quite legitimate for a patentee to seek injunctive relief to enforce such rights. However, on the other hand, a refusal by a patentee to grant a licence may result in adverse effect on competition.

187. Given the nature of the right that a patentee enjoys, it is not easy to reconcile a patent holder's refusal to grant a licence to use his patent as a violation of antitrust laws. The interface between IPR rights and antitrust laws have been a subject matter of debate in various jurisdictions and more particularly in cases where a patentee holds an SEP.

188. In ***Broadcom Corporation v. Qualcomm Incorporated***: **501 F.3d 297,** the United States Court of Appeals considered Broadcom

Corporation's (hereafter 'Broadcom') appeal against a decision of the District Court dismissing Broadcom's action against Qualcomm alleging monopolisation in Wideband Code Division Multiple Access (WCDMA) technology in the UMTS Standards and anti-competitive conduct of tying and exclusive dealing. Broadcom had alleged that Qualcomm had falsely promised to licence its patent on FRAND terms and had induced SSOs to include its technology as an essential part of UMTS Standard. Qualcomm had thereafter reneged on its promises to offer and use of its technology on FRAND terms. It was alleged that Qualcomm was abusing its monopoly status by charging higher fees from those implementers who did not use Qualcomm's chipsets and also demanding royalties on parts of UMTS Chipsets for which it did not own patents. The District Court rejected the complaint made by Broadcom for various reasons including that Broadcom enjoyed a legally sanctioned monopoly in respect of its patented technology and Broadcom had failed to provide information on the composition of dynamics of the market for UMTS chipsets for the Court to infer that Qualcomm's conduct was anti-competitive. Broadcom's complaint of unlawful tying and exclusive dealing was also rejected.

189. On an appeal preferred by Broadcom, the Appellate Court proceeded

to examine the issues on the assumption that the allegations made in the complaint were true. It observed that *"when a patented technology is incorporated in a standard, adoption of the standard eliminates alternative to the patented technology"*. In such circumstances, the patent holder may be in a position to demand supra-competitive royalties. The Court proceeded to hold that *"in a consensus-oriented private standard-setting environment, a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, coupled with an SDO's reliance on that promise when including the technology in a standard, and the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct"*.

190. The aforesaid judgment was rendered in the context of Sherman Act. The Court held that the allegations satisfied the claim for monopolization under Section 2 of the Sherman Act, which required willful acquisition or maintenance of monopoly power accompanied by some anti-competitive conduct on the part of the possessor.

191. In the Matter of ***Rambus, Inc., No. 9302, at 4 (F.T.C. Aug.2, 2006)***, the Federal Trade Commission found that *Rambus Inc*., a developer of computer memory technologies had deceived the SSO by failing to disclose

its IPRs in the technology that was accepted as essential to the implementation of computer memory standards. *Rambus* had participated in the standard setting process and had misled other members of the SSO that it was not seeking any new patents relevant to the standard but had amended its patent applications to cover the standard. The Federal Trade Commission found that *Rambus* had distorted the standard setting process and engaged in anti-competitive hold up.

192. The question whether the demand of excessive royalties and certain terms of licensing could be considered as an abuse by an SEP holder has also been considered by authorities in the European Union under Article 101 and 102 of the Treaty on the Functioning of the European Union (hereafter 'TFEU'). In the case of ***Eurofix-Bauco v. Hilti***, the European Commission held that it was an abuse to demand excessive royalty with the sole object of blocking or unreasonably delaying a licence. This decision of the commission was upheld on appeal (Case T-30/89 ***Hilti AG v. Commission***: **[1991] ECR II-1439**).

193. The issue whether the action of an SEP holder in seeking injunctive reliefs against a potential licensee offends Article 102 of TFEU has also been a subject matter of debate in various cases. In what is known as

the "Orange book case", a court in Germany considered the defence that seeking an injunction against infringement of patent would amount to an abuse of dominant position. The case concerned a *de facto* standard for CD-Rs which were required to comply with the specifications as set out in a document known as the "Orange book". In that case, the patent holder, Phillips, claimed that all manufacturers or persons selling CD-Rs were required to obtain a licence from Philips in respect of licence for use of its patents. Philips also initiated an action for infringement of its patent against a number of manufacturers engaged in manufacturing CD-Rs and sought injunctive reliefs as well as damages. In their defence, the manufacturers claimed that Philips was in a dominant position in respect of markets for CD-Rs and its conduct of seeking injunction reliefs constituted abuse of its dominant position and offended Article 102 of TFEU. The German Federal Court in its judgment delivered on 6th May, 2009 in ***KZR 39/06, (Orange-Book Standard)*** held that a potential licensee could claim such defence only in limited circumstances where the defendants could establish that (i) they had made an unconditional offer for obtaining a licence which could not be refused by the patent holder without abusing its dominant position and (ii) such terms included the defendants waiving their

right to challenge the patent. This view was followed in a number of cases.

194. In recent times, there has been much advancement in the telecommunication sector and technology. Companies - such as Ericsson - have acquired a large portfolio of patents which have been accepted as a part of the standards established by various SSOs. Enforcement of these SEPs has become a major area of dispute between the technology company holding the SEPs and mobile phone manufacturers. Two such cases, one initiated by Motorola for enforcement of GPRS Standard Essential Patents and the other initiated by Samsung for enforcement of UMTS Standard Essential Patents are significant. Both these cases were initiated against Apple in German Courts. In both the cases, negotiations for licences with Apple had broken down and this caused both Samsung and Motorola to initiate action for infringement of their SEPs against Apple. Both Motorola and Samsung sought injunctive reliefs against Apple for infringement of their patents. Apparently, this led the European Commission to initiate investigations against alleged anti-competitive conduct against Samsung and Motorola. In their decision, in the case of Motorola, the European Commission held that Motorola has abused its dominant position by seeking injunctive reliefs against Apple. The Commission reasoned that

even though the parties could not agree on FRAND terms, Apple had agreed to submit the FRAND disputes to a binding resolution of a German Court. Importantly, the Commission noted that any such resolution should also contain a commitment on the part of Apple not to challenge Motorola's patent. In the case of Samsung, the Commission did not proceed to make any decision with regard to infringement and accepted the binding commitments offered by Samsung not to seek injunctions in relation to any of its present or future SEPs for mobile devices for a period of five years against any potential licensee who accepted the specified licensing framework which provided for (a) a negotiation period of 12 months; and (b) in absence of a consensus, a determination by Court or an arbitrator of FRAND terms.

195. A mention must also be made on a recent decision rendered by the Court of Justice of the European Union delivered on 16th July, 2015 in ***Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH***: **(Case C-170/13)**. The aforesaid case related to a claim made by Huawei, a Chinese company against ZTE Corp. It was Huawei's case that ZTE Corp. was marketing mobile network products in Germany that incorporated software linked to 4G and "Long Term Evolution" (LTE) standard.

Although, the said parties attempted to negotiate a licensing arrangement on FRAND terms but the negotiations were not successful. This led Huawei to initiate proceedings before the German Federal Court of Justice (Landgericht Düsseldorf) for infringement of its patent. This action was defended by ZTE who claimed that Huawei's action for seeking injunctive relief was an abuse of its dominant position and violated Article 102 of TFEU. ZTE contended that it was a willing licensee. In view of the controversial issues involved and considering that there may be differences in the approach of the German Courts and the EU Commission, the Court stayed the proceedings and referred five questions to the European Court of Justice. In those proceedings, Advocate General Wathelet delivered an opinion to the Court of Justice - as is required under the process of the Court of Justice - recommending what is described as a "middle-path" between protection available to an SEP holder and the implementer. The aforesaid opinion was endorsed by the Court of Justice. The Court of Justice held that a refusal of a proprietor of an SEP to grant a licence on FRAND terms may, in principle, constitute an abuse within the meaning of Article 102 of TFEU. Accordingly, the abusive nature of such refusal may in principle be raised as a defence to the actions for prohibitory injunctions.

The Court of Justice further held that the irrevocable undertaking to grant licences on FRAND terms given to a SSO by a SEP holder cannot negate the substance of his patent rights. But, nonetheless, it justifies imposition on the proprietor of an SEP, an obligation to comply with certain specific requirements when bringing actions against alleged infringer for injunctive reliefs or for recall of the infringing products. The Court of Justice proceeded to lay down a set of specific obligations that a SEP holder is required to discharge before bringing an action for alleged infringement. The relevant extract from the judgment indicating the said set of specific requirements is quoted below:-

> "Accordingly, the proprietor of an SEP which considers that that SEP is the subject of an infringement cannot, without infringing Article 102 TFEU, bring an action for a prohibitory injunction or for the recall of products against the alleged infringer without notice or prior consultation with the alleged infringer, even if the SEP has already been used by the alleged infringer.
>
> Prior to such proceedings, it is thus for the proprietor of the SEP in question, first, to alert the alleged infringer of the infringement complained about by designating that SEP and specifying the way in which it has been infringed.
>
> As the Advocate General has observed in point 81 of his Opinion, in view of the large number of SEPs composing a standard such as that at issue in the main proceedings, it is not certain that the infringer of one of those SEPs will necessarily

be aware that it is using the teaching of an SEP that is both valid and essential to a standard.

Secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, it is for the proprietor of the SEP to present to that alleged infringer a specific, written offer for a licence on FRAND terms, in accordance with the undertaking given to the standardisation body, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated.

As the Advocate General has observed in point 86 of his Opinion, where the proprietor of an SEP has given an undertaking to the standardisation body to grant licences on FRAND terms, it can be expected that it will make such an offer. Furthermore, in the absence of a public standard licensing agreement, and where licensing agreements already concluded with other competitors are not made public, the proprietor of the SEP is better placed to check whether its offer complies with the condition of non-discrimination than is the alleged infringer.

By contrast, it is for the alleged infringer diligently to respond to that offer, in accordance with recognised commercial practices in the field and in good faith, a point which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

Should the alleged infringer not accept the offer made to it, it may rely on the abusive nature of an action for a prohibitory injunction or for the recall of products only if it has submitted to the proprietor of the SEP in question, promptly and in writing, a specific counter-offer that corresponds to FRAND terms.

Furthermore, where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for that alleged infringer, from the point at

which its counter-offer is rejected, to provide appropriate security, in accordance with recognised commercial practices in the field, for example by providing a bank guarantee or by placing the amounts necessary on deposit. The calculation of that security must include, inter alia, the number of the past acts of use of the SEP, and the alleged infringer must be able to render an account in respect of those acts of use.

In addition, where no agreement is reached on the details of the FRAND terms following the counter-offer by the alleged infringer, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay.

Lastly, having regard, first, to the fact that a standardisation body such as that which developed the standard at issue in the main proceedings does not check whether patents are valid or essential to the standard in which they are included during the standardisation procedure, and, secondly, to the right to effective judicial protection guaranteed by Article 47 of the Charter, an alleged infringer cannot be criticised either for challenging, in parallel to the negotiations relating to the grant of licences, the validity of those patents and/or the essential nature of those patents to the standard in which they are included and/or their actual use, or for reserving the right to do so in the future."

196. It is relevant to note that the aforesaid judgment was rendered in the context of Article 102 of TFEU which reads as under:-

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

197. Section 4 of the Competition Act contains the anti-abuse provisions and reads as under:-

"**4. Abuse of dominant position** -

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service;

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or

service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors."

198. Although the language of Article 102 of TFEU is materially different from the language of Section 4 of the Competition Act, a close examination does indicate that Section 4 of the Competition Act would also cover abuse of a dominant position as proscribed by Article 102 of TFEU. Clause (a) and clause (b) of Section 4(2) of the Competition Act are similar in their import as clause (a) and (b) of Article 102 of TFEU. Clause (c) of Article 102 of TFEU postulates that applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, may constitute abuse of dominant position. In comparison, clause (c) of Section 4(2) of the Competition Act is much wider and takes within its sweep any practice or practices which results in denial of market access. Clause (d) of Article 102 of TFEU and clause (d) of Section 4(2) of the Competition Act are similarly worded.

199. In view of the aforesaid, there is good ground to hold that seeking injunctive reliefs by an SEP holder in certain circumstances may amount to abuse of its dominant position. The rationale for this is that the risk of suffering injunctions would in certain circumstances, clearly exert undue pressure on an implementer and thus, place him in a disadvantageous

bargaining position *vis-a-vis* an SEP holder. A patent holder has a statutory right to file a suit for infringement; but as stated earlier, the Competition Act is not concerned with rights of a person or an enterprise but the exercise of such rights. The position of a proprietor of an SEP cannot be equated with a proprietor of a patent which is not essential to an industry standard. While in the former case, a non-infringing patent is not available to a dealer/manufacturer; in the latter case, the dealer/manufacturer may have other non-infringing options. It is, thus, essential that bargaining power of a dealer/manufacturer implementing the standard be protected and preserved.

200. In the present case, apart from instituting suits for infringement against Micromax and Intex, Ericsson has also threatened Micromax with complaints to SEBI, apparently, while Micromax was contemplating and/or in the process of floating a public offer of its shares. Such threats were, undoubtedly, made with the object of influencing Micromax to conclude a licensing agreement. It is not necessary for this Court to examine whether in the facts of this case, such threats also constitute an abuse of Ericsson's dominant position. Suffice it to state that in certain cases, such threats by a proprietor of a SEP, who is found to be in a dominant position, could be

held to be an abuse of dominance. Clearly, in certain cases, such conduct, if it is found, was directed in pressuring an implementer to accept non-FRAND terms, would amount to an abuse of dominance.

(iv)The disputes, being subject matter of suits, could not be entertained by CCI.

201. It has been contended on behalf of Ericsson that since, the disputes between the parties were subject matter of pending suits, the same could not be entertained by CCI. In my view, the aforesaid contention is also unmerited. As explained earlier, the proceedings under the Competition Act before the CCI are not in the nature of a private *lis*. The object of the proceedings is to prevent and curb the practices which have an adverse effect on the competition in India. The proceedings in the suits filed by Ericsson and the proceedings before CCI are not mutually exclusive. It is also necessary to bear in mind that it is not necessary that an adverse finding against Ericsson by CCI would necessarily results in the grant of relief as prayed for by Intex or Micromax. The scope of enquiry before CCI would obviously be limited to whether Ericsson has abused its dominant position and, if so found, CCI may issue orders as contemplated under Section 27 of the Act. Additionally, it must be noted that Ericsson

had filed a suit after Intex had made a complaint before the CCI.

202. The contention that since, by virtue of Section 61 of the Competition Act, the jurisdiction of the Civil Courts is barred in relation to matters that CCI or COMPAT are empowered to decide and some issues before the CCI and in the suits are common, the subject matter would be outside the scope of the Competition Act, also cannot be accepted. The question whether there is any abuse of dominance is solely within the scope of the Competition Act and a civil court cannot decide whether an enterprise has abused its dominant position and pass orders as are contemplated under Section 27 of the Competition Act. Merely because a set of facts pleaded in a suit may also be relevant for determination whether Section 4 of the Competition Act has been violated, does not mean that a civil court would be adjudicating that issue. Further, merely because certain reliefs sought by Micromax and Intex before CCI are also available in proceedings under the Patents Act also does not exclude the subject matter of the complaints from the scope of the Competition Act. An abuse of dominant position under Section 4 of the Competition Act is not a cause that can be made a subject matter of a suit or proceedings before a civil court.

(v) Whether Micromax/Intex could maintain a complaint for abuse of dominance since they had contested Ericsson's claim for infringement

203. The complaints made by Micromax and Intex premised on the basis that Ericsson is a proprietor of the subject SEPs. This, according to Ericsson, would militate against their respective stands in the suits filed by Ericsson and, thus, the complaints made by Micromax/Intex were liable to be rejected by CCI. In my view, the aforesaid contention cannot be accepted. It is Ericsson's case that it is the proprietor of subject SEPs and, therefore, it is not open to Ericsson to contend that its conduct in respect of those SEPs cannot be made subject matter of enquiry by CCI on the ground that SEPs have been denied by Micromax and Intex. As mentioned above, the proceedings under the Competition Act are not in the nature of private *lis* and the scope of enquiry would be only limited to whether there is any abuse of dominance which is proscribed under Section 4 of the Competition Act. Of course, the conduct of Micromax and Intex would have to be taken into account in determining whether Ericsson had violated its FRAND obligations.

204. The issue whether a licensee/prospective licensee could enter into negotiations for a licence on FRAND terms while reserving its right to

challenge the rights of a patentee is also a contentious issue. In the ***Orange Book Case*** (*supra*), the German Federal Court had taken a view that a defence of patent abuse could be claimed by a potential licensee only if the potential licensee has waived its right to challenge a patent. However, in a later decision delivered by the Court of Justice of the European Union in ***Huawei Technologies Co.*** *(supra)*, the Court has taken a different view and held that an alleged infringer could not be criticised for challenging the licence parallely while negotiating for grant of licence. In ***Vringo Infrastructure Inc. v. ZTE*****: (2013) EWHC 1591 (Pat.)**, the High Court of England and Wales had considered the defendant's plea for a decision on the validity of the plaintiff's claim to the patents, in a suit for infringement, before proceeding to decide the FRAND issues. In that case, the plaintiff, Vringo Infrastructure Inc. (Vringo), instituted actions for infringement of its SEPs by ZTE (UK) Ltd. Vringo was prepared to offer a licence for its global SEP portfolio on FRAND terms. ZTE, on the other hand, asserted that Vringo's patents were invalid and/or not infringed and insisted on this issue being decided before deciding the issue as to the licence terms. In view of the defence taken by ZTE, Vringo contended that ZTE was not a willing licensee. This was rejected by the Court and it was held that ZTE's

stand that the Vringo's patents were invalid and/or not infringed did not mean that ZTE was not a willing licensee.

205. In my view, a potential licensee cannot be precluded from challenging the validity of the patents in question. The expression "willing licensee" only means a potential licensee who is willing to accept licence of valid patents on FRAND terms. This does not mean that he is willing to accept a licence for invalid patents and he has to waive his rights to challenge the patents in question. Any person, notwithstanding that he has entered into a licence agreement for a patent, would have a right to challenge the validity of the patents. This is also clear from clause (d) of Section 140(1) of the Patents Act, which was introduced with effect from 20th May, 2003. The said clause expressly provides that it would not be lawful to insert in any contract in relation to sale or lease of a patented article or in a licence to manufacture or use of patented article or in a licence to work any process protected by a patent, a condition the effect of which may be to prevent challenges to validity of a patent. Thus, a licensee could always reserve its right to challenge the validity of a patent and cannot be precluded from doing so.

206. It follows from the above, that a potential licensee, could without

prejudice to his rights to challenge the validity of patents could take such steps or proceedings which are premised on the patents being valid. The doctrine of election would have no application in this case and it is not necessary for a potential licensee to elect to accept the validity of patents in order to assail its abuse.

207. In view of the above, it would not be necessary for Micromax or Intex to waive their rights to challenge a patent for instituting a complaint which is based on the premise that Ericsson's patents are valid. The CCI, cannot be faulted for proceeding on the basis that Ericsson holds the SEP's that it asserts it holds; at any rate, Ericsson cannot be heard to complain against CCI proceeding on such basis.

(vi) Whether impugned orders are without jurisdiction as being perverse

208. In the given facts and circumstances, it is difficult to form an opinion that the conduct of Ericsson indicates any abuse of dominance considering the fact that it does appear that Ericsson had made efforts to arrive at a negotiated settlement with Micromax and Intex, who on the other hand, appear to have been manufacturing/dealing with products using the patented technologies without either obtaining a licence from Ericsson or

approaching the Controller of Patents for a compulsory licence. However, it is not open for this court, in proceedings under Article 226 of the Constitution of India, to supplant its views over that of the concerned authority; in this case the CCI. This is not a case where it can be held that no reasonable person could have formed a view that the complaints filed by Intex and Micromax, *prima facie*, disclosed abuse of dominance by Ericsson. This is also not a case where the impugned orders can be stated to have been passed on no material at all. Therefore, I am unable to accept that the impugned orders passed by CCI are perverse and, therefore, without jurisdiction.

209. Mr Narain had pointed out that the CCI having permitted Ericsson to file its submission ought to have considered the various issues raised by Ericsson but the impugned orders do not disclose that the CCI had considered the contentious issues. In my view, there is considerable merit in the said submission. Although at the stage of passing an order under Section 26(2) of the Act, the CCI is not required to enter into an adjudicatory process, nonetheless, it has to form a *prima facie* view and this would include a view as to its jurisdiction to entertain the information/complaint. It was thus apposite for the CCI to at least notice

the contours of the controversy raised by Ericsson and take a prima facie view. This would also be necessary to outline the area in which investigations were required to be undertaken by the DG. Having stated the above, I do not consider it necessary to remand the matter to CCI for reconsidering its prima facie view, particularly as the issues pertaining to the CCI's jurisdiction as canvassed by Ericsson have been examined in these proceedings.

210. Before concluding, it is also necessary to note that Ericsson had also filed complaints relating to the high-handed and officious manner in which investigations were being conducted. Ericsson had also expressed its apprehension as to a breach of confidentiality in relation to the confidential information provided to the CCI. In this regard, it must be observed that the CCI, the DG and employees of the CCI are obliged to maintain confidentiality and secrecy of the confidential information provided by Ericsson and must take adequate measures to maintain the same. In a given case of negligence, the CCI/DG may not be immune from a claim of loss or damages if they fail to maintain confidentiality/secrecy of the sensitive information provided to them. As regards the conduct of investigation; needless to state that any arbitrary, unreasonable, capricious or malafide

actions would be subjected to judicial review and it would be open for Ericsson to initiate fresh proceedings if the conduct of investigation or any actions of CCI/DG are contrary to the provisions of the Competition Act or fall foul of the constitutional standards required of an authority.

211. It is also necessary to clarify that nothing stated herein should be construed as an expression of opinion - *prima facie* or otherwise - on the merits of the allegations made by Micromax and Intex; all observations made or views expressed herein are in the context of the jurisdiction of CCI to pass the impugned orders.

212. In view of the aforesaid, the writ petitions are dismissed. All applications also stand disposed of. All interim orders are vacated. However, in the circumstances, the parties are left to bear their own costs.

VIBHU BAKHRU, J

MARCH 30, 2016
RK/MK