BEFORE THE SUPREME COURT OF AVALON

Special Leave Petition filed under Article 136 of the Constitution of Avalon & Appeals filed under Section 53T of the Competition Act, 2002

MEMORIAL FILED ON BEHALF OF THE RESPONDENTS

SLP(C) No. 101/2017

Adison & Anr. ……. Appellant

V.

Competition Commission of Avalon ……Respondent

CLUBBED WITH

Appeal No. 1/2017

Plato& Ors. ……. Appellant

V.

Competition Commission of Avalon …..… Respondent

Most Respectfully Submitted to the Hon'ble Judges of the Supreme Court of Avalon

COUNSEL APPEARING ON BEHALF OF 'RESPONDENTS

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STATEMENT OF JURISDICTION

THE PARTIES HAVE APPROACHED THIS HON'BLE COURT INVOKING ITS APPELLATE JURISDICTION UNDER ARTICLE 136 OF THE CONSTITUTION OF AVALON TO GRANT A SPECIAL LEAVE AGAINST THE ORDER OF THE HIGH COURT.

*"**136: Special leave to appeal by the Supreme Court***

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

THE APPELLANTS HAVE APPROACHED THIS HON'BLE COURT INVOKING ITS APPELLATE JURISDICTION UNDER SECTION 53T OF THE COMPETITION ACT OF AVALON.

"***53T: Appeal to Supreme Court.***

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them;

Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days."

In the present case the Hon'ble Court has used his original inherent power and clubbed the matters together under order "LV" (55), Rule 5 of the Supreme Court rules.

STATEMENT OF FACTS

ABOUT AVALON:

Avalon is a republic and a growing market in Asia whose laws are pari material to laws of India. It has a self-sustaining market with high potential for industrial growth. In 1991, government on Avalon opened its market to global competition and enacted Avalon Competition Act, 2002 to deal any emergent issues. Although, due to various judicial and policy consideration it was enacted on 20th May, 2010. Competition Commission of Avalon has high persuasive value of CCI, Indian court and also relies on precedents and jurisdiction from EU and US.

GROWTH OF TECHNOLOGY AND COMPETITION:

After the growth of consumer electronic industry in Avalon, Adison, Brandon, Coral were leading manufacturers of TVs based on CRT technology. They started manufacturing LCD technology after entering into technology sharing agreement with Kitachi and discontinued to manufacture CRT based TVs. Later, Plato, Quantos, Rony and Coral entered into technology sharing agreement with Hatim Tai and manufactured LCD(E) based TVs and Adison and Brandon continued to do the same. Because of the sudden emergence of TV industry, different manufactures started offering loyalties, incentives, discounts, different schemes to the customer.

In Dec 2015, Brandon filed an Information under § 19(1)(a) of the Competition Act, before CCA alleging cartelization between manufactures of LCD(E) technology as their TVs were sold at abnormally high prices. CCA found it was a prima facie case of violation of § 3 of Competition Act and directed DG to investigate into the matter.

DG'S INVESTIGATION AND FINDING:

DG investigated that manufactures of LCD(E) marginally increase prices of their productduring festive season to achieve their targets. On further investigation it was found that, Mr.KechriMotiwala raised an issue on March 2010, that multi brand retailers are in profit from the incentives offered by different companies sold TVs at very low or very high prices which affects single brand retailers. Therefore, their plea to set a minimum sale price for TVs having similar technology, was negated by all the manufactures of LCD(E) together but taken into consideration by Adison and Brandon together. Later, DG also tracked three phone class between Adison and Brandon, and a call before entering common Facilitation Function from a common 2pm Air Avalon flight where their entries

were made in red pen. It also took notice of the fact that they raised their prices in sync during festive season which is a result of violation §3 of CCA.

ARGUMENT BY MANUFACTUERES AND DECISION BY CCA:

LCD(E) manufactures argued DG's report and alleged that conduct of cartelization is outside the purview of Competition Act and the conduct was prior to CCA. Adison and Brandon argued that there was no evidence of cartelization against them and DG's finding is based on cherry picking. CCA after hearing the parties held them violation of § 3(3) and 27(b) of the Competition Act.

APPEAL AND THE DECISION BY COMPAT:

Adison and Brandon filed an appeal before COMPAT challenging the finding of commission against §3 and also raised an issue of jurisdiction of the CCA and DG's investigation. The COMPAT after hearing the issue of all the six parties decided that the appeals filed by LCD (E) manufacturers are dismissed and CCA findings on cartelization was upheld. Also, CCA was right in holding the price rise increase in Nov- Dec2010 was in contravention of § 3 of the Act and there was no merit in the pleas of the Appellant that the act in question was outside the ambit of the Act. Further, it also held the plea by Adison and Brandon that DG acted outside his jurisdiction as unsustainable and remanded back the matter to CCA on the appeal so filed by them. Lastly, the penalties were rightly imposed by CCA according to the provision of the Act.

FINAL APPEAL IN SC:

Later, LCD(E) manufacturer approached the SC under § 53T of the Competition Act challenging the violation of §3 against them. Adison and Brandon on the other hand approached the HC challenging the finding of the COMPAT on scope and powers of DG's investigation but the writ was dismissed by HC. Aggrieved by HC, it approached the SC under Special Leave Petition challenging the order of HC to dismiss the petition and order of COMPAT remanding the matter back to CCA. The SC admitted the SLP as well as civil appeals, and directed that all the related matters be listed for final hearing together.

STATEMENT OF ISSUES

I. WHETHER THE ORDER OF COMPAT DECLARING THE DIRECTOR GENERAL'S REPORT SUSTAINABLE IS CORRECT IN LAW?

II. WHETHER THERE IS A VIOLATION OF SECTION 3(3) OF THE COMPETITION ACT, 2002 BY THE SIX MANUFACTURERS?

SUMMARY OF ARGUMENTS

1. WHETHER THE ORDER OF COMPAT DECLARING THE DIRECTOR GENERAL'S REPORT SUSTAINABLE IS CORRECT IN LAW?

It is humbly submitted that direction from the Commission is a prerequisite for investigation by the Director General. The Director General is empowered to assist the Competition Commission in investigating into any contravention of the provisions of said Act but not allowed to expand his scope of investigation. In the instant case, the Director General was only directed to investigate into the festive season only, but he expanded his scope of investigation and investigated in excess of the commission's directions, thereby initiating suomoto enquiry which does not fall in the scheme of the Act. The act provides for hearing at multiple stages, both before the Commission and the Director General. By simply relying on misleading appearance of facts and conducting a mere ritual of hearing by forming a conclusion based on oral communication, the Director General has violated the principles of natural justice. The findings of the Director General are based on the conduct prior to the enactment of the act, thereby rendering his report invalid and unsustainable. Thus, the order of COMPAT declaring the Director General's report sustainable is not correct in law.

2. WHETHER THERE IS A VIOLATION OF SECTION 3(3) OF THE COMPETITION ACT 2002 BY THE SIX MANUFACTURERS?

It is humbly submitted that existence of cartel is sufficient to prove the violation of section 3(3) and subsequently, existence of an agreement is sufficient for proving cartel. In the instant case there is existence of an agreement between the manufactures which has an appreciable adverse effect on competition in Avalon. The scheme of the act provides an arrangement, understanding or action in concert in an anti-competitive agreement. In the instant case the material facts themselves reveal existence of cartel between the manufactures. Existence of high concentrated market, interdependence between manufactures and creation of oligopolistic market is indicative of giving rise to a platform for cartelization. Thus there is a violation of section 3(3) by the manufactures.

ARGUMENTS ADVANCED

I - WHETHER THE ORDER OF COMPAT DECLARING THE DIRECTOR GENERAL'S REPORT SUSTAINABLE IS CORRECT IN LAW?

It is humbly submitted that as per §19(1) of the Competition Act, 2002,[1] the competition commission may initiate enquiry, a) on its own basis of information and knowledge in its possession, b) on receipt of an information or c) on receipt of a reference from the Central Government or a State Government or a statutory authority.[2] This gives the commission, power to initiate enquiry on its own on the basis of information and knowledge in its possession. Further, as per §26(1) of the Act the competition commission has the power to direct the Director General[3] to investigate into any matter where it finds a prima facie infringement of the sections listed in the Act.[4] In the instant case, the CCA on finding a prima facie case of violation of §3 of the Act[5] passed an order under §26(1) of the act directing the DG to investigate into the alleged cartelization which clearly denotes that CCA fulfilled its statutory and legal duty in doing so.

The DG's investigation revealed that all the manufacturers had fixed prices which resulted in violation of the provisions of the Act. Further recommending that the six manufacturers were in violation of Section 3(3) of the Act.[6]It is contended that the COMPAT's order in declaring the DG's report sustainable[7] is correct in law. In reporting a violation of Section 3(3) of the act by the manufacturers,[8] the DG has neither expanded his scope of investigation, nor has he acted outside the scope of his authority.

This contention is sought to be substantiated on four grounds (a)that the DG's findings fall within the purview of the Act, (b) the DG in reporting a violation of Section 3(3) of the Act has acted within the scope of his authority, (c) he has fulfilled his statutory and legal duty in reporting the said violation and (d) the informant is an active part of the investigation process.

[1]Hereinafter the Act.
[2]§19(1), Competition Act, 2002.
[3]Hereinafter DG.
[4] §26(1), Competition Act, 2002.
[5]§3, Competition Act, 2002.
[6]Proposition, ¶ 21.
[7]Proposition, ¶ 27, Line c.
[8]§3(3), Competition Act, 2002.

1.1 –THAT THE DG'S FINDING FALL WITHIN THE PURVIEW OF THE ACT.

1.1.1 - It is humbly submitted that in reporting the conduct of cartelization, the entire investigation of the DG is based on findings which does not save the alliance of the manufacturers since the Act nowhere declares the agreement already entered into as void. Though the agreement between Plato, Quantas, Rony and Coral was entered before the enactment of substantive provisions coming into force, the question in the instant case was as to whether the agreement between the manufacturers which was valid until coming into force of the Act, would be valid even after the operation of the law. The manufacturers as on relevant date, i.e 2004 certainly proposed to act upon that agreement[9] which satisfy all acts done in pursuance of the agreement before the Act came into force valid and unquestionable. The provisions make it clear that after coming into force of the Act, no person shall enter into an agreement in contravention of its provisions and if entered into, same shall be void. However, the Act does not render the agreement entered, prior to coming into force of it as void ab initio. The agreement prior to coming into force of the Act was, therefore, certainly valid, for it was not in breach of any law or affected any law then existing.

1.1.2 - It is humbly contended that though the transaction and agreement between Plato, Quantas, Rony and Coral with Hatim Tai maybe prior to coming into force of the Act, it stands covered by the Act on the date it came into operation,i.e20 May 2010[10]. In the case of *Kingfisher Airlines Limited v. Competition Commission of India*,[11]it was held that though the Competition Act is not retrospective, it would cover all agreements entered into prior to the commencement of the Act which are sought to be acted upon by the parties after the commencement of the Act.This is so because all transactions in respect of the agreement between the manufacturers on the date the Act came into force were saved.[12] This is because the transactions were valid since the Act had not come into force and it did not specifically render them void. In the instant case, the agreement being valid until coming into force of the Act makes every act done in pursuance of the agreement before the Act came into force valid and unquestionable. Therefore, the DG's findings fall within the purview of the Act.

[9]Proposition, ¶ 9.
[10]Proposition, ¶ 3.
[11]Kingfisher Airlines Ltd. v. Competition Commission of India, [2011] 12 taxmann.com 285 (Bom.).
[12]R. Rajagopal Reddy v. PadminiChandrasekharan, (1995) SCC (2) 630.

1.2THAT THE DG IN REPORTING A VIOLATION OF SECTION 3(3) HAS ACTED WITHIN THE SCOPE OF HIS AUTHORITY.

1.2.1 - It is humbly submitted that CCA has the jurisdiction to direct the DG to investigate and arrive at a finding against the manufacturers. Further, the DG in reporting a violation based on evidence procured from his investigation on the direction of Competition commission of Avalon[13] is not a violation of the Act.

1.2.2- In the case of *Grasim Industries v. Competition Commission of India*,[14] it was held that, if the Commission, on consideration of an information forms an opinion that there exists a prima facie contravention of §3 of the Act and the DG, while investigating the said information, reports contravention of the said provision such a report will not be contrary to the provisions of the Act. This is because the Commission had already considered the information well in advance which was procured by DG upon its investigation before forming an opinion as per the first explanation to §26 of the Act, read with §19[15]. In the instant case, formation of opinion and direction given by the CCA acted as a pre requisite for the commencement of DG's investigation which shows that CCA had full DG acted upon the direction of CCA.

1.2.3 - It is pertinent to note that as per the second explanation to Regulation 18 of the Competition Commission of India (General) Regulations, 2009 provides that a direction of investigation to the Director General shall be deemed to be the commencement of an Inquiry under §26 of the Act.[16]Thus, formation of an opinion that there is a contravention of the provisions of the Act, is a sine qua non, for investigation by the Director General. In other words, the investigation by the Director General depends upon the nature of the opinion formed by the Commission, where in the instant case CCA formed an opinion about the existence of a prima facie contravention of §3(3) on consideration of information received by it. Further, the DG acted only after the direction given by CCA which restricts the scope of his investigation within its authority.

1.2.4 - It is humbly contended that along with the DG's investigation, a careful analysis of the material facts of the case reveal the violation of §3(3). These material facts contain information with regard to various structural factors of the Avalon product market, particularly a highly concentrated

[13]Hereinafter CCA.
[14]Grasim Industries Ltd. v. Competition Commission of India, [2014] 41 taxmann.com 333 (Delhi).
[15]Explanation 1, §26(1) r/w §19, Competition Act, 2002.
[16]Regulation 18, Competition Commission of India, 2009.

market with regard to a healthy market share of manufacturers[17], interdependence between manufacturers leading to creation of an oligopolistic market[18] and information with regard to a homogenous product[19]. All of these are indicative of giving rise to a platform for cartelization[20] as per §2 (c) of the Act. Therefore, the DG has acted within the scope of his authority in reporting the violation of Section 3(3).

1.3THAT THE DG HAS FULFILLED HIS STATUTORY AND LEGAL DUTY IN REPORTING THE SAID VIOLATION.

1.3.1 It is submitted that in reporting the contravention of §3(3), the DG, a) Acted within this statutory and legal duty in reporting all the contraventions of the Act, b) fulfilled his duty with regard to application of mind to the material facts and c) provided additional informationin relation to the subject of whichCCA already had knowledge.

1.3.2 - It is humbly submitted that as per §26(1), the DG shall investigate into any matter on the direction of the Commission. Further, §41(1) empowers the DG to assist the Commission in investigating into any contravention of the provisions of the said act.[21] In the instant case, the DG did not take cognizance of any matter of which the CCA had no information about, the DG acted upon the direction given by CCA. This makes one thing clear, that the DG did not exercise *suomoto* power while conducting his investigation. The DG's act was not exercised beyond his investigatory functions.[22] Hence, having acted well within his autonomy, and by not expanding his scope of investigation the DG has fulfilled his statutory and legal duty in reporting the said violation.

1.3.3 It is been held that there must be application of mind to the material and the formation of opinion must be honest and bonafide.[23] In the instant case, if the DG concerned would not have not applied its mind to essential matters, the power conferred on DG could not have been said to have been exercised honestly and in a bona fide manner.[24]It is submitted that the DG in reporting a

[17]Proposition, ¶ 15.
[18]Proposition, ¶ 16.
[19]Proposition, ¶ 7.
[20] §2(c), Competition Act, 2002.
[21]§41(1), Competition Act, 2002.
[22]All India Tyre Dealers' Federation v. Tyre manufacture, 2012 SCC Online CCI 65.
[23]Director General of Income-tax (Investigation) *v.* Spacewood Furnishers (P.)Ltd., [2015] 57 taxmann.com 292 (SC).
[24]Brundaban Chandra DhirNarendra v.The State Of Orissa, AIR 1953 Ori 121.

violation of §3(3) has applied his mind, thereby obtaining such material by intelligence[25] and in honest and a bona fide manner.

1.3.4 It is submitted that in reporting the said violation, the information received by the DG was simply additional information pertaining to the same subject matter of complaint. The proviso to §26(1) would apply, thereby clubbing the information received by the DG and information already in knowledge of CCA fall within the ambit of §19(1). As a quasi-judicial body, the Commission is bound by certain constitutional principles and is bound to disclose reasons for its rulings.[26] Prima facie is a settled principle of law,[27] the CCA had already formed an opinion and recorded its reasons in respect of the alleged conduct of cartelization between the manufacturers. The CCA had issued a direction in the period of November- December 2010, it clearly tantamount to a directions under §41(1).[28]The Commission or the Director General had not done anything in a manner otherwise than what is prescribed in the Act and the Regulations, the DG merely placed before CCA, an information already available in the complaint lodged by the individual.[29] It was an additional information that could be taken note of under the Proviso to section 26(1). Therefore,neither the DG nor CCA overstepped the jurisdiction vested in them in law.

1.4THAT THE INFORMANT IS AN ACTIVE PART OF THE INVESTIGATION PROCESS.

1.4.1 - It is humbly submitted that The DG in respect of all the powers conferred to him, recommended all the six manufacturers to be in violation of §3(3) of the Act. The expression *'reason to believe'* confers wide discretion on the DG in reporting the saidviolation. In the case of *Secretary of State for Education & Science v. TamerideMetroborough Council,*[30]it was held that 'the very concept of administrative discretion involves a right to choose between more than one possible courses of action upon which there is a room for reasonable people to hold differing opinion as to what may be preferred'.The DG in exercise of his discretionary power acted pursuant to the order of CCA and upon his own judgement in recommending all the six manufacturers to be in violation of §3(3). In the instant case, the DG returned with a finding that the prices of the informant increased in sync with the prices of Adison which appeared to have been colluded.[31]This gives the DG, a reason to believe, that the act of the informant resulted in the said violation. The expression reason to

[25]Dr.Pratap Singh v. Director of Enforcement, 1985 AIR 989.
[26]SeimensEngg& Mfg. Co. of India Ltd. v. Union of India &Anr.(1976) 2 SCC 981.
[27]Ramdev Food Products (P) Ltd. v. ArvindbhaiRambhai Patel &Ors., (2006) 8 SCC 726.
[28]Proposition, ¶ 11.
[29]Hyundai Motor India Ltd. v. Competition Commission of India, [2016] 67 taxmann.com 40 (Madras).
[30]Secretary of State for Education & Science v. TamerideMetroborough Council, [1976] 3 All ER 665.
[31]Proposition, ¶5, para 20.

believe postulates belief and existence of reasons for that belief,[32]in the instant case, the DG while reporting the said violation relied upon information and not on mere suspicion[33]. A substantive insight into the DG's investigation reveals certain communication evidence between Adison and Brandon which satisfies the said contravention. For instance, call records of the CFOs of Adison and Brandon while attending the same felicitation function,[34]entries in the visitor register made with a red pen,[35] travel via same flight[36] and conscience between representatives of Adison and Brandon at the Annual Technology Conclave while agreeing to consider a minimum resale price for the single brand retailers. All are indicative of the fact that Brandon, who was the Informant was an active part to the alleged contravention and subsequently, entitled to pursue complaint, fully participate in the proceedings by way of producing evidence and administering interrogatories.

1.4.2 - It is pertinent to note that the allegations for inquiry by the Commission may emanate from receipt of any information from any person, as defined in §2(l),[37] any consumer, as defined in §2(f),[38] any consumer's association or any trade association or on its own motion. In the instant case, since the authenticity of both, the information and informant is to be confirmed, the CCA may cause its investigation by the DG under §26 to satisfy itself whether or not the complaint requires to be entered into.

1.4.3 - The commissionin its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive.[39] Regulation 17(2) of the Competition Commission of India (General) Regulations, 2009 call for invitation to invite not only the information provider but even 'such other person' which would include all persons, even the affected parties, as it may deem necessary.[40]Similarly, in the instant case, Brandon will be a part of the same investigation process to fulfil the authenticity of the information filed by him.

[32]Income Tax Officer v. LakhmaniMewal Das, (1976) 3 SCC 757.
[33]N. K Textile Mills & Another v. Commissioner Of Income-Tax, (1966) 62 ITR 58 P H.
[34]Proposition, ¶ 17, line 1-2.
[35]Proposition, ¶ 17, line 7-8.
[36]Proposition ¶ 18-19.
[37]§2(l), Competition Act, 2002.
[38] §2(f), Competition Act, 2002.
[39]CCI v. Steel Authority of India Ltd., [2010] 103 SCL 269 (SC).
[40]Regulation 17(2), Competition Act, 2002.

II .WHETHER THERE WAS VIOLATION OF SECTION 3(3) OF THE COMPETITION ACT, 2002 BY THE SIX MANUFACTURERS?

It is humbly submitted before the Hon'ble Supreme Court of Avalon that there is a violation ofsection 3(3) of the Act by Plato, Quantas, Rony and Coral and also by Adison and Brandon.

The objective of the competition policy is to promote efficiency and maximize welfare and thus to create a conducive business environment in which the abuse of the market power is prevented mainly through competition. Section 3 of the Act deals with the economic regulation of the market power intended to constrain an enterprise from exercising it. It is designed to prevent along with conspiracies and monopolies against consuming public, such unfair practices against smaller competitors and also such other practices that unfairly disadvantage competitors or injure consumers.

In the instant case, the manufacturers are alleged to enter into a price fixing horizontal agreements and what is prohibited are certain kind of an agreement under § 3(3) which are often so harmful for the competition and so rarely justified that the law does not require proof of that agreement of that kind and is anti-competitive in the particular circumstances. These agreements are proved to have AAEC and are set out in 3(3) lf the Act. It is not just a formal contract, but also concerted practice of, or decision taken by, any person or enterprise or between association of person or enterprise including cartel, engaged in identical or similar trade of goods or provision of services.

2.1 THAT THE SIX MANUFACTURES ARE COLLECTIVELY CATEGORIZED AS AN ENTERPRISE UNDER § 2(H) OF THE ACT.

2.1.1 - It is humbly contended that section 3 of the Act, 2002 only prohibits the agreements which are entered into by any enterprise or by association of enterprise or person or association of persons including cartels.

2.1.2 - Section 2(h)defines the expression enterprise as a person or department of government engaged in any activity relation to storage, distribution, supply, production or control of goods articles or goods or services of any kind which includes investment and the business of acquiring, holding, underwritings or dealing with shares, debentures or other securities of any other body corporate[41].

2.1.3 - In common parlance, the expression 'enterprise' means an economic activity where 'activity' includes profession or occupation carried on by a person capable of producing profits, an activity which is exercised in an independent manner, consisting of well-defined actions, and having an

[41] § 2(H), Competition Act, 2002.

economic character. In Reliance Big Entertainment Ltd[42], it was observed that even a 'person' defined under 2(l) of the Act can be defined as an enterprise, where such person to qualify as an enterprise must be engaged in some kind of economic activity as mention in 2(h). Thus, while all enterprises are persons but not all persons are enterprise. It is pertinent to note that in the context of competition law, the concept of an undertaking encompasses every entity engaged in economic activity regardless of its legal status or the way it is financed[43]. Thus, in the instant case, the focus is on the economic activities of all the six manufacturerswhoare engaged in the activity of manufacturing LCD[44] and LCD would fall within the definition of goods[45]and hence they all will fall within the definition of section 2(h) of the Act, 2002 as an enterprise.

2.2 THAT THERE IS CARTELIZATION BETWEEN MANUFACTURES.

2.2.1 - It is humbly contended that section 2(c) of the Act, 2002 defines cartel as an explicit arrangement designed to eliminate competition. Cartels are considered as cancer to open market economy[46] and the supreme evil of antitrust[47]. In Hindustan Development Corporation[48] cartel has been defined as an association of producer, who by agreement amongst themselves limits control or attempt to control the production, sale or price of or trade in goods or provision of service to obtain the monopoly in any particular commodity or industry. Thus the emphasis is on one the association of producers and the agreement between them and second, attempt to control that is which involves two elements: a specific intent to achieve monopoly and the dangerous probability of monopolization of the relevant market. Even the unfair conduct may be sufficient enough to prove necessary intent and attempt to control.

2.2.2 - The definition is to be read with section 3 of the Act, 2002 which makes it a void agreement[49] including cartel, entered into by enterprise or person or an association thereof. Section 3(3) of the act identifies horizontal agreement, including cartel agreement. It contended that to establish the existence of cartel, conduct of itself is sufficient. Further, there is an existence of a technology

[42]Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, [2012] 18 taxmann.com 301 (CCI).
[43]C-41/90, Höfner&Elser v. Macrotron GmbH,[1991] E.C.R. I- 1979.
[44]Moot proposition, ¶ 5.
[45] § 2(I), Competition Act, 2002.
[46]Mr Mario Monti, Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?, 3RD NORDIC COMPETITION POLICY CONFERENCE STOCKHOLM, (Sep, 11- 12, 2000) ,europa.eu/rapid/press-release_SPEECH-00-295_en.htm.
[47]VERSHAVAHINI, INDIAN COMPETITION LAW 58 (LexisNexis2016)
[48]Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499.
[49] § 3(2), Competition Act, 2002.

sharing agreement between the manufacturers, thereby fulfilling the structural factors giving rise to cartel[50] with regard to §3(3) of the Act.

2.2.3 - For cartelization it is necessary that there should be an agreement and all the structural factors are also to be fulfilled. In the instant case, and all the structural factors which are necessary for cartel is also fulfilled and there is a price – fixing horizontal agreement between the manufactures of LCD (E).

2.2.A - THAT THE STRUCTURAL FACTOR FOR THE CARTELIZATION IS FULFILLED.

2.2.A.1 - It is humbly submitted before the hon'ble Supreme Court of Avalon that in the case *All India Tyre Dealer Federation*[51] it was held that there are certain factors which may carefully analyzed to confirm the presence of Cartel.

2.2.A.2 - The material facts satisfy the first factor being the oligopolistic market. In the instant case, there are less number of manufacturers which create high degree of interdependence among them. Each enterprise comprises of a price and output which anticipate the probable action of the other at any given time. Whereas, each of the enterprise has to concern itself with the strategic choice of the competitors. These strategic choices can be price, quantity and quality[52] respectively.

2.2.A.3 - The second factor established in this case is the homogeneity of the product[53] the product manufactured by the companies is homogenous in nature, i.e they are perfectly substitutable. In the instant case, all manufactures are manufacturing LCDs and they all are substitutable by the buyers. Thus market players have all incentives to collude rather than to compete.[54]

2.2.A.4 - Market sharing which is another factor where independent undertaking or enterprises enter into agreement to eliminate competition either by direct or indirect price fixing to share market either geographically, or on type of goods they sell, or on type of consumer. In the instant case as well, since all the manufacturers share market by selling similar type of good is therefore held liable for elimination or reducing the competition as such agreements are held anti-competitive.[55]

[50]FICCI Multiplex Association of India Federation House *v.* United Producers/Distributors Forum, [2012] 28 taxmann.com 356 (CCI).
[51] All India Tyre Dealers, *Supra Note 22*, at ¶ 277.
[52]Id. at ¶ 278.
[53] FICCI MULTIPLEX, *Supra Note* 50.
[54]*Id.*
[55]Case 41/69, ACF Chemifarma v. Commission, [1979] E.C.R. 661.

2.3 - THAT THERE IS A HORIZONTAL AGREEMENT BETWEEN MANUFACTURES.

2.3.1 - The term 'agreement"[56]has been defined and interpreted in a broad fashion to include not only expressly written or formally entered agreements but also impliedly , informal and unwritten agreements which may include any arrangement[57] or understanding or action in concert[58]. The definition of agreement also cover situation where parties act on the basis of a nod or a wink[59].

2.3.2 - It is humbly contended that Section 3(3) of the act deals with the Horizontal agreements[60] including cartel. Here, horizontal agreement means agreement which is entered into between two or more firms operating at same level of production or distribution in market. In the instant case there is a presence of horizontal agreement between the manufacture as all the manufactures are operating at same level of production and therefore manufacturing the LCD televisions.

2.3.3 - What is prohibited are certain kind of agreements which are often so harmful for the competition and so rarely justified that the law does not require proof of that agreement of that kind and is anti-competitive in the particular circumstances. These agreements are proved to have appreciable adverse effect[61] and are set out in 3(3)[62] lf the Act. It is not just a formal contract between, but also concerted practice[63] of, or decision taken by, any person or enterprise or between association of person or enterprise including cartel, engaged in identical or similar trade of goods or provision of services. Decision to increase the price during festive season by all LCD (E) manufacturers and also by Adison and Brandon, can be taken as a conclusive evidence of the presence of an agreement between all the six manufactures.

2.3.A- THAT THERE IS PRICE FIXING HORIZONTAL AGREEMENT BETWEEN THE MANUFACTURES.

2.3.A.1 - It is humbly contended that horizontal agreements are between competitors who aim at restricting the competition and thus leading to customers paying not the competitive but higher prices, by means of price fixation or making desired quantities non available or reducing choices. Such agreements are void per se.[64]The per se rule reflect a long standing judgment that every horizontal price fixing arrangement among competitors poses some threat to the free market even if

[56]§2(b), Competition Act, 2002
[57]*In re*,Hindustan Times Ltd., (1979) 49 CompCas 495.
[58]Case 48/69, ICI Ltd. v Commission, [1972] ECR 619.
[59]Builders Association of India v. Cement Manufacturers Association, [2016] 73 taxmann.com 247 (CCI).
[60]VERSHAVAHINI, *Supra note* 47, at 72.
[61]Hereinafter Referred as AAEC.
[62] §3(3), Competition Act, 2002.
[63]§ 2(m), Completion Act, 2002.
[64]Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958).

participants do not themselves have the power to control market prices.[65] The per se approach is not rendered inapplicable for the reason that the agreement has pro-competitive justification. Such agreement holds a facial invalidation even if pro-competitive justification is offered.[66] Price fixing conspiracy may consist of any mutual agreement, or arrangement of understanding between two or more enterprise to sell uniform or to raise lower or stabilize prices or discounts. It may also mean to conform each other price list or obtain price information or discuss prices. These are fixed or administered either by cartel or concert or by trade association.[67]Exchange of information, the object which is to be influence the conduct on the market of an actual or potential competitor, to disclose the competitor of the conduct which they are likely to adopt on market or render the market artificially transparent is not acceptable.[68]

2.3.A.2 - In the instant case, Mr. Jung Ho's interview and his acceptance to the fact that they do aim at increasing prices during festive season to achieve the target is a clear indication to the fact that there was a price fixing agreement between all the four LCD (E) manufacturers. Similarly, similar price rise by Adison and Brandon during festive season in sync is another conclusive evidence of the same.

2.3.A – THAT THERE IS ACTION IN CONCERT BY THE MANUFACTURES.

2.3.A.1 - It is humbly contended that the word 'action in concert' was defined in Cemeteries CBR SA[69] which means when one competitor disclose its future intention or conduct on the market to another, when the latter request it or at the very last accept it. This would apply even where the information could be obtained through legitimate channels by the undertakings[70].

2.3.A.2 - The word action in concert also covers the understanding as well as an agreement and informal as well as formal arrangement which lead to cooperation.[71] In the instant case there is action in concert by the manufacturers of LCD (E) pertinent from a TV interview[72] by the CEO of Hatim Tai in Business Today, in which he explicitly stated that the Television Company did try to capitalize on the festival season and marginally increase the price of product by 15 – 20% to achieve their target. Mr. Jung Ho's interview is a direct indication to understanding between Plato, Quantas,

[65]FTC v. Superior Ct. TLA, 493 U.S. 411, 413 (1990).
[66]Arizona v Maricopa County Medical Society,457 U.S. 332 (1982).
[67]United States v. Scoony Vacuum Oil Co., Inc., 310 U.S. 150 (1940).
[68]Joined Cases 40-56, 113 & 114/73, SuikerUnie&Ors. v. Commission, 1975 E.C.R. 1663.
[69]Case T 25/95, Cemeteries CBR SA v. Commission, 5 CMLR 204 (2000), ¶ 1849.
[70]Joined Cases T-202, 204 & 207/98, Tate & Lyle plc&ors. v. Commission of the European Communities, 5 CMLR 2 (2001).
[71]Technip S.A. v. S.M.S. Holding (P.) Ltd.,[2005] 60 SCL 249 (SC).
[72]Moot Proposition, ¶ 12.

Ronyand Coral to increase the prices of their product during the festival season. A clear acceptance of obligation to follow each other's conduct can be sufficient proof of a concerted action.[73] When a group of competitors enters into a series of separate but similar agreement with the competitors or others, a strong inference arises that such agreements are the result of concerted action[74] which is quite evident in the instant case.

2.3.A.3 - According to the DG's findings, the prices by Adison and Brandon increased in sync during the month of November and December, 2010 which appears to have colluded and therefore resulted in violation of the provision of the Act. The parallel behaviour may not by itself be identified with a concerted practice; it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market[75].In the instant case, two instances that could be taken as an action in concert by Adison and Brandon were, one when both agreed to increase their price during festive season and another when both agreed to set a minimum sale price at Annual Technology Conclave[76]. Therefore, for the existence of concentrated practice there must exist coordination or practical cooperation among enterprise, and this coordination or cooperation must be established as a result of direct or indirect communication[77]. Such a collusive behavior is also presumed to be anti-competitive in terms of § 3(3) of the Act.

2.3.a.THAT THERE IS NOT ONLY PRICE PARALLELISM BUT THERE IS PLUS FACTOR.

2.3.a.1 - Price parallelism is a mirroring effect where traders independently pursue their unilateral non cooperative action in view of what other rivals are doing. It occurs if firms change their prices simultaneously, in the same direction, proportionally. Price parallelism is often used in prosecuting cartel as a tool of determine whether a pattern of collusion can be determined. Uniform conduct of pricing by competitors permits inference on existence of conspiracy between competitors[78] although parallel conduct in itself is not a sufficient proof.[79] There must be additional evidence[80] which tends to prove the existence of unlawful agreement, usually known as 'plus factor'.[81]

[73]Basic Slag Ltd. V Registrar of Restrictive Trading Agreements, (1966) LR 6 RP 101
[74]United States v. United States Gypsum Co.,333 U.S. 364, 394 (1948).
[75]Imperial Chemical Industries Ltd, *Supra note* 58 at ¶ 64.
[76]Moot Proposition, ¶ 14.
[77]SuikerUnie,*Supra note* 68.
[78]Akali Manufacturing Association of India &ors. v. American Natural Soda Ash Corporation, (1998) 3 Comp LJ152 MRTPC.
[79]Brook Group Ltd. v. brown &Willionson Tobacco Corp, 509 U.S. 209 (1993).
[80]Monsanto Co. v. Spray-Rite Svc. Corp., 465 U.S. 752, 753 (1984).
[81]Muthoot Mercantile Ltd. v. State Bank of India, [2015] 54 taxmann.com 104 (CCI).

2.3.a.2 - In the Flat Glass[82] case the commission recognized the following plus factor (i) – Evidence that the defendant had a motive to enter into a price fixing conspiracy; (ii) – evidence that defendant acted contrary to its interest; (iii) evidence implying a traditional conspiracy. Even out of the above, the court recognized had the most important evidence will usually be non-economic evidence where there was an actual manifest to not compete. The evidence may involve customary indication of traditional conspiracy or proof that defendant got together and exchange assurance of common action or adopted a common plan even though no actual meeting, conversation or exchange documents are shown.[83] In the instant case, Mr. Jung Ho's interview can be taken as a plus factor which is an admissible evidence to prove the presence of action in concert and price fixation among these four manufacturers according to regulation 41(1) and 41(2) of Competition Rules and Regulation, 2009.

2.3.a.3 - During Mr. Jung Ho's interview, he clearly stated that "our technology are not very high with the exception of festive seasons where the local manufacturers increase the prices of products by 15-20% to achieve their production and sales targets."[84] This is a clear indication to price parallelism that all the manufactured of LCD (E) technology raised it prices during the festive season. OECD in its paper *'Prosecuting Cartel without Direct Evidence of Agreement (February, 2006)* explained, that as a broad statutory language suggests, unlawful agreement among competitor can be taken in many forms. They can be reached through the informal means of communication including conversation at an association of meeting, price announcement or advertisements[85], public statement[86] by senior officers.

2.3.a.4 - In re alleged cartelization[87] case it was held that quotation of identical prices filling in same date and past conduct of parties is sufficient to show that opposite party has entered into an agreement to determine prices. It is contented that circumstantial evidence are of no less value than direct evidence and law makes no distinction between the two[88]. The OECD report on *Cartel without Direct Evidence of 2006* which stated that that there are two types of circumstantial evidence[89]: *communication evidence*[90] and *economic evidence*. It is contented that among the set of circumstantial evidence, an evidence of communication among the participants may give an

[82]*In re*,Flat Glass Anti – Trust Litigation, 385 F.3d 350, (3rd Cir. 2004).
[83]Petruzzi's IGA v. Darring – Delaware Co Inc., 998 F. 2c 1224 (1993)
[84]Moot Proposition, ¶12, ¶3.
[85]OECD, Prosecuting Cartels without Direct Evidence agreement, Organisation for Economic Co-operation and Development (Sep, 11, 2006),https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf.
[86]*Id.* at 114.
[87]Alleged cartelization *v.* M/s Stone India Limited &ors., Case no. 03/2012 (CCI).
[88]Builder Association of India, *Supra note* 59.
[89]OECD, Supra note 85, at 10.
[90]Cartel operators met or otherwise communicated. It includes record of telephonic conversation or travel to a common destination or notes or records of the meaning in which they participated.

important clue for establishing any contravention[91]. The instant case satisfies some of the communication evidences like both the CEOs of Adison and Brandon took the same flight at 2:00 pm on 19th May, 2010 to reach New Town to attend same felicitation function of Minister of Corporate Affairs held on the same day. It was also alleged that both of their entries were made in red pen. Another evidence to the same are the phone calls exchanged between them on their personal numbers before entering the function. In *International Cylinder (P.) Ltd.*[92]it was held by COMPAT that the existence of an association is by itself is sufficient, as it gives an opportunity to the competitors to interact with each other and discuss their trade problems. There will be no necessity to prove that any party actually discussed prices by actively taking part in meeting. Therefore phone calls, travelling to similar destination, consideration to set minimum resale price, and similar price increase in sync during festive season can be proved as a strong evidence against the two.

It is submitted that as there is an agreement between manufactures to increase the price of their LCDs during festival season and for the attraction of section 3(3) of the act it is necessary that there should be an agreement, in the instant matter as there is cartelization between manufactures there is violation of section 3(3) of the competition act, 2002.

2.4 –THAT THERE IS AN AAEC ON COMPETITION BY THE ACT OF MANUFACTURES.

2.4.1 - It is humbly submitted that there is an AAEC on completion by act of all manufactures. Adverse effect results when an agreement harms the competitors in the consumer welfare sense of economies i.e on price and output. The overt act must be looked to find out that the effect, is calculated, or designed or could be predicted. The words appreciable adverse effect on competition embraces acts, contracts, agreement or combinations which operate to the prejudice of the public interest by unduly restricting the competition.

2.4.2 - It is contented that Section 3(3) of the act presumes certain kind of agreement between enterprises or person or concentrated practices including cartel shall be presumed to be an AAEC, and there is no scope of investigation or inquire about such presumption under the act. Such agreement is presumed to be per se void[93]. Here the word *"shall presume"* have been used to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and not lying down a rule of conclusive proof[94]. In *Cinemax India*[95] it was held that

[91]All India Tyre Dealers' Federation, *Supra note* 22, at ¶ 308.
[92]International Cylinder (P.)Ltd. v. Competition Commission of India, 2013 SCC OnLine Comp AT 169.
[93] § 3(2) of Competition act, 2002.
[94]Sodhi Transport co. &Anr.v. State of U.P., 1986 AIR 1099.
[95]Cinemax India Ltd. v. Film Distributors Association (Kerala), [2015] 54 taxmann.com 223 (CCI).

agreements which is listed in section 3(3) of act, if established, then it shall be presumed that such agreement has an AAEC and if presumption is raised, then burden shifts to the other side.[96]

2.4.3 - The decision by all the six manufacturers to increase the price during festive season is a result of price fixing horizontal agreement, concerted action and along with a conclusive proof of cartelization[97] between them is a sufficient ground to further justify and lay down presumption of that it had AAEC.

[96]International Cylinder (P.)Ltd., *Supra note* 92, at ¶ 44.
[97]Aamir Khan Productions (P.)Ltd. v. Union of India [2010] 102 SCL 457 (BOM).

PRAYER

WHEREFORE IN LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE APPELLANTS MOST HUMBLY AND RESPECTFULLY PRAY AND REQUEST THE HONORABLE COURT:

TO HOLD:

THE COMPAT JUDGEMENTS AS CORRECT IN BEST INTEREST OF JUSTICE.

TO PASS:

i. **AN ORDER HOLDING THE REPORT OF THE DIRECTOR GENERAL AS VALID IN WANT OF JURISDICTION.**

ii. **AN ORDER UPHOLDING THE ACTIONS OF THE COMPETITION COMMISSION OF AVALON AND DIRECTOR GENERAL TO ARRIVE AT A FINDING AGAINST THE MANUFACTURERS VALID.**

iii. **AN ORDER HOLDING THE ACTIONS OF MANUFACTURERS TO BE ANTI-COMPETITIVE IN NATURE.**

iv. **AN ORDER HOLDING THE MANUFACTURERSGUILTY OF CARTELIZATION.**

v. **AN ORDER UPHOLDING THE ACTIONS OF CCA IN IMPOSING THE PENALTIES TO BE VALID.**

MISCELLANEOUS:

ANY OTHER RELIEF WHICH THIS HON'BLE COURT MAY BE PLEASED TO GRANT IN THE INTERESTS OF JUSTICE, EQUITY AND GOOD CONSCIENCE. ALL OF WHICH IS RESPECTFULLY SUBMITTED.

FOR THIS ACT OF KINDNESS, THE APPELLANTS SHALL BE DUTY BOUND FOREVER

ALL OF WHICH IS RESPECTFULLY SUBMITTED

(COUNSEL FOR THE RESPONDENTS)