IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: November 19, 2018
Judgment delivered on: December 18, 2018

+ LPA 637/2018 & CM. Nos. 47926/2018 and 47927/2018

MAHYCO MONSANTO BIOTECH (INDIA) PRIVATE LTD & ANR.

..... Appellants

Through: Mr. P.V. Kapur, Sr. Adv. with Mr. Ajit Warrier, Mr. Rajshekhar Rao, Mr. Aditya Nayyar, Mr. Angad Kochhar, Mr. Aman Singh Sethi, Mr. Vaibhav Aggarwal, Ms. Yashika Maheshhwari and Mr. Siddhant Kapur, Advs.

versus

COMPETITION COMMISSION OF INDIA & ORS

.....Respondents

Through: Mr. Samar Bansal, Adv. and Mr. Manan Shishodia, Adv. for R-1/CCI
Ms. Gauri Puri with Mr. Vinayak Mehrotra, Advs. for R-2.
Mr. Sunil J. Mathews, Adv. for R-3
Mr. Jayant K. Bhushan, Sr. Adv. with Mr. Amitabh Kumar, Mr. Vaibhav Choukse, Ms. Akansha Mehta & Mr.Aditya Gupta, Advs. for R-4 to R6.
Mr. Sabah Iqbal Siddiqui, Adv. for R-7.

+ LPA 651/2018 & CM. Nos. 48742/2018 and 48743/2018

MONSANTO COMPANY ..... Appellant
Through: Mr. Ajit Warrier with
Mr. Angad Kochhar & Mr.
Aditya Nayyar, Advs.

versus

COMPETITION COMMISSION OF INDIA AND
ORS. ..... Respondents
Through: Mr. Samar Bansal with
Ms. Devahuti Pathak &
Mr. Manan Shishodia, Advs. for
CCI
Mr. Amitabh Kumar with
Mr. Vaibhav Choukse &
Ms. Akansha Mehta, Advs. for
R-3 to 5

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. These appeals have been filed by the appellants challenging the order dated 12th October, 2018 passed by the learned Single Judge in W.P. (C) 7583/2016 and 7578/2016 whereby the learned Single has dismissed the writ petitions by relying upon the judgment of the Coordinate Bench of this Court in ***Cadila Healthcare Ltd. and Anr. V. Competition Commission of India***, ***LPA No. 160/2018*** decided on 12th September, 2018.

2. It was the submission of Mr. P.V. Kapur and Mr. Rajshekhar Rao, learned Sr. Counsel / counsel appearing for the appellants that in ***Cadila (Supra),*** the Coordinate Bench of this Court has noticed the order passed by the Competition Commission of India (CCI) in ***Ministry of Agriculture v. M/s. Mahyco Monsanto Biotech Limited*** and has confirmed the reasoning therein. According to them, the Coordinate Bench has confirmed the judgment which was under challenge in the writ petitions before the learned Single Judge. This was done without notice to the appellants herein. As such the judgment of the Coordinate Bench in ***Cadila (Supra)*** to the extent it affirms the order of the CCI impugned by the appellants before the learned Single Judge in the writ petitions has adversely affected their legal rights and remedies as evidenced by the summary dismissal of the writ petitions. In this regard, they had relied upon the judgment of the Supreme Court in ***Poonam v. State of Uttar Pradesh and Ors. 2016 2 SCC 779.***

3. It was their submission that the judgment in ***Cadila (Supra)*** strongly indicates that the Division Bench was not apprised of and made aware by CCI of the pendency of the writ petitions filed by the appellants herein, wherein the challenge had

been squarely mounted to the said order of CCI in ***Ministry of Agriculture case (supra)*** (and connected matter). The private respondents had filed an application being CM. No. 41877/2018 before the learned Single Judge seeking dismissal of the writ petition by relying on ***Cadila (supra).*** The appellants had also filed an application being CM. no. 42823/2018 seeking reference of the writ petition to a larger Bench in light of the binding precedent of the Supreme Court in ***Central Board of Dawoodi Bohra Community and Anr. V. State of Maharashtra and Anr. (2005) 2 SCC 673,*** wherein it was *inter alia* contended that the grounds raised by the appellants before the learned Single Judge with respect to the scope, ambit and applicability of Section 48 of the Companies Act, 2002 were never raised before and / or dealt by the Division Bench in ***Cadila (Supra).*** It is stated that the learned Single Judge without calling upon CCI to clarify the actual facts and / or considering the applications filed by the appellants, summarily dismissed the writ petition, although it was a matter of record that certain substantial grounds raised by the appellants in the writ petition with regard to the construction and interpretation to be placed on Section 48 on the 2002 Act were neither raised before, nor considered by the Division Bench in

Cadila (Supra). In essence the substantial grounds raised by the appellants in relation to the construction and interpretation of Section 48 of the 2002 Act were neither raised nor considered in ***Cadila (Supra).***

4. It was the submission of the learned counsel for the appellants that the Scheme of Act of 2002 does not contemplate punishment of the Directors / Officers of a company under Section 27 of the 2002 Act and that they can only be proceeded against if the orders / directions of CCI are not obeyed and / or are flouted by the company. However, CCI may, in a given case, be entitled to invoke provisions of Chapter VI of the 2002 Act if the pre-condition of the various Sections contained therein are shown to have been fulfilled. The categories of orders that can be passed under Section 27 of the 2002 Act can only be directed against an '*enterprise'* as defined under Section 2(h) of the Act, 2002, and not against individual Directors / officers. It is their submission that since the grounds and points raised by the appellants at the time of hearing before this Court have admittedly not been considered by the Division Bench in ***Cadila (Supra),*** this court ought to refer the matter to a larger Bench to decide the legal challenge raised by the appellants. In this regard

they rely upon the judgment of the Supreme Court in the case of ***Dawoodi Bohra (supra)***.

5. It was the submission of the learned counsel for the appellants that Division Bench in ***Cadila (Supra)*** only considered a limited argument in relation to Section 48 of the 2002 Act and admittedly did not consider the arguments raised by the appellants before the ld. Single Judge. A reading of ***Cadila (Supra)*** would show that the Division Bench has, without considering the special scheme and construction of the 2002 Act, gone into an elaborate discussion on the interpretation of Section 138 of Negotiable Instruments Act, 1881 and while doing so, the Division Bench, with utmost respect, did not consider that two statutes can only be said to be in *pari materia* with each other when they deal with the same subject-matter and / or same person or things and / or same class or persons, or have the same purpose or objects. The rationale behind this rule is based on the interpretative assumption that words employed in legislations are used in an identical sense. A comparison of the preamble as also the Statement of Objects and Reasons of the 2002 Act and the NI Act would show that there is no similarity between the subject matter of the two legislations and they do not deal with the same

person or things and / or same class or persons, or have the same purpose or objects. Therefore, there was no justification or warrant to refer to the NI Act, when the 2002 Act, as a special Act, deals with a subject matter which is entirely distinct from the NI Act. In this regard, they would rely on ***Shah and Co., Bombay v. State of Maharashtra and Anr. AIR 1967 SC 1877*** & ***Bangalore Turf Club Limited v. Regional Director Employees' State Insurance Corporation (and Connected appeals) (2014) 9 SCC 657.***

6. It was submitted that in light of special construct and scheme of the 2002 Act, an interpretation that Section 48 can be invoked by the CCI against individual Officers / Directors of the Company to investigate their role and conduct of offences, as contemplated under Sections 3 and 4 of the 2002 Act, and made punishable under Section 27 thereof, would result in a legal absurdity and would render the statutory provisions unworkable and nonsensical for the reason that such an interpretation would render the words *"punished accordingly"*, appearing in Section 48 of the 2002 Act nugatory inasmuch as the orders which CCI can pass under Section 27 of the 2002 Act can only relate to and be directed against an enterprise and not individual Directors /

Officers of a company. The same is also evident from the fact that Section 27 of the 2002 Act employs terms such as "*turnover*" and "*profit*" which terms can only be relevant to an enterprise and not to an individual. If "*turnover*" is interpreted to include income of a director / officer (as suggested by the learned counsel for the respondents herein), the same would amount to re-writing Section 27 of the Act. Further, the term "*profit*" cannot be applied in the context of a Director / Officer. The Supreme Court in ***Excel Crop Care Ltd v. Competition Commission of India and Ors. AIR 2017 SC 2734*** has interpreted the word "*turnover*" appearing in Section 27 of the 2002 Act to mean only the relevant turnover pertaining to the infringing product (s). In the context of a director / officer of a company and in the absence of any enabling provision or prescribed parameters being prescribed under the 2002 Act, it would be impossible to ascertain the relevant turnover.

7. According to the counsels, it is a settled rule of interpretation that if the language used in a statute is capable of bearing more than one construction, a construction that results in absurdity or anomaly should be eschewed. On the contrary, the court should prefer a construction that brings it into harmony

with its purpose as it may always be presumed that while employing a particular language in the provision, absurdity or anomaly was never intended. In this regard, reliance was placed on the judgment passed by the Supreme Court in ***M. Nizamudeen v. Chemplast Sanmar Limited and Ors. (2010) 4 SCC 240.***

8. It was the submission of the learned counsel for the appellants that the Supreme Court while interpreting the 2002 Act in ***Excel Crop Care (supra)***, also observed that in a situation where two interpretations are possible, one that leans in favour of the infringer has to be adopted on the principle of strict interpretation. It is equally settled that the court cannot rewrite, recast or reframe the legislation for the reasons that it has no power to legislate. Further, the court cannot add words to a statute or read words into it which are not there. Even assuming there is a defect or omission in the words used by the legislature, the Court cannot correct or make up the deficiency and it shall only decide what the law is and not what it should be. In this regard reliance is placed on the judgment of the Supreme Court in the case of ***Union of India v. Deoki Nandan Aggarwal (1992) Supp. (1) SCC 323.***

9. It was the submission of the learned counsel for the

appellants that during the course of arguments on 19th November, 2018, a query was put to the appellants whether Section 27 (g) of the 2002 Act would empower CCI to punish erring Officers / Directors of a Company under Section 27 of the 2002 Act. To which it was their submission that the power to prescribe punishment under a statute is an important legislative function and the said function cannot be presumed in favour of the CCI so far as directors / officers of a company are concerned. If such an interpretation is ascribed to Section 27 (g) of the 2002 Act despite the statute itself being bereft of such an enabling provision and any concomitant statement of defined guidelines or parameters, then CCI would have unbridled and uncanalised powers to punish the Officers / Directors of Company without any legislative guidelines / checks and as per its whims and fancies, which is anathema to rule of law. In this regard, reliance was placed on ***Kishan Prakash Sharma and Ors. V. Union of India and Ors. (2001) 5 SCC 212*** and ***B.R. Enterprises v. State of U.P. and Ors. (1999) 9 SCC 700***

10. Further they distinguished the judgment relied upon by the learned counsel for private respondents in the case of ***Rajasthan Pharmaceutical Laboratory, Bangalore and Ors. V.***

State of Karnataka (1981) 1 SCC 645, which was in the context of the Drugs and Cosmetics Act, 1940. The respondents, by relying upon a similarly worded section therein as Section 48 of the 2002 Act, sought to argue that once an offence is committed, both the company and its officers are deemed to be guilty of the offence. However, perusal of the judgment would show that to the contrary, the said judgment supports the case of the appellants inasmuch as at Paragraph 7, it was clearly observed that the words "*punished accordingly*" in the context would mean that a person deemed guilty of an offence committed by a company shall receive the punishment and that is prescribed by the Act for that offence. In the present case, since no punishment can be imposed upon individual directors / officers of a company under Section 27 of the 2002 Act, such individual directors / officers of a company cannot be proceeded against and punished, except as contemplated under Chapter VI of the 2002 Act.

11. They also submitted that the learned counsel for the respondents have contended that if the interpretation which is sought to be given by the appellants to Section 48 of the 2002 Act has to be accepted, the same would render Section 48 of the 2002 *otiose* in its entirety. This submission is wholly misplaced and

deserves to be rejected. In terms of the interpretation propounded by the appellants to Section 48 of the 2002 Act, it is their stand that the said section would only apply in a case where orders / directions of CCI are disobeyed / flouted by individual directors / officers of a company.

12. The learned counsels for the appellants in the alternative contended that if this court were to come to a conclusion that judgment passed in ***Cadila (supra)*** does not require reconsideration by a larger Bench, it would be seen that the said judgment is primarily premised on a judgment of a three Judge Bench of the Supreme Court in ***Aneeta Hada v. M/s. Godfather Travels and Tours Private Limited (2008) 13 SCC 70***. The issue in that case was whether a director / officer of a company could be prosecuted when the company has not been arrayed as an accused.

13. On the other hand, it is the submissions of Mr. Jayant K. Bhushan, learned Senior Counsel appearing for the respondent nos. 4 to 6 in LPA 371/2018 and respondent Nos.3 to 5 in LPA 351/2018 that the plea of the appellants that no notice can be issued to the Directors or persons in-charge of the Company till the Competition Commission returns a finding against the

Company that it has indulged in anti-competitive activities, is squarely covered by the judgment of the Division Bench of this Court in the case of ***Cadila (Supra)*** which is binding on this Court and there is no occasion arises for disagreeing with it or referring the matter to a larger Bench.

14. It is his submission that the vicarious liability of persons in-charge of companies for offences committed by companies exists in several statutes, such as the Negotiable Instruments Act, 1881 (Section 141), Prevention of Food Adulteration Act, 1954 (Section 17) and the Drugs and Cosmetics Act, 1940 (Section 34). In none of these statutes is there any provision which envisages a two stage inquiry, as has been canvassed by the Appellants, nor is there any judgment of the Supreme Court or of this Court or any other High Court to the knowledge of the respondents that states that such a two stage process is envisaged or that before notice is issued to the persons in-charge of the company, a finding of guilt must be recorded against the company. According to Mr. Bhushan, it would not even be in the public interest as it would prolong the proceedings and may even result in the same issue being argued twice. If for instance, the initial proceedings were only against the company and the

company did not properly defend itself and a finding of guilt was recorded against the company, the directors or person-in charge would surely come and challenge the finding before they could be held vicariously liable and would insist on that finding being revisited.

15. It was his submission that no prejudice would be caused to persons in-charge if they were asked / permitted to participate in the proceedings at the initial stage itself. They would be given a chance to contest the charge against the company as well as the charge that they were in-charge of the company at the time when the offence was committed. He refers to paras 52 to 55 of the judgment of the Division Bench of this Court in ***Cadila (Supra)***. Further, it was submitted that the reasoning of the learned Single Judge in ***Pran Mehra vs. CCI, W.P. (C) 6258/2014*** as well as the Division Bench in ***Cadila (Supra)*** is correct and needs no re-visitation. In this regard he would rely upon the judgment of the Kerala High Court in ***B. Unnikrishnan and Ors. vs. CCI and Ors. W.P. (C) 22534/2016***.

16. It was his submission that Section 48 which provides for vicarious liability of person in-charge of and responsible for the conduct of business of the company will apply only for

contravention of orders of the CCI or DG under Section 42 to 44 of the Competition Act and not for contravention of Section 3 and 4 of the Competition Act by the Company is misconceived.

The only basis on which the appellants submit that Section 48 applies only to contravention of orders of the CCI or DG and not to contravention of Section 3 and 4 of the Competition Act by the company is on the ground that under Section 27, the penalty for contravening Sections 3 or 4 is a maximum of 10% of the turnover of the company. According to him, a reading of Section 48 of the Competition Act shows that it applies in case of any of the provisions of the Competition Act or rule or regulation or contravention of an order or direction passed by the CCI or DG. Therefore, to hold that Section 48 applies only for a contravention of an order of the CCI or DG would render the first part of the Section namely, 'contravention of *any* provisions of the Competition Act' completely redundant and otiose. It is a fundamental principal of interpretation of statutes that no construction should be put on a provision which renders a part of it otiose. Reliance was placed on the judgment of constitutional bench of the Supreme Court in the case of ***Aswini Kumar Ghosh and Ors. vs. Arabinda Ghosh AIR 1952 SC 369*** on this issue

wherein it is held as under:

> *"It is not a sound principle of construction to brush aside words in a statute as being in opposite surplus age, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."*

17. It was submitted that Section 48 of the Competition Act is crystal clear as it states that where a company contravenes any provision of the Competition Act, a person in-charge of the company, when the contravention was committed, shall be *"deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly."* The words *"punished accordingly"* have been interpreted by the Supreme Court in Rajasthan Pharmaceutical Laboratory (supra) wherein in paras 6 and 7, it has been held that "*punished accordingly"* does not mean that individuals have to be punished in exactly the same manner as the company. The punishment prescribed for the offence in the Competition Act for contravention of Section 3 and 4 is in Section 27 i.e. a penalty which shall not be more than the average of the turnover of the last 3 preceding years. The provision was basically enacted in reference to an enterprise which would be conducting business but that does not mean that the deeming provision cannot be interpreted for an individual in

the context of the Competition Act. Meaning of the term 'turnover', in the context of an individual, can easily be interpreted to mean the income of the individual from the company in question. Merely because the term needs an interpretation does not mean that the individual escapes complete liability although Section 48 is very clear that the person in-charge of managing the affairs of the company shall be deemed to be guilty when there is a contravention of Section 3 or 4 of the Competition Act by a company. In this connection, reliance was placed on ***Excel Crop Care Limited (Supra)*** wherein even though Section 27 of the Competition Act only said turnover of the company, the Supreme Court interpreted turnover in the context to mean turnover for the relevant product. It is submitted that this judgment therefore shows that the word *'turnover"* has to be interpreted in the context of the offence and need not literally mean what it *prima facie* states. Thus, in the context of an individual who is in-charge of a company, turnover may mean his income from that company. It is submitted that the interpretation of Section 48 as suggested by the appellants that it would not apply to contravention of any provision of the Competition Act is totally contrary to the express language of the

section and can never be the correct interpretation.

18. It was the submission of Mr. Bhushan that the rationale for the vicarious liability of the persons in-charge is the same for the contravention of Section 3 and 4 as it is for the contravention of any direction of the CCI or DG. The whole idea behind these provisions of vicarious liability is that the company being a non-thinking entity, cannot think for itself but it is the human beings, being directors or persons in-charge, who think for it. Thus, to provide a disincentive for repetition of such activity, not only must the company be penalized but the persons who have been thinking for the wrong doings must also be penalized. Thus, the liability of directors or the persons in-charge is just, valid and necessary for the contravention by the company of Sections 3 and 4 of the Competition Act as it is for a contravention by the Company of an order or direction by the CCI or DG.

19. Further, Mr. Bhushan on the second submission made by the appellants that Section 48 occurs in Chapter VI of the Competition Act, therefore, the same will apply only to contravention by companies under Chapter VI itself, submitted that the said argument is stated to be rejected because Section 48 does not say that it shall apply to any contravention of that

Chapter alone. It specifically says it applies to a contravention by a company of any provision of the Competition Act.

20. On the third submission made by the appellants that Section 48 only applies to an enterprise and only punishes enterprises for contravention of the Competition Act is concerned, it is submitted that Section 27 may apply only to an enterprise, but when the enterprises is a company (which it obviously can, as per definition of enterprise in Section 2(h) and definition of person under Section 2(I)(iii) of the Competition Act), Section 48 becomes applicable and every person, namely, individual would be deemed to be guilty of the same offence as the company. This is the statutory framework of many similar deeming provisions of guilt for persons in-charge of companies where offences were committed by companies in various other Acts.

21. On the issue of hearing the appellants by the Division Bench before pronouncing the judgment in ***Cadila (Supra)***, since the Bench pronounced on the correctness of Competition Commission's order in the appellants' case is concerned, it the submission of Mr. Bhushan that often similar issue arises in different cases. It is an accepted position in law that the Court

while deciding a lis between some parties lay down the law which will have an effect on the lis between separate parties which are still pending. Yet, there is no requirement in law for hearing all parties who may be affected. In deciding the lis between the parties involved in ***Cadila (Supra)***, this Court has laid down law and while laying down that law, it has noticed that the judgment of the CCI in the present case, laid down the correct law. There is absolutely nothing wrong with this and the submission that the appellants were therefore condemned unheard is totally misplaced.

22. In the end, it is his submission that the points raised by the appellants are either covered by the ***Cadila (Supra)*** or have no merit. In any case, that the appellants have held up the proceedings before the Competition Commission by filing one petition after another, none of which have any merit, for the last nearly three years. The CCI proceedings began from February 2016 and despite the DG having submitted the investigation report to the CCI, no final order of the CCI has been given yet on account of frivolous litigations pending in this Court initiated by Monsanto. He submitted that this Court may dismiss the appeals with exemplary costs as they have not only held up the CCI

proceedings but also have wasted valuable time of this Court.

23. Mr. Samar Bansal, learned counsel for the CCI had argued on similar lines as was argued by Mr. Bhushan. In effect he has adopted the arguments of Mr. Bhushan.

24. Having heard the learned counsel for the parties and perused the record including the written submissions filed in this appeals, the following issues arise for consideration:-

(i) Whether before deciding the appeal in the case of ***Cadila (supra),*** the Division Bench was required to hear the appellants as the Division Bench has pronounced on the correctness of the CCI orders in two cases in ***Ministry of Agriculture v. M/s. Mahyco Monsanto Biotech Limited and connected matter,*** which were under challenge in two writ petitions filed by the appellants herein;

(ii) Whether no notice can be issued to the Directors / Persons In-charge of the Company till the CCI returns a finding against the Company that it has indulged in anti-competitive activities under Sections 3 and 4 of the Competition Act;

(iii) Whether Section 48 of the Competition Act, which provides for vicarious liability of persons In-charge and responsible for the conduct of business of the Company, will

apply only on contravention of orders of CCI or DG under Sections 42 to 44 of the Competition Act and not to contravention of Sections 3 and 4 of the Competition Act.

ISSUE NO.1

25. Insofar as the issue No.1 is concerned, no doubt the judgment passed by the CCI in ***Ministry of Agriculture (supra) and connected matter*** was under challenge before the learned Single Judge of this Court; the said judgment having been approved by the Division Bench in the case of ***Cadila (supra),*** the appellants were required to be heard. In any case we have also heard the learned counsel for the appellants on the issues, which they had raised in their writ petitions or at least in their applications for amendment for additional grounds and which have been incorporated in these appeals and accordingly, proceed to decide the same. So, to that extent, the grievance of the appellants has been addressed.

26. Before we come to the other two issues raised by the appellants in these appeals, it is necessary to note the only issue, which the Division Bench in ***Cadila (supra)*** has framed for its consideration, which has a bearing on the judgment passed by the CCI in ***Ministry of Agriculture (supra)*** and which was under

challenge before the learned Single Judge by the appellants is question No.4 which reads, "*Whether DG could have issued notice to Cadila Officials under Section 48".*

27. That apart, the issue whether the penalty could have been imposed on the Officers / Directors only for contravention of Sections 42 to 44 of the Competition Act or also for contravention of Sections 3 and 4 of the said Act, is an issue, which was neither raised nor considered by the Division Bench in ***Cadila (supra).*** Having said that, we now proceed to answer the two issues, which have arisen for our consideration.

ISSUE NO. 2

28. Insofar as issue No. 2 is concerned, the Division Bench in ***Cadila (supra),*** in paras 52 to 54, has held as under:-

> *52. Cadila's argument on this aspect is that without first recording the complicity or otherwise of a company, its directors or employees/officials cannot be issued notice for contravention of the Act. In other words, according to Cadila, the CCI has to first record that the company is guilty of an abusive act, after which it can proceed against its director, etc. The relevant provision is as follows:*
>
> *—Contravention by Companies*
>
> *48. (1) Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in-*

charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,

a) "company" means a body corporate and includes a firm or other association of individuals; and
b) "director", in relation to a firm, means a partner in the firm.

53. The question sought to be agitated was urged before another single judge in Pran Mehra vs. Competition Commission of India and Another (Writ Petitions No. 6258/ 2014, 6259/ 2014 and 6669/ 2014) when the court held as follows:

"6.... I am in agreement with the submissions of Mr. Chandhiok that there cannot be two separate

proceedings in respect of the company (i.e. VeriFone) and the key-persons as the scheme of the Act, to my mind, does not contemplate such a procedure. The procedure suggested by Mr.Ramji Srinivasan is both inefficacious and inexpedient. As in every such matter, including the proceedings under Section 138of the Negotiable Instruments Act, 1881 (in short N.I. Act), a procedure of the kind suggested is not contemplated. The judgment of the Supreme Court in the case Aneeta Hada dealt with proceedings under Section 138 of the N.I. Act. The judgment does not deal with issue at hand, which is whether adjudication in two parts, as contended by Mr. Ramji Srinivasan, is permissible. The judgment, in my opinion is distinguishable.

7. It is no doubt true that the petitioners can only be held liable if, the CCI, were to come to a conclusion that they were the key-persons, who were in-charge and responsible for the conduct of the business of the company. In the course of the proceedings qua a company, it would be open to the key-persons to contend that the contravention, if any, was not committed by them, and that, they had in any event employed due diligence to prevent the contravention. These arguments can easily be advanced by key-persons without prejudice to the main issue, as to whether or not the company had contravened, in the first place, the provisions of the Act, as alleged by the D.G.I., in a given case.

The CCI has, by its separate order, in Ministry of Agriculture v M/s Mahyco Monsanto Biotech Ltd (Ref. Case No.02/2015, order dated 26/07/2016) followed the above decision and had further cited Shailendra Swarup v. The Director, Enforcement Directorate (2011) 162 Comp. Cas. 346 (Del.) which held that FERA proceedings can be held simultaneously, Sushila Devi vs. Securities and Exchange Board of India (2008) 1 Comp. L.J. 155 Del., where the petitioner being the officer in-charge of and responsible for the conduct of the business

of the company was summoned as an accused for violation of Sections 24 (1) of the Securities and Exchange Board of India Act, 1992 along with the company. The CCI also noticed that the law on this aspect was finally settled in Aneeta Hada vs. M/s Godfather Travels & Tours Private Limited (2008) 13 SCC 70.

54. Aneeta Hada set at rest the controversy whether in one proceeding, against the company, its director ("person in-charge") can also be prosecuted or proceeded against on the principle of vicarious liability. Before Aneeta Hada, there existed a dichotomy of opinions – on the one hand, in State of Madras vs. C.V. Parekh and Another (1970) 3 SCC 491 held that without prosecuting the company, the director could not be prosecuted. Sheoratan Agarwal and Another vs. State of Madhya Pradesh (1984) 4 SCC 352(on the other hand), explained the decision in C.V. Parekh (supra) by a two judge bench of the Court which held that the company alone or the person in-charge of and responsible for the conduct of business of the company alone, may be prosecuted for the acts of the company as there is no statutory requirement that such person cannot be prosecuted unless the company is also arraigned as an accused with him. In Aneeta Hada (supra) it was held, inter alia, as follows:

> *58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words ―as well as the company‖ appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against*

it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

This court is of opinion that the correct interpretation of law was given in Pran Mehra the reasoning of which is hereby confirmed, as is the reasoning in Ministry of Agriculture v M/s Mahyco Monsanto Biotech Ltd, which proceeds on a correct appreciation of the law. Accordingly Cadila's grievance with respect to issuance of notice to its directors by citing Section 48 is without substance; it is hereby rejected. The impugned judgment cannot be faulted."

29. The submission of Mr. Kapur and Mr. Rao on this issue was that the judgment of ***Cadila (supra),*** is primarily premised on a judgment of three Judges in ***Aneeta Hada (supra),*** wherein the issue was whether a Director / Official of a Company could be prosecuted when the Company has not been arrayed as an accused. In other words, the said judgment is not applicable. We are unable to accept the said contention. Para 58 of the of the judgment in ***Aneeta Hada (supra),*** as noted by the Division Bench is very clear and we reproduced the same as under:-

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words —"as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof

thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

30. That apart in ***Pran Mehra v. CCI and another,*** Writ Petitions No. 6258/2014, 6259/2014 and 6669/ 2014 decided on February 26, 2015, a learned Single Judge of this Court, has on the precise issue dealing with the provisions of the Competition Act, stated as under:-

"6.... I am in agreement with the submissions of Mr. Chandhiok that there cannot be two separate proceedings in respect of the company (i.e. VeriFone) and the key-persons as the scheme of the Act, to my mind, does not contemplate such a procedure. The procedure suggested by Mr.Ramji Srinivasan is both inefficacious and inexpedient. As in every such matter, including the proceedings under Section 138of the Negotiable Instruments Act, 1881 (in short N.I. Act), a procedure of the kind suggested is not contemplated. The judgment of the Supreme Court in the case Aneeta Hada dealt with proceedings under Section 138 of the N.I. Act. The judgment does not deal with issue at hand, which is whether adjudication in two parts, as contended by Mr. Ramji Srinivasan, is permissible. The judgment, in my opinion is distinguishable. (emphasis supplied by this Court)

7. It is no doubt true that the petitioners can only be held liable if, the CCI, were to come to a conclusion that they were the key-persons, who were in-charge and responsible for the conduct of the business of the company. In the course of the proceedings qua a

> *company, it would be open to the key-persons to contend that the contravention, if any, was not committed by them, and that, they had in any event employed due diligence to prevent the contravention. These arguments can easily be advanced by key-persons without prejudice to the main issue, as to whether or not the company had contravened, in the first place, the provisions of the Act, as alleged by the D.G.I., in a given case. (emphasis supplied by this Court)*

31. We agree with the aforesaid conclusion of the learned Single Judge, which is independent of what was held in ***Aneeta Hada (supra),*** which is the correct interpretation of law. So, we reject the submission of Mr. Kapur and Mr.Rao.

ISSUE NO. 3

32. On this issue, the submissions of Mr. Kapur and Mr. Rao can be summed up as under:-

(i) The Scheme of Competition Act, does not contemplate punishment of the Officers / Directors of a Company under Section 27 of the Act as the order contemplated therein can only be against an '*enterprise';*

(ii) They can only be proceeded against if the orders / directions of CCI are not obeyed and / or are flouted by the Company;

(iii) The interpretation that Section 48 of the Competition Act

can be invoked by CCI against individual Officers / Directors of the Company to investigate their role and conduct, for offences as contemplated under Sections 3 and 4 of the Competition Act and made punishable under Section 27 thereof would result in legal absurdity and would render the statutory provisions unworkable and nonsensical for the reason that such an interpretation would render the words '*punished accordingly'* appearing in Section 48 of the Competition Act nugatory, inasmuch as the orders which CCI can pass under Section 27 of Competition Act can only relate to and be directed against an enterprise and not to individual Officers / Directors of a Company. The same is evident from Section 27 of the Act, which employs terms such as '*turnover'* and '*profit'* which terms can only be relevant to an *'enterprise'* and not to an individual.

(iv) It is a settled rule of interpretation that if the language used in a Statute is capable of bearing more than one construction, the construction that leads to absurdity or anomaly should be eschewed. On the contrary, a construction that brings it into harmony with its purpose must be followed.

(v) In the ***Cadila*** judgment, the Division Bench without considering the special Scheme and construction of the

Competition Act has gone in to elaborate discussion on the interpretation of Section 138 of NI Act. A comparison of two statutes can only be said to be *pari materia* with each other, when they deal with the same subject matter and / or same person or things and / or same class of persons or have the same purpose or objects.

33. Having noted the submissions made by Mr. Kapur and Mr. Rao, to answer this issue, it is necessary to reproduce Sections 27, 42 to 44 and 48 of the Competition Act:-

> ***27. Orders by Commission after inquiry into agreements or abuse of dominant position*** *-Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—*
> *(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 percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:*
>
> *[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 percent. 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; [Omitted by Competition (Amendment) Act, 2007]

(g) pass such other 45[order or issue such directions] as it may deem fit. 46[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.

42. Contravention of orders of Commission - (1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

(2) If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

(3) If any person does not comply with the orders or

directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit:

Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.]

42A Compensation in case of contravention of orders of Commission] - Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.]

43. Penalty for failure to comply with directions of Commission and Director General - If any person fails to comply, without reasonable cause, with a direction given by—

(a) the Commission under sub-sections (2) and (4) of section 36; or (b) the Director General while exercising powers referred to in sub-section (2)of section 41,
such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.]

43A Power to impose penalty for non-furnishing of information on combinations] - If any person or enterprise who fails to give notice to the Commission under sub- section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination.]

44. Penalty for making false statement or omission to furnish material information - If any person, being a party to a combination,—

(a) makes a statement which is false in any material particular, or knowing it to be false; or

(b) omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

48. ***Contravention by companies****-(1) Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction

issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly. Explanation.—For the purposes of this section,—

(a) "company" means a body corporate and includes a firm or other association of individuals; and
(b) "director", in relation to a firm, means a partner in the firm.

34. We may state at the outset that, in view of our conclusion to issue No.2 above, we proceed to answer this issue, on the premise that Officers / Directors can be proceeded against, along with Company. We also say that the Officers / Directors can only be liable if the CCI were to come to the conclusion that they were the key persons who were In-charge and responsible for the conduct of the business of the Company.

35. On a perusal of Section 27 of the Act, it is clear that it stipulates, the CCI on a finding that there is a contravention of Section 3 or Section 4, can pass orders against an *'enterprise'* and a *'person'* i.e individual, who has been proceeded against, imposing penalty.

36. The issue is, as contended by Mr. Kapur and Mr. Rao that, the penalty under Section 27(b) being 10% of the average

'turnover' for the last three preceding financial years cannot be on the person / individual / Director / Official. This they say so, as there is no '*turnover'* of a person. On this submission of Mr. Kapur, the argument of Mr. Bhushan and Mr. Bansal was primarily was that on a reading of Sections 27(b) and 48 of the Competition Act, it is clear that a penalty can be imposed on a person for violation of the provisions of the Act, which includes Sections 3 and 4 also, in view of the presence of the words *"upon each of such person"* in Section 27(b) and *"where a person committing contravention of any of the provisions of this Act"* in Section 48(1).

37. We agree with the said submission of Mr. Bhushan and Mr. Bansal. There cannot be any dispute that if the Company and the Officers / Directors are being proceeded against for violation of Sections 3 and 4, there has to be a consequence for violation. Mr. Kapur and Mr. Rao's plea was that the word '*turnover'* would not be applicable to Officers / Directors. The plea appears to be appealing on a first blush, but on a deeper consideration, if we agree with the submission made by Mr. Kapur and Mr. Rao then the very provision of penalty to be imposed on the Officers / Directors being *'persons'* in terms of

Section 27(b) would be rendered otiose / nugatory. In other words, there would not be any stipulation of penalty to be imposed on Officers / Directors even if they are found to be violating Sections 3 and 4. That cannot be the intent of Sections 27(b) and 48. Such a stipulation, surely requires a purposive interpretation.

38. The Supreme Court in ***State of Bihar & Ors. V. Anil Kumar and Ors AIR 2017 SC 2716*** has by relying upon ***National Insurance Co. Ltd. v. Laxmi Narain Dhut (2007) 4 SCALE 36*** held as under: -

> *"68. A statute is an edict of the Legislature and in construing a statute, it is necessary to seek the intention of its maker.* ***A statute has to be construed according to the intent of those who make it and the duty of the court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature.*** *This task very often raises difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure.* ***It is impossible even for the most imaginative Legislature to foresee all situations exhaustively and circumstances that may emerge after enacting a statute where its application may be called for. Nonetheless, the function of the Courts is only to***

expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. *(See District Mining Officer and Ors. v. Tata Iron & Steel Co. & Anr. JT 2001 (6) SC 183).* ***It is also well settled that to arrive at the intention of the legislation depending on the objects for which the enactment is made, the Court can resort to historical, contextual and purposive interpretation leaving textual interpretation aside.***

(emphasis supplied)

69. It was also opined:

More often than not, literal interpretation of a statute or a provision of a statute results in absurdity. ***Therefore, while interpreting statutory provisions, the Courts should keep in mind the objectives or purpose for which statute has been enacted.*** *Justice Frankfurter of U.S. Supreme Court in an article titled as Some Reflections on the Reading of Statutes (47 Columbia Law Reports 527), observed that,*

> ***"legislation has an aim, it seeks to obviate some mischief, to supply an adequacy, to effect a change of policy, to formulate a plan of Government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statutes, as read in the light of other external manifestations of purpose"***.

39. Further, it has been held by the Supreme Court in ***Board of Muslim Wakfs Rajasthan v. Radha Krishna & ors (1979) 2 SCC 468***, that the construction which tends to make any part of the statute meaningless or ineffective must always be avoided and construction which advances the remedy intended by the statute should be accepted. Mr. Kapur and Mr. Rao, in their submissions had relied on the general meaning of the word '*turnover'* i.e the income of a Company in a particular period, but the synonyms of the word '*turnover'* (as per English Oxford Living Dictionary) are revenue, gross revenue, income, yield, volume of business, business sales. So, the turnover, in the context of Officers / Directors has to be interpreted as the income of the Officers / Directors from the Company, as there cannot be an income of an Officer / Director from an infringing product. We have been told, during the course of the arguments that the CCI has been imposing penalty on the income of the Officers /

Directors of the Company. We agree with such an action.

40. So, the plea of Mr. Kapur and Mr. Rao that Section 27(b) shall be applicable to an *'enterprise'*, is not appealing.

41. Insofar as the plea of Mr. Kapur and Mr. Rao that Section 48 as it falls under Chapter VI, only relates to the contravention of Sections 42 to 44 of the Act, is also not appealing, inasmuch as the Section contemplates *"on contravention of the provisions of the Act"*, one shall be liable to be proceeded against and punished accordingly. The contravention of the provisions of the Act includes Sections 3 and 4, as is clear from Section 46, which is also in Chapter VI, stipulates lesser penalty for violating Section 3 in certain eventualities. If the interpretation as sought to be advanced by Mr. Kapur and Mr. Rao, is to be accepted / agreed to, then Section 48 shall become nugatory, and there shall be no penalty for violating the Act.

42. Insofar as the judgments, as relied upon by the learned counsels for the appellants are concerned, in ***Poonam (supra),*** the reliance was placed on a proposition of law that no order can be passed behind the back of a person adversely affecting him.

43. Insofar as ***Central Board of Dawoodi Bohra Community and Anr. (supra),*** the reliance was placed by the appellants in

support of their contention that the matter must be referred to a larger Bench in the facts of this case.

44. Insofar as the judgments in the case of ***Shah and Co., Bombay (supra)*** & ***Bangalore Turf Club Limited*** relied upon by the appellants in support of their submission that there is no justification to refer to the NI Act when the 2002 Act as a Special Act deals with the subject matter, which is entirely distinct from the NI Act.

45. Insofar as the ***M. Nizamudeen (supra)*** is concerned, the same was relied upon by the learned counsel for the appellants to contend that it is a settled rule of interpretation that if the language used in a statute is capable of bearing more than one construction, a construction that results in absurdity or anomaly should be eschewed.

46. Similarly, ***Union of India v. Deoki Nandan Aggarwal (supra),*** was relied upon by the learned counsel for the appellants to contend that defect or omission in the words used by the legislator, the Court cannot correct or make up the deficiency. It shall only decide what the law is, and not what it should be.

47. Insofar as ***B. Unnikrishnan and Ors.*** and ***B. R. Enterprises (supra)*** are concerned, the same were relied upon

that the Officers / Directors cannot be punished without any legislative guidelines / checks and as per whims and fancies this is anathema to rule of law.

48. Suffice it to state, in view of our conclusion above, the judgments so relied upon have no applicability.

49. We see no reason, to refer the writ petition for consideration by a larger Bench.

50. In view of our discussion above, we are of the view, that the impugned order needs no interference. The appeals are dismissed. No costs.

CM. Nos. 47926/2018 and 47927/2018 in LPA 637/2018
CM. Nos. 48742/2018 and 48743/2018 in LPA 651/2018

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

DECEMBER 18, 2018*/jg/ak*