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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 14th December, 2022

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W.P.(C) 16963/2022 & CM APPLs. 53757/2022, 53758/2022
MAKEMYTRIP INDIA PVT LTD MMT & ANR. Petitioners

Through: Mr. Mukul Rohatgi and Mr. Ramji Srinivasan, Sr. Advocates with Mr Shashank Gautam, Mr. Rajat Moudgil, Ms. Aashna Manocha, Mr Akshat Hansari, Ms. Anisha Bohra, Mr. Swapnil Singh, Mr. Sreemoyee Deb and Mr. Anand Sree, Advs. (M-

versus

COMPETITION COMMISSION OF INDIA & ORS..... Respondents

Through: Mr. N. Venkataraman, ASG with Mr. Rajeev Saxena, Mr. Samar Bansal, Mr. Chandra Shekhara Bharatho, Ms. Amritha Chandramouli, Mr. S. Ram Narayana, Mr. Rahul Vijay Kumar, Mr Madhav Gupta & Mr Vedant Kapur Advs. for CCI/R-1.

Mr. Rajeev Saxena. (nominated counsel CCI) with Mr. Siddharth Luthra Mr Saurav Bansal for R-1.

Mr. Vaibhav Gaggar, Mr Vaibhav Chouker, Ms. Ela Bali, Ms. Kokila Kumari, Mr. Faiz Siddiqui, Mr. Somdev Tiwari & Mr. Mrityunjay Mahendra, Advs for R-3.

Mr. Abir Roy, Mr. T. Sundar Ramanathan, Mr. Vivek Pandey, Mr. Aman Shankar & Mr Soham Goswami Advs for R-4.

Mr. Rohan Arora, Adv. for R-5

Ms. Rukhmini Bobde, Ms. Sonal Gupta, Mr. Ishan Nagar, Mr. Abhishek

Thakral & Mr. Amlaan Kumar, Advs.
for R-(FHRAI)

CORAM:
JUSTICE PRATHIBA M. SINGH
Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioners impugning the order dated 6th December, 2022 passed by the NCLAT, Principal Bench, New Delhi in the *Competition Appeal (AT) No.57/2022* titled “*Make My Trip (India) Pvt. Ltd. & Anr. v. Competition Commission of India*”. The said appeal arises out of the order dated 19th October, 2022 passed by the Competition Commission of India (hereinafter, “CCI”) in *Case No.14 of 2019* titled “*Federation of Hotel & Restaurant Associations of India (FHRAI) and Anr. v. MakeMyTrip India Pvt. Ltd. and Ors.*”, to the following effect.

“311. In the facts and circumstances of the case, the Commission finds the conduct of MMT-Go in violation of the provisions of Section 4(2)(a)(i) as well as Section 4(2)(c) read with Section 4(1) of the Act as adumbrated in this order. Further, for the reasons recorded in this order, the arrangement between MMT-Go and OYO has also been found to be in contravention of Section 3(4)(d) read with Section 3(1) of the Act.”

312. The Commission observes that under Section 27 of the Act, it has wide ranging powers to impose monetary as well as non-monetary sanctions. Having regard to the submissions made by the parties and taking a holistic view in the matter, the Commission is of the view that, besides imposing monetary penalty (which is dealt later in the order), it is imperative to ensure an environment that supports fair competition amongst the OTAs as well as amongst the franchisee service providers, which will

ultimately benefit consumers and the independent hotels in the long run. Towards that end, the Commission directs MMT-Go as Under:

a. MMT-Go is directed to suitably modify its agreements with hotels/chain hotels, to remove/abandon the price and room availability parity obligations imposed by it on its hotel/chain hotel partners with respect to other OTAs.

b. MMT-Go is directed to modify its agreement with hotels/chain hotels, to remove/abandon the exclusivity conditions that exist inter-alia in the form of D minus clause.

c. MMT-Go is directed to provide access to its platform on a fair, transparent and non-discriminatory basis to the hotels/chain hotels, by formulating the platforms' listing terms and conditions in an objective manner.

d. MMT-Go will notify all its hotel/chain hotel partners, about the aforesaid modifications.

e. MMT-Go is directed to provide transparent disclosures on its platform as regards the properties not available on its platform, either on account of termination of the contractual arrangement with any hotel/chain hotel or by virtue of exhaustion of quota allocated to MMT-Go by such hotel/chain hotel. Illustratively, for properties listed on MMT-Go but sold out on the said portal by virtue of exhaustion of quota allocated to MMT-Go, may specify 'sold out on MMT-Go portal'; similarly, properties continuing to be appearing on MMT-Go portal, despite termination/expiry of listing arrangement should be removed from the portals and in the interregnum with a 'not available on MMT-Go

portal' specification.

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319. The Commission observes that though the contravening conduct of MMT-Go pertains to hotel segment, the predominant nature of the service that it offers is online intermediation services. In case of digital market platforms, restricting revenue to just one segment would not appropriately capture the interdependent and integrated nature of the ecosystem wherein one product/ service reinforces multiple other products/ services. This approach might be appropriate in traditional markets, but not so much so in case of two-sided or multi-sided platforms. In such platforms, not only two user sides are interacting and thus, intricately intertwined with each other, but the products/ services offered by the platform operator through other verticals also derive strength from each other due to economies of scope and scale. Accordingly, in such markets, for the purposes of revenue determination, the entire platform has to be taken as one unit. Any other interpretation or approach would render the deterrence exerted by the Statute as redundant and nugatory. Keeping in view the nature of the services offered by MMT-Go, the Commission considers it appropriate to consider its entire turnover as shown in its financial statements submitted by it as the relevant turnover. Based on the foregoing, the Commission deems it fit to impose on MMT-Go a monetary penalty @5% of its relevant turnover, during the financial years 2017-18, 2018-19 and 2019-20, as calculated below:

Financial Year	MMT (Relevant Turnover in crore rupees)	GoIbibo (Relevant Turnover in crore rupees)	MMT-Go (Relevant Turnover in crore rupees)
2017-18	2,759.07	1,356.31	4,115.38

2018-19	3,145.53	1,430.89	4,576.42
2019-20	3,130.72	1,586.45	4,717.17
Total	9,035.32	4,373.65	13,408.97
Average	3,011.77	1,457.88	4,469.66
5% of Average Relevant Turnover			223.48
Rupees Two Hundred Twenty-Three crores and Forty-Eight Lakhs only			

320. As regards OYO, the Commission observes that OYO is a franchisee service provider engaged primarily in providing services to its partner hotels through listing on its own portal as well as the portals of other OTAs, besides providing other services to said hotel partners. OYO submitted financial statements with regard to Oravel Stays Limited as well as Oyo Hotels and Homes Private Limited (OHHPL/formerly 'Alcott Town Planners Private Limited'), the latter being the subsidiary of the former. However, OYO has claimed that only the commissions earned by it on hotel room bookings be considered as its relevant turnover. Further, OYO has submitted that for the financial years 2017-18 and 2018-19, the commissions earned on hotel room bookings through Oravel Stays Limited be considered while for the financial year 2019-20, the commission earned on hotel room bookings as reflected in OHHPL be taken into consideration for penalty imposition, if any. Having regard to the business operations of OYO, the Commission observes that its entire revenue from the business operations constitute its relevant turnover and the same needs to be taken into consideration, for the purpose of imposition of penalty and a restrictive interpretation of the term relevant turnover as canvassed by OYO cannot be accepted. In view thereof, the Commission deems it fit to impose on

OYO a monetary penalty @5% of its relevant turnover, as submitted by it, during the financial years 2017-18, 2018-19 and 2019-20, as calculated below:

<i>Financial Year</i>	<i>Oravel Stays Limited (in crore rupees)</i>	<i>OHHPL (in crore rupees)</i>	<i>OYO [Total] (Relevant Turnover in crore rupees)</i>
2017-18	265.91	160.86	426.77
2018-19	3,595.13	535.94	4,131.07
2019-20	36.29	5,538.98	5,575.27
<i>Total</i>	<i>3,897.33</i>	<i>6,235.78</i>	<i>10,133.11</i>
<i>Average</i>	<i>1,299.11</i>	<i>2,078.59</i>	<i>3,377.70</i>
<i>5% of Average Relevant Turnover</i>			<i>168.88</i>
<i>Rupees One Hundred Sixty-Eight Crores and Eighty-Eight Lakhs only</i>			

321. The Commission directs MMT-Go and OYO to deposit the respective penalty amounts as calculated above within a period of 60 days of receipt of the present order, in accordance with the provisions of the Act.”

3. Aggrieved by the above order dated 19th October, 2022, the Petitioner No.1 - Make My Trip (India) Pvt. Ltd. challenged the same before the NCLAT, Principal Bench, Delhi. Vide the impugned order dated 6th December, 2022, the NCLAT has admitted the said appeal, however, directed a deposit of 10% of the penalty amount, which was imposed by the CCI as a condition for admission of the appeal. The impugned order dated 6th December, 2022 passed by the NCLAT, reads as under:

“06.12.2022. Heard Mr. Mukul Rohatagi, Ld. Sr.

Counsel with Mr. Ranjit Srinivasan, Ld. Sr. Counsel assisted by Mr. Shashank Gautam, Ld. Counsel for the Appellant, Mr. Samar Bansal Ld. Counsel for the CCI/R-1 as well as Mr. Vaibhav Gagar, Ld. Counsel for the Respondent No.3.

The present Appeal has been preferred against an order dated 19.10.2022 passed by CCI in Case Nos.14 of 2019, 01 of 2020. Mr. Mukul Rohatgi, Ld. Sr. Counsel tried to persuade the court that penalty has incorrectly been imposed and as such even while admitting it requires to be stayed however, considering the fact that in one another identical matter i.e. Competition Appeal (AT) No. 55 of 2022, this Court while admitting has directed for depositing 10% of the penalty amount, there is no reason to pass a different order.

This appeal requires hearing.

Admit.

It is admitted subject to deposit of 10% of penalty amount which is to be deposited within a period of six weeks. *Deposit shall be made in the nature of FDR in favour of Registrar, National Company Law Appellate Tribunal, New Delhi. This Appeal shall be heard side by side of Competition Appeal (AT) No. 55 of 2022 which has directed to be listed 'For Hearing' on 11.04.2023.*

It is clarified that we have admitted the appeal on deposit of 10% of the penalty and we have not dealt with any other part of the order passed by the CCI."

4. Mr. Rohatgi and Mr. Srinivasan, ld. Senior Counsels appearing for the Petitioners submit that the impugned order dated 6th December, 2022 passed by the NCLAT is completely ambiguous as to the reasons for which the direction for deposit of 10% of the penalty amount imposed by the CCI has been issued. It is clear that the said impugned order does not grant any interim protection *qua* the remaining 90% of the penalty amount, or any other

directions issued by the CCI vide impugned order dated 19th October, 2022. Thus, they submit that the impugned order dated 6th December, 2022, directing deposit of 10% of the penalty amount, merely as a pre-deposit for the admission of the appeal, would be unsustainable. Mr. Rohatgi, thus, submits that the Court ought to clarify that if the deposit as directed is made, the recovery of the remaining 90% penalty amount ought to be stayed. It is further submitted that an appeal against the order of the CCI would lie before the NCLAT, under Section 53B of The Competition Act, 2002.

5. Mr. Venkataraman, Id. Additional Solicitor General appearing for the CCI, submits that the NCLAT has merely followed the pattern, which was followed in the order dated 22nd November, 2022 passed by the NCLAT in ***Oravel Stays Limited v. CCI & Ors.*** Be that as it may, it is submitted that the clear understanding of the parties present, while the impugned order dated 6th December, 2022 was passed, was that, subject to deposit of 10% of the penalty amount imposed by the CCI, the recovery of the remaining 90% of the penalty amount would remain stayed. He further submits that, insofar as the remaining directions issued by the CCI vide impugned order dated 19th October, 2022 are concerned, the NCLAT has made it clear that it has not dealt with any other part of the order passed by the CCI. In addition, it is contended that the appeal against the order passed by the NCLAT would lie to the Supreme Court under Section 53T of The Competition Act, 2002.

6. Heard Id. Counsel for the parties. This Court has also perused the order dated 6th December, 2022 passed by the NCLAT, as also, the order dated 19th October, 2022 passed by the CCI. Various directions have been issued by the CCI vide order dated 19th October, 2022, which were challenged before the NCLAT. One of the components of the said order dated 19th October, 2022

is the aspect relating to penalty. The total amount, which has been fixed as penalty in the case of the Petitioner herein, is to the tune of Rs.223.48 crores.

7. The appeal before the NCLAT, admittedly, challenges the entire order dated 19th October, 2022 passed by the CCI. The impugned order dated 6th December 2022 passed by the NCLAT, however, while admitting the appeal, does not give any reasons for directing the deposit of 10% of the penalty amount. Further, no interim protection has been explicitly granted in the said impugned order, in respect of the recovery of the remaining 90% of the penalty amount.

8. The appeal before the NCLAT is a first appeal challenging the order passed by the CCI. Thus, in the opinion of this Court, a pre-deposit of 10% of the penalty amount could not have been made for mere admission of the appeal. It is obvious that the intention, which may not be explicitly made clear in the entire order dated 6th December, 2022 passed by the NCLAT, is against the recovery of the remaining 90% of the penalty amount.

9. Upon a specific query by the Court as to whether the Petitioner No.1 is willing to deposit the 10% of penalty amount, subject to which there shall be stay on the recovery of the remaining 90% of the penalty amount, Mr. Srinivasan, Id. Senior Counsel submits, under instructions from Mr. Adhiraj Singh, authorized signatory of the Petitioner No.1, that insofar as the said interim protection is concerned, the matter may be relegated back to the NCLAT.

10. While the Court was dictating the order, based on the above submissions, Mr. Srinivasan, Id. Senior Counsel, at that stage, again under instructions, submits that the Petitioner is willing to deposit 10% of the penalty amount, as directed vide order dated 6th December, 2022 by the

NCLAT, without prejudice to its rights and contentions. Subject to the said deposit being made, the recovery of the remaining 90% of penalty imposed by the CCI, may be stayed.

11. In view of the submission finally made on behalf of the Petitioner, it is directed that subject to the deposit of 10% of the total penalty amount of Rs.223.48 crores, in accordance with the order of the CCI, as directed by the NCLAT, no recovery shall be effected in respect of the remaining 90% of the penalty amount. The said deposit shall be without prejudice to the rights and contentions of the parties.

12. Insofar as the other directions issued by the CCI are concerned, the Petitioner is free to approach the NCLAT for any other interim reliefs.

13. It is made clear that none of the other contentions addressed either by the Petitioner or the Respondents have been considered or adjudicated by this Court, including the maintainability of the present writ petition.

14. The present petition, along with all pending applications, is disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 14, 2022/dk/ad