

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Competition Appeal (AT) No. 18 of 2018

IN THE MATTER OF:

Google LLC & Ors.

...Appellants

Versus

Competition Commission of India & Ors.

...Respondents

Present:

For Appellants: Dr. Abhishek Manu Singhvi and Mr. Arun Kathpalia, Senior Advocates assisted by Mr. Samir Gandhi, Mr. Ravishekhar Nair, Ms. Hemangini Dadwal, Ms. Deeksha Manchanda, Mr. A. Singhvi, Ms. Kritika Ramesh, Mr. Aakarsh Narula, Ms. Anuja Agarwal, Ms. Pritika Magima and Ms. Tanya Sethi, Advocates.

For 1st Respondent: Mr. Vaibhav Gaggar, Ms. Neha Mishra, Ms. Aayushi and Mr. Adarsh Chamoli, Advocates.

For 2nd Respondent: Mr. Amit Sibal, Senior Advocate assisted by Mr. Rajshekhar Rao, Mr. Naval Chopra, Mr. Yaman Verma, Mr. Aman Sethi and Mr. Anandh Venkataramani, Advocates.

O R D E R

Google LLC & Ors. have preferred this appeal under Section 53B(1) of the Competition Act, 2002 (hereinafter referred to as “the Act”) against part of the majority decision and orders dated 31st January, 2018/8th February, 2018 passed by the Competition Commission of India (hereinafter referred to as “Commission”) in Case Nos. 07 and 30 of 2012.

2. By the impugned order, out of 25 alleged violations of Section 4 of the Act, by the majority of four Hon'ble Members given clean chit in respect to 22 allegations but certain observations and findings have been recorded against the Appellant in respect of the rest three allegations, relevant of which reads as follows:

"420. In view of the discussion in the preceding paras, the Commission holds that Google enjoys dominant position in Online General Web Search and Web Search Advertising Services markets in India. The Commission further holds Google to have abused its dominant position on the following three counts:

- (a) Ranking of Universal Results prior to 2010 which was not strictly determined by relevance. Rather the rankings were pre-determined to trigger at the 1st, 4th or 10th position on the SERP. Such practice of Google was unfair to the users and was in contravention of the provisions of Section 4(2)(a)(i) of the Act.*
- (b) Prominent display and placement of Commercial Flight Unit with link to Google's specialised search*

options/ services (Flight) amounts to an unfair imposition upon users of search services as it deprives them of additional choices and thereby such conduct is in contravention of the provisions of Section 4(2)(a)(i) of the Act.

- (c) *The prohibitions imposed under the negotiated search intermediation agreements upon the publishers are unfair as they restrict the choice of these partners and prevent them from using the search services provided by competing search engines. Imposing of unfair conditions on such publishers by Google amounts to violation of the provisions of Section 4(2)(a)(i) of the Act. Google is doing so because it has dominance in the market for online general web search to strengthen its position in the market for online syndicate search services. This amounts to violation of the provisions of Section 4(2)(e) of the*

Act. Further, as competitors were denied access to the online search syndication services market, contravention of Section 4(2)(c) of the Act is also made out.”

3. While deciding the question of penalty, the majority of the Hon’ble four Members observed as follows:

“421. Coming to the remedies, the Commission notes that so far as display of Universal Results at fixed positions is concerned, it has been submitted that since October, 2010, Google has made display of such results on free floating basis. As such, the contravention remains confined to the period from May, 2009 (i.e. when the provisions of the Act relating to Abuse of Dominant Position came into effect) to October, 2010 and that is no longer subsisting. Accordingly, the Commission takes Google’s submission on record and refrains from issuing any cease order. In this regard, however, the Commission issues a desist order and directs Google not to resort to such fixing of position in future.

422. So far as the contravention noted by the Commission in respect of Flight Commercial Unit is

concerned, the Commission directs Google to display a disclaimer in the commercial flight unit box indicating clearly that the “search flights” link placed at the bottom leads to Google’s Flights page, and not the results aggregated by any other third party service provider, so that users are not misled.”

4. The Commission also considered the question of imposition of monetary penalty and after taking into consideration the total turnover of the Company imposed a penalty of Rs. 135.86 Crore (Rupees One Hundred Thirty-Five Crore and Eighty-Six Lakh only) upon Google for infringing anti-trust conduct and directed the Appellant to deposit the penalty amount within 60 days.

5. The two Hon’ble Members including, the Hon’ble Member (J) gave their dissenting finding (minority decision) and held as follows:

*“It is important to note that each and every clause of sub-section (2) of Section 4 of the Act uses words or operatives to reflect abuse. For instance, Section 4(2) (a) (i) uses **“imposes unfair or discriminatory condition in purchase or sale of goods or services”**. Similarly, clauses 4(2) (b), (c), (d) and (e) emphasise on other abuses with operatives such as **“limits or restricts”, “indulges in***

practice or practices resulting in denial of market access”, “**makes conclusion of contract**”, “**uses its dominant position ... to enter into, or protect ...**”. Thus, a dominant player will be guilty of abuse only in the presence of proof of such behaviour as emphasised in the operatives used in these clauses. It goes without saying that the onus is on the Commission to establish from the evidence on record that there is either an **imposition** of unfair or discriminatory condition in purchase or sale of goods or services or there is a **restriction** of production of goods or provision of services or market, technical or scientific development or **indulgence** in practice or practices which result in **denial** of market access to some player (s) in the relevant market. Unfortunately, as detailed in the preceding paras, we do not find any evidence on record to establish abuse as indicated by the operatives used in Section 4 of the Act.

33. In conclusion, we note that with exponential growth of the internet, online

markets now cover an ever-increasing spectrum of commercial activities. What we are also witnessing is creation of large online platforms that can wield substantial power over all market participants. By virtue of their access to the entire internet landscape as also to large volumes of personal data, they may be in a position to deter new innovation or dampen consumer welfare. However, market power or dominance in itself is not an antitrust concern; it is the conduct of such players that warrants careful competition scrutiny. It is when the evidence shows that the dominant firm uses its market power to stifle innovation and/ or competition or exploits the market power to the detriment of its consumers that a competition agency should intervene. Intervention can no longer revolve primarily around the creation or the strengthening of market power, but it should focus on the conduct of the dominant players and its implications for competition and consumers. We are of the view that regulatory interventions should be evidence-based as opposed to perception-based. In the instant case, the investigation has not brought on

record the evidence and competitive analysis necessary to have a complete understanding of either the markets concerned or the conduct. Hence, we hesitate to use the instrumentality of this law to correct perceptions at the expense of the consumers who according to us are the constituency of this law. In view of the same, we do not find Google to be in contravention of Section 4 of the Act.”

6. Referring to the relevant provisions and the findings, learned Senior Counsel appearing on behalf of the Appellants requested to pass order of stay in the part of the impugned order dated 31st January, 2018, passed by the four Hon’ble Members (majority decision). Notices were issued on Respondents and case was fixed for hearing on the question of passing of interim order.

7. Learned Senior Counsel appearing on behalf of the Appellant submitted that the Commission erred in law because it neither claimed nor referred to any evidence that Google unfairly impose or compelled users to take ‘search services’ by its manner of display of the ‘Flights Unit’. According to him, the ‘Flights Unit’ provides users with an additional option (for free) that they can choose to click on any if they wish. There is no unfair imposition or compulsion.

8. It was further submitted that the Commission failed to identify any evidence of competitive harm, as it was required to establish a contravention

of Section 4(2)(a)(i) of the Act. It failed to notice that the Flight Unit does not receive “unduly” prominent placement on the page. The Commission does not dispute that the Flight Unit displays directly relevant, real-time information about flights in response to user queries about flights entered on Google.

9. According to the Appellants, the Commission wrongly disregarded that Google legitimately displays the ‘Flight Unit’ above its free results and marks it as “Sponsored” as part of its ad-funded business model. This is similar to a free newspaper showing advertisements on its front page separately from its news articles.

10. It was further submitted that the Commission failed to establish that Google’s ranking of universal results prior to 2010 infringed Section 4(2)(a)(i) of the Act.

11. So far as the imposition of penalty is concerned, Learned Senior Counsel for the Appellants contended that the Commission failed to appreciate the guidelines laid down by the Hon’ble Supreme Court in **“Excel Crop Care Limited V/s. Competition Commission of India- (2017) 8 SCC 47”**. According to learned Senior Counsel for the Appellants, as per the decision of the Hon’ble Supreme Court, the penalty under Section 27 of the Act can only be imposed on **“turnover pertaining to products and services that are the subject of contravention”**.

12. It was submitted that the Commission imposed a penalty on Google's turnover from India generated from activities (AdWords, Google's advertising platform) for which it specifically found that no infringement has been made.

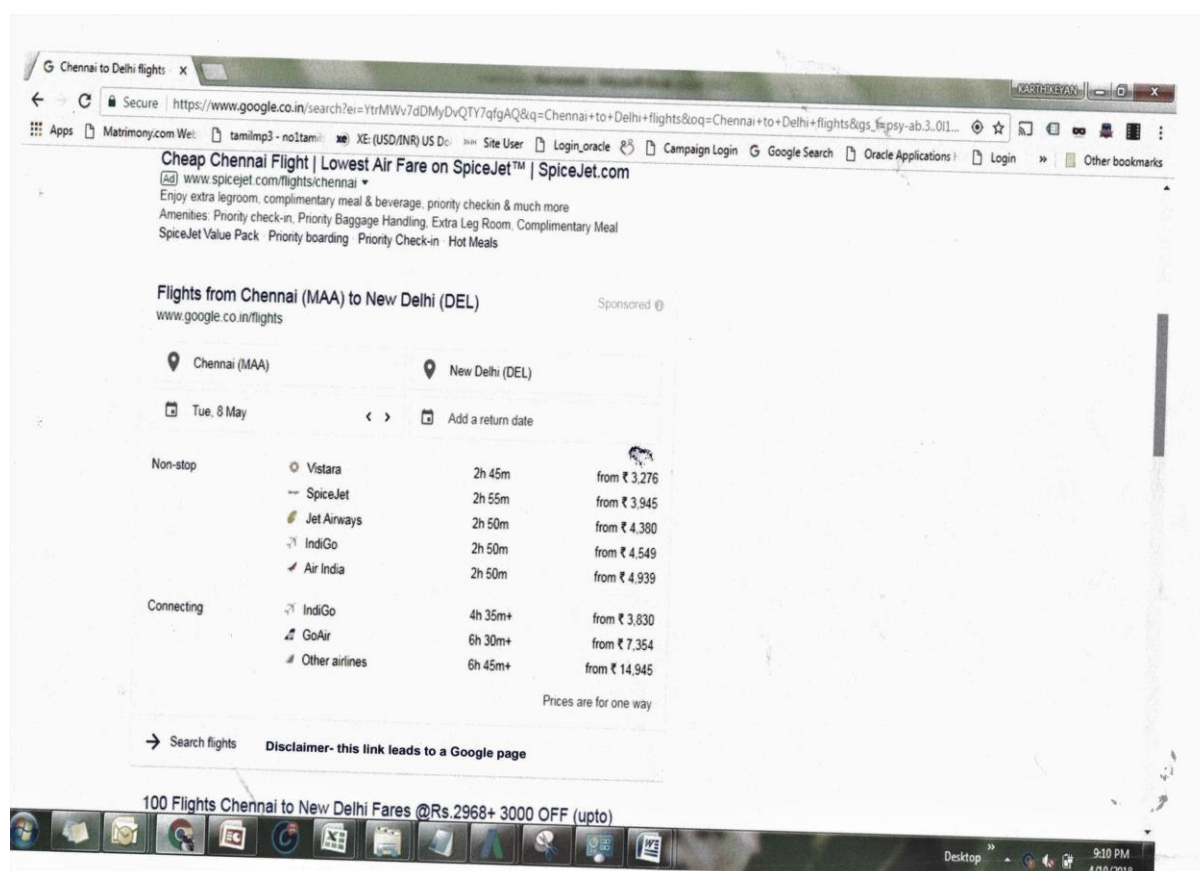
13. It was also submitted that if the total turnover pertaining to products and services for which deficiency alleges displays of 'Flight Unit', is taken into consideration it comes to around Rs. 5 lakhs and not Rs. 136 Crores as noticed by the Commission.

14. Learned Senior Counsel appearing on behalf of the 2nd Respondent ('Informant')- Matrimony.com Limited referred to the decision of the Hon'ble Supreme Court in ***"Excel Crop Care Limited (Supra)"*** (Paragraph Nos. 95 & 112) and submitted that as per the said decision the total turnover of the Company is to be taken into consideration and not the turnover for alleged violation.

15. It was submitted that prominent display and placement of Commercial 'Flight Unit' with link to Google's specialised search options/ services (Flight) amounts to an unfair imposition upon users of search services as it deprives them of additional choices, but in spite of the same, the Committee has allowed the Google to display 'Commercial Flight Unit' but with a disclaimer in the unit box indicating clearly that the "search flights" link placed at the bottom leads to Google's Flight page, and not the results aggregated by any other third party service provider, so that users are not mislead.

16. Learned Senior Counsel for 2nd Respondent submitted that the Appellant is only required to indicate **"Disclaimer- this Link leads to**

Google Page”. A sample copy was handed over, impression of which is as follows:



17. In reply, learned Senior Counsel for the Appellant referred another document relating to Google Flights, a copy of which is extracted below. It was submitted that the data's are based on about 17,60,000 results showing flight from New Delhi to Cape Town, South Africa, wherein reference of www.google.co.in/flights have been mentioned. It was brought to our notice that if the website is open, it reflects the 'Google Flights'. The website already shows that time and cost of Flight shown are 'Google Flight' and therefore, the question putting any disclaimer does not arise.

Google

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	2:30 AM – 1:50 PM Ethiopian	14h 50m DEL–CPT	1 stop 1h 25m ADD	₹ 54,313 round trip	▼
	2:30 AM – 5:30 PM Ethiopian, South African	18h 30m DEL–CPT	2 stops ADD, JNB	₹ 57,919 round trip	▼
	4:15 AM – 4:30 PM Emirates	15h 45m DEL–CPT	1 stop 2h 30m DXB	₹ 75,833 round trip	▼

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Other departing flights

Prices are not available for: Kenya Airways. Flights with unavailable prices are at the end of the list.

	9:35 AM – 1:50 PM ^{*1} Ethiopian	31h 45m DEL–CPT	1 stop ▲ 18h 35m ADD	₹ 54,313 round trip	▼
	9:50 PM – 11:35 AM ^{*1} Emirates	17h 15m DEL–CPT	1 stop ▲ 3h 51m DXB	₹ 75,833 round trip	▼
	4:00 AM – 4:30 PM flydubai, Emirates	16h 0m DEL–CPT	1 stop 2h 35m DXB	₹ 76,505 round trip	▼
	4:45 AM – 11:25 PM Etihad, South African	22h 10m DEL–CPT	2 stops AUH, JNB	₹ 78,341 round trip	▼
	3:25 AM – 11:10 AM ^{*1} Qatar Airways	35h 15m DEL–CPT	1 stop 21h 0m DOH	₹ 78,409 round trip	▼
	3:25 AM – 7:10 PM Qatar Airways, British Airways • Operated by kulula	19h 15m DEL–CPT	2 stops ▲ DOH, JNB	₹ 79,033 round trip	▼
	4:45 AM – 8:10 PM Etihad, British Airways • Operated by kulula	18h 55m DEL–CPT	2 stops AUH, JNB	₹ 79,989 round trip	▼
	2:40 PM – 9:45 AM ^{*2} Vistara, Silkair, Singapore Airlines	46h 35m DEL–CPT	3 stops COK, SIN, JNB	₹ 1,15,622 round trip	▼
	3:45 AM – 9:15 PM KLM	21h 0m DEL–CPT	1 stop 1h 25m AMS	₹ 1,25,971 round trip	▼
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18. Learned counsel appearing on behalf of the Commission requested not stay the impugned order, as otherwise it will amount to grant of final relief by way of interim order.

19. We have heard learned counsel appearing on behalf of the Appellants, Informant (2nd Respondent) and the Commission and perused the records and the impugned judgment.

20. From the majority decision of four Hon'ble Members, we find that out of twenty-five allegations, three allegations have been held to be proved. In respect of which certain directions given, as quoted above. We have also noticed that two Hon'ble Members, including the Hon'ble Judicial Member referring to the relevant facts and provisions of the law came to a definite conclusion that the Commission has failed to establish from the evidence on record that there is an imposition of unfair or discriminatory condition in purchase or sale of goods or services or there is a restriction of production of goods or provision of services or market, technical or scientific development or indulgence in practice or practices which result in denial of market access to some player(s) in the relevant market. In the conclusion, they held that the Appellant- Google creating large online platforms can wield substantial power over all market participants. By virtue of their access to the entire internet landscape as also to large volumes of personal data, they may be in a position to deter new innovation or dampen consumer welfare. But it further held that market power or dominance in itself is not an antitrust

concern; it is the conduct of such players that warrants careful competition scrutiny, which the majority of Members have failed to prove.

21. Taking into consideration the submissions made by the learned Counsel for the parties, materials on records and the reasoning given by both the majority and minority members, we admit the appeal for hearing on merit and pass the following interim order.

22. Until further orders, the operation of the impugned directions of the majority Hon'ble Members dated 31st January, 2018 as given at Paragraph 422 of the said order which relates to disclaimer of Commercial Flight, shall remain stayed. The Appellants will continue to mention 'Google Flight' in respect to 'search flight', as brought to our notice.

23. In so far as the penalty is concerned, without deciding the question what should be the criteria of relevant turnover for the purpose of imposition of penalty which will be decided after final hearing, we direct that if the Appellants' deposit 10% of the penalty amount imposed on Appellant(s) by way of FDR in favour of Registrar, NCLAT within four weeks, the impugned order so far it relates to penalty also shall remain stayed.

Post the matter for hearing on 28th May, 2018.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
27th April, 2018
/AR/