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Page 1 Monday, May 18, 2026
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2023 SCC OnLine SC 88

In the Supreme Court of India

(Before Dr D.Y. Chandrachud, C.J. and P.S. Narasimha and J.B. Pardiwala, JJ.)

Google LLC and Another ... Appellants;

Versus

Competition Commission of India and Others ... Respondents.

Civil Appeal No. 229 of 2023

Decided on January 19, 2023

Advocates who appeared in this case:

For Appellant(s) Dr. Abhishek Manu Singhvi, Sr. Adv.
Mr. Maninder Singh, Sr. Adv.
Mr. Arun Kathpalia, Sr. Adv.
Mr. Vijendra Pratap Singh, Adv.
Mr. Ramsekhar Nair, Adv.
Mr. Parhasarthi Jhal, Adv.
Ms. Hemangini Dadwal, Adv.
Mr. Toshit Shandilya, Adv.
Ms. Arunima Chatterjee, Adv.
Mr. Mohith Gauri, Adv.
Ms. Saijobani Basu, Adv.
Mr. Uday Khanna, Adv.
Mr. Prabhas Bajaj, Adv.
Ms. Deepanshu Poddar, Adv.
Mr. Atish Ghoshal, Adv.
Mr. Param Tandon, Adv.
Ms. Ketki Agrawal, Adv.
Ms. Bhaavi Agrawal, Adv.
Mr. Abhisar Vidyarthi, Adv.
Mr. Aman Sharma, Adv.
Mr. Aditya Dhupar, Adv.
Mr. Snehasish Mukherjee, AOR

For Respondent(s) Mr. N. Venkatraman, Sr. Adv.
Mr. Samar Bansal, Adv.
Mr. Manu Chaturvedi, Adv.
Mr. Tahir Ashraf Siddiqui, AOR

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Page 2 Monday, May 18, 2026
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Mr. Naval Chopra, Adv.
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Ms. Shally Bhasin, Adv.
Mr. Yaman Verma, Adv.
Mr. Amit Singh Sethi, Adv.
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Page 3 Monday, May 18, 2026
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Mr. Prateek Yadav, Adv.
Ms. Parinita Kare, Adv.
Mr. S. S. Shroff, AOR

ORDER

1. Invoking the appellate jurisdiction of this Court under Section 53T of the Competition Act, 2002, the appellants have called into question an order of the National Company Law Appellate Tribunal[1] dated 4 January 2023. NCLAT is in seisin of Competition Appeal (AT) No 1 of 2023 arising from an order of the Competition Commission of India[2] dated 20 October 2022. While admitting the appeal, the NCLAT has directed the appellants to deposit 10% of the penalty quantified by the order of the CCI within three weeks. However, no stay has been granted in respect of the rest of the directions of the CCI which has resulted in the institution of the appeal before this Court.

2. The principal grievance which was urged, when the appeal was taken up, was that while on the one hand, NCLAT noted that "urgency has been shown in passing interim order", the appeal has been directed to be listed on 3 April 2023 but there has been no expression of opinion, *prima facie*, on the merits of the order in appeal with a view to evaluating whether a case for interim stay was made out.

3. The NCLAT noted that the order of the CCI was dated 20 October 2022 but the appeal was filed nearly two months thereafter on 20 December 2022 and when the appeal was taken up on 4 January 2023, the application for interim stay was pressed. NCLAT has not granted an interim stay.

4. Dr. AM Singhvi, senior counsel appearing on behalf of the appellant has submitted that :

(i) This Court may decide the merits of the application for the grant of an interim stay though NCLAT has not done so;

(ii) NCLAT is seized of a statutory appeal which should not be rendered infructuous by the appellate forum having not decided on the merits of the interim application;

(iii) The order passed by CCI suffers from a manifest error in that there is no finding that there has been an abuse of dominance in India within the framework provided by Sections 3 and 4 of the Competition Act, 2002;

(iv) As regards the anti-fragmentation obligation on Original Equipment Manufacturers, Google would ensure allowing smart phone and tablet makers who licence Play and Search to distribute incompatible smart phones and tablets.

5. Mr. N Venkataraman, Additional Solicitor General appears on behalf of the first respondent. We have also heard Mr. Mukul Rohatgi,

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Page 4 Monday, May 18, 2026
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Mr. Rajshekhar Rao and Mr. Jayant Mehta, senior counsel on behalf of the interveners.

6. NCLAT has listed the appeal for final hearing on 3 April 2023. It has not entered into an analysis of the correctness of the order which has been passed by the CCI.

7. This Court had the option of either remitting the proceedings back to NCLAT for a rehearing of the application for interim relief on merits or considering whether a case for the grant of interim relief in the appeal has been made out on the basis of the materials on the record. We have adopted the second course of action. Remitting the matter back to NCLAT for a detailed hearing on the merits of the application for interim relief would result in a delay in the final disposal of the appeal in accordance with the time schedule which has been set out in the order of NCLAT. Since the entire proceeding is pending before the NCLAT in appeal, this Court while assessing the merits of the order of the CCI should on the basis of a *prima facie* evaluation, determine whether interference at this stage is warranted.

8. At this stage, it would be necessary to advert to the directions which have been issued by the CCI in its order dated 20 October 2022. In paragraphs 617, 618 and 618, the following directions have been issued by the CCI :

> "617. Accordingly, in terms of the provisions of Section 27 of the Act, the Commission hereby directs Google to cease and desist from indulging in anti-competitive practices that have been found to be in contravention of the provisions of Section 4 of the Act, as detailed in this order. Some of the measures, in this regard, are indicated below:
>
> 617.1. OEMs shall not be restrained from (a) choosing from amongst Google's proprietary applications to be pre-installed and should not be forced to pre-install a bouquet of applications, and (b) deciding the placement of pre-installed apps, on their smart devices.
>
> 617.2. Licensing of Play Store (including Google Play Services) to OEMs shall not be linked with the requirement of pre-installing Google search services, Chrome browser, You Tube, Google Maps, Gmail or any other application of Google.
>
> 617.3 Google shall not deny access to its play service apps to disadvantage OEMs, app developers and its existing or potential competitors. This would ensure interoperability of apps between Android OS which complies with compatibility requirements of Google and Android Forks. By virtue of this remedy, the app developers would be able to part their apps easily onto Android forks.

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Page 5 Monday, May 18, 2026
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617.4. Google shall not offer any monetary/other incentives to, or enter into any arrangement with, OEMs for ensuring exclusivity for its search services.

617.5. Google shall not impose anti-fragmentation obligations on OEMs, as presently being done under AFA/ACC. For devices that do not have Google's proprietary applications pre-installed, OEMs should be permitted to manufacture/develop Android forks based smart devices for themselves.

617.6. Google shall not incentivise or otherwise obligate OEMs for not selling smart devices based on Android forks.

617.7. Google shall not restrict uninstalling of its pre-installed apps by the users.

617.8. Google shall allow the users, during the initial device setup, to choose their default search engine for all search entry points. Users should have the flexibility to easily set as well as easily change the default setting in their devices, in minimum steps possible.

617.9. Google shall allow the developers of app stores to distribute their app stores through Play Store.

617.10. Google shall not restrict the ability of app developers, in any manner, to distribute their apps through side-loading.

618. The Commission also directs that the anti-competitive clauses of the respective agreements (MADA, AFA/ACC and RSAs), as identified in this order, shall not be enforced by Google *w.r.t.* it's agreements with OEMs in India, with immediate effect.

619. Google, however, is allowed three months from the date of receipt of this order to implement necessary changes in its practices and/or modify the applicable agreements and to submit a compliance report to the Commission in this regard."

9. In paragraph 620, CCI has proceeded to quantify the penalty which has been levied on the appellants as a percentage of the average turn over for 2018-2019, 2019-2020 and 2020-2021.

10. Dr. Singhvi has urged that there has been no finding by CCI on the abuse of Google's dominant position in India. The fact that Google has a position of dominance is not in dispute. The findings which have been arrived at by CCI in its order in paragraph 485, 486, 487 and 488 need to be noticed at this stage. Those findings are extracted below :

"485. Google argues that Indian users download billions of apps each year and therefore developers can offset through downloads any benefit associated with preinstallation of an app. However, Google fails to support its claim with data to show the extent of rival search apps downloaded from Play Store and/or other app marketplaces, rather the available data demonstrates otherwise. The

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Page 6 Monday, May 18, 2026
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Commission notes that, based on the available data, the same manifestly is not true in case of competing search service providers. The actual download of competing search apps by Android users in India is negligible as such downloads of competing search apps together is of the Android devices in India. Google further claims that developers can offset any benefit associated with preinstallation of an app, through downloads. However, this assertion of Google is also meritless, as demonstrated by above data. Further, the conduct of Google in imposing pre-installation directly contradicts its' own assertions. If the same is taken to be true, then there is no need to require pre-installation of GMS on home screen. The Commission is of the view that practices followed by Google itself evidences that pre-installation creates a behavioural bias and thus, is an important promotional opportunity for its revenue earning services.

486. It further contends that the majority of Indian Android users customise their device's default home screen, for example, by moving an app and/or adding apps to positions of their choosing. However, the Commission is of the view that this does not make any material difference for OEMs who, having signed MADA, cannot offer exclusivity or the most prominent placement to a competing app. User customizations do not give competing app developers a reasonable chance to pay the OEMs to exclusive pre-install their apps and gain traction by exploiting the *status quo* bias in favour of pre-loaded apps.

487. Google claims that users access rival search services through browsers. However, he Commission notes that Google search is set as a default search service in Google's own browser Chrome, which enjoys significant market share in the Android ecosystem. Thus, another effective path to access users through browser is essentially reserved for Google search. Google's claim that the drop-down menu on Chrome allow users to change the default, again conveniently disregards users' tendency to stay in the default choice and to choose inaction over action. Even for Safari, Google is paying a substantial amount for the opportunity to gain the default position as it realises that default position is very critical, and user seldom changes the default. Thus, Google sees a value proposition in its agreement with Apple by securing user search queries from iOS devices and at the same time ensuring that competing engines does not obtain the default position in mobile is the question.

488. It is pertinent to mention that the Investigation has demonstrated that pre-installation of this core suite of apps is non-exclusive, meaning that the MADA partner is free to preinstall competing apps and place them in as prominent locations as Google's apps. As per Google, it offers a non-monetary trade, under

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Page 7 Monday, May 18, 2026
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which it provides OEMs with an advanced OS and suite of apps for free and OEMs promote Google's revenue generating apps through pre-installation. According to Google, this 'trade' or 'barter' model eliminates an upfront licensing fee for OEMs, which has had significant benefits for OEMs and carriers. Google has also stated that it drives down OEMs' up-front costs, thereby facilitating OEM entry and the release of a wide array of lower-priced devices. However, the Commission holds that irrespective of its effect on the OEMs, the bundling strategy of Google helps further its dominance across markets and affects the contestability and vitality of competition in markets, such as search, web browsing, online advertising etc. The requirements that Google imposes on the OEMs through MADA can be construed as anticompetitive tying. For instance, an OEM may want YouTube only, but Google makes the manufacturer accept Google Search, Google Maps, Google Network Location Provider and other apps. An app developer with offerings only in some applications cannot replace Google's full suite of services."

11. Apart from the above findings, CCI has made the following observations in paragraphs 468, 469 and 470 of its order which is in appeal :

"468. The claims made by Google that MADA is optional and voluntary, do not refect the commercial reality in terms of the real choice available to a device manufacturer. While an OEM is not obligated to pre-install any Google app on its Android devices, what cannot be lost sight of is that lack of essential Google apps, e.g., Play Store, erodes marketability of the devices. Majority of users expect these apps on an Android device, which unless pre-installed, cannot be accessed as they are not distributed through other Android app marketplaces. Google's policy of withholding its own apps from non-Google Android app marketplaces reinforces the compulsion for OEMs to pre-install these apps on their Android devices. Access to Play Store is particularly critical as Google is including more functionality and API calls under the closed licensing of Google Play. This makes Google Play Services a critical input for Android OEMs. However, to pre-load even a single essential Google app, such as Play Store that provides users access to the Android app universe, a device manufacturer must sign MADA and AFA, committing to pre-install the full GMS suite.

469. Thus, theoretically device manufacturers need not sign MADA, if they do not wish to be subjected to the contractual restrictions. However, such a choice is commercially not viable for the OEMs for various reasons already discussed supra. The so-called choice for OEMs that Google refers to is between signing a non-

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Page 8 Monday, May 18, 2026
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> negotiable MADA and commercial failure. Android OEMs seeking to have a commercially viable business have no meaningful choice but to sign MADA and AFA and accept all restrictions they contain.
>
> 470. Through the tying arrangement, Google has used Android as a vehicle, especially, to cement the dominance of its search engine. Google's strategy rests on the reach, scale and market power of Android, which allows Google to have control over a vast majority of smart mobile devices that serve as key gateways to the. internet. Keeping Android OS open and 'free' of monetary consideration is thus in as much Google's interest as it claims it to be for the OEMs and users. Combined with the power of Android is the dominance that Google enjoys over Play Store which has attained unparalleled market position benefiting from huge indirect network effects, resulting in an overwhelming dependence of users, app developers and consequently of the OEMs. Its gatekeeper position in the Android mobile ecosystem thus makes Google well placed to leverage its power to protect and further enhance its dominance in online search by making it difficult for rival search service providers to enter and compete effectively in the mobile search space. The well -regarded benefits of the open-source system of Android cannot legitimize an exclusionary conduct that causes harm to competition in any specific area/markets."

12. These findings cannot be regarded as contrary to the weight of the record, at the interlocutory stage. At the present stage, since the appeal is pending before NCLAT, we are desisting from entering a finding on the merits of the rival submissions which have been urged on behalf of the contesting parties. Any expression of opinion of this Court on the merits would affect the proceedings which are pending before the NCLAT. It would suffice to note that the findings which have been arrived at by the CCI cannot be held at the interlocutory stage to be either without jurisdiction or suffering from a manifest error which would have necessitated interference in appeal.

13. For the above reasons, while we are not inclined to interfere with the impugned order of the NCLAT, we would request the NCLAT to dispose of the appeal by 31 March 2023.

14. Parties shall move the NCLAT with a certified copy of this order within three working days.

15. We request the President of NCLAT to pass appropriate administrative directions indicating a time schedule for the early disposal of the appeal.

16. For the above reasons, we affirm the order of the NCLAT declining to grant interim relief though for the reasons which have been indicated above. The appeal shall stand disposed of in the above terms.

17. Since the appellants have been pursuing their interlocutory

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Page 9 Monday, May 18, 2026
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remedies before the NCLAT and later before this Court, time for compliance of the order passed by the CCI is extended by a further period of a week from today. It is clarified that all actions taken in the meantime shall abide by the result of the appeal.

18. Pending applications, if any, stand disposed of.

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[1] "NCLAT"

[2] "CCI"

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