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COMPETITION LAW

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I INTRODUCTION

OVER THE years we are surveying the Competition Law cases and insisting again and again that to a free market economy, interest of the market is far more important than that of the consumers, though it is always claimed that the interest of the consumers is the ultimate objective of the Competition law. Though the provisions of the Competition Act are consumer friendly, the way it is interpreted over the years, makes it much friendlier to the corporate rather than to the consumers. Progressively India is becoming industrially more developed but on the other hand the Commission located at Delhi is proving to be inconvenient to a large number of Information Providers. Therefore for the effective and efficient functioning of the Act and with the enlargement of the size of the market, it would be desirable that more benches of the Commission are established in different part of the country.

II TRENDS

The year 2017 is important for two reasons. Firstly , due to the amendment introduced by The Finance Act of 2017 which amended section 53A of the Competition Act, with effect from 26 May 2017 the Competition Appellate Tribunal (CompAT) has ceased to exist and its functions are entrusted to the National Company Law appellate Tribunal (NCLAT). However the Amendment did not introduce any substantive or procedural changes of the appellate tribunal. As the NCLAT hears appeals from other Acts also there may be delays in disposal of appeals at least in the initial years. In addition we are not sure if the members of the NCLAT have the expertise in the field of Competition law. Secondly, the Supreme Court's judgement to the effect that the penalty can only be imposed on the turnover of the relevant

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1 Case no. 36 and 82 of 2014

product or service and not on the entire product or service of an enterprise is certainly likely to tone down the power of the Commission to deter an enterprise from violating the provisions of the Act. *Hyundai Motors Limited* v. *Competition Commission of India,*[1] decided by the National Company Law Appellate Tribunal seems to be a step backward in as much as the Tribunal demanded that anti-competitive terms in an agreement alone do not attract the provisions of the Act but these terms must be acted upon. However, the good news is the Commission is, it seems, moving away from its earlier position that 'meeting of mind' should be separately proved and increasingly coming round to the position that 'meeting of mind' is to be inferred from overall circumstances. But this position is abandoned in *In Re Cartelisation case in sale of Sugar Mills.*[2]

III COMPETITION COMMISSION: VERTICAL ANTI-COMPETITIVE AGREEMENTS

Fx Enterprises Solutions India Pt. Ltd. v. *Hyundai Motor India Ltd.*[3] is a case on anti-competitive agreements. Hyundai Motors India Limited (HMIL) is a wholly owned company of Hyundai Motor Company (HMC) of Korea and was incorporated under Companies Act of 1956. The factory is located at Sriperambudur in Tamilnadu. Fx Enterprises Solutions India Pt. Limited (EESI) is information provider (IP) and is an incorporated company and is a dealer and service provider of the OP from 2006 to 2014. Pursuant to an agreement between IP1 and OP, the IP1 purchased a land in Faridabad suitable for the requirement of dealership and service centre. On, 25.04.2014 OP terminated the agreement with HMIL. It was alleged the OP enter into excusive dealership agreement with dealers and the dealers can purchase spares only through OP and authorised suppliers. Dealers are required not to give discounts to customers beyond the limit prescribed under 'discount Control Mechanism'.

It was alleged by the IP that discount control mechanism amounts to resale price maintenance, prohibited under section 3 (4)(e) of the Act. It was also alleged that the OP indulged in 'hub & spoke' which means that there is vertical arrangement between the dealers and suppliers and horizontal between dealers through the role played by a common supplier. This amounts to price collusion. Finally it was also alleged that (a) HMIL controls the sources of product, (b) ties the sale of desired car to the sale of unwanted cars and (c) designates the sources of supply of complementary goods for dealers resulting in tie in arrangement in contravention of section 3 (4) (a) of the Act.

St. Antony, IP2 is a private company with its office in Trivandrum. In 2009 IP2 entered into a non-exclusive dealership with OP for a period of three years. One of the provisions of the agreement was that the IP2 will not enter into any dealership

2 2017 Comp LR 613 (CCI).

3 Case no. 36 and 82 of 2014 decided in 2017; 2017 SCC on line CCI 26.

agreement with a competitor of HIPL without its permission. This amounts to refusal to deal in violation of section 3 (4)(d) of the Act.

The DG was directed to investigate both these cases. As the passenger cars produced by different producers, are substitutable, the DG defined RM as 'sale of passenger cars in India.' The RM was further subdivided for each of the contravened provisions of the Act.

(a) For refusal to deal (clause 5(iii) of dealership agreement) the RM is 'interbrand sale of passenger cars in India'.
(b) For resale price maintenance (whether OP imposes resale price) the RM is 'intra brand of Hyundai brand cars in Delhi and NCR'.
(c) Tie in arrangement:
    (i) For determining whether OP imposes tie in arrangement in the sale of CNG kit the RM is 'sale of CNG kit for Hyundai cars in Delhi and NCR.'
    (ii) Whether OP imposes tie in arrangement in respect of sale of lubricants the RM is 'sale of lubricants for Hyundai cars in Delhi and NCR.'
    (iii) Whether there is tie in arrangement for car insurance the RM is 'Insurance of Hyundai cars in India.'
(d) Relying upon on *Shamsher Kataria* v. *Honda Siel Cars,*[4] there are three segments of automobile market:
    (i) primary market of manufacture and sale of passenger cars
    (ii) secondary market or aftermarket of spare parts for each brand of cars
    (iii) aftermarket for each brand of repair service

    The DG further observed that sale of CNG kit, lubricants and insurance policy and services fall within the ambit of aftermarket. For CNG kit RGM is 'Delhi NCR' but for lubricants and insurance RGM is 'India'. The DG gave the following findings:

    (i) As clause 5 (iii) of Dealership Agreement require the dealer to take prior permission from the OP before accepting dealership of other brands of car, it amounts to 'exclusive supply arrangement' in violation of section 3 (4)(b) and 'refusal to deal in violation of section 3 (4)(d) read with section 3 (1) of the Act.
    (ii) Discount Control mechanism is imposed by the OP to punish those who breach discount control mechanism. The Mechanism is violative of section 3(4)(e) read with section 3(1) of the Act as it is resale price maintenance.
    (iii) The DG found OP guilty of tie in arrangement in relation to (a) supply and refitting of CNG kit, (b) sale and supply of lube oil, (c) sale of insurance policies and their service: all this amounted to exclusive supple arrangement and refusal to deal in violation of sections 3(4)(b) and 3 (4)(d) of the Act.

4 2014 Comp LR 001(CCI).

(iv) As 100% of market was controlled by the OP. The OP is dominant in the aftermarket of supply and refitting of CNG kit, supply of lube oil and provision of insurance policies. Therefore the impugned conditions included in dealers agreement amount to abuse of dominant position in violation of section 4 (2)(a)(i), 4(2)(a)(ii) and 4 (2)(c) of the Act.

(v) The DG however did not find OP guilty of mandating purchase of high end cars.

The Commission after considering the report of the DG, replies and counters of the parties, gave its findings. The CCI observed that neither the IP made any allegation of abuse of dominant position, nor the CCI mandated the DG to cause investigation of violation of section 4 of the Act. As the DG is required to conduct investigation in terms only of the direction of the CCI, as held by the Supreme Court in *CCI* v. *Steel Authority of India,*[5] the DG report in relation to the violation of section 4 is void. The CCI further observed that there no substance in the allegation of the OP that the DG did not follow the rules of natural justice.

After reproducing the definition of a distinct market for each contravention by the DG and being not fully satisfied with this definition, the CCI proceeded to define upstream market, the market of the producers of passenger cars, and downstream market, the market of sale of passenger cars. In India most of the car dealers are single brand dealers therefore according to the CCI the RPM from the supply side would be market of dealership and supply of Hyundai passenger cars. On the face of it the CCI appears to be correct but, in our opinion, the fact is that the dealers of Hyundai cars would have to compete with the dealers of cars of other brands in the same price segment. The potential consumer compares the features of the same segment brands of other producers, situated in the vicinity, with the Hyundai products. Therefore there is demand side competition which effects the supply side competition as well.

Regarding downstream competition the RGM according to the CCI would be India, as the condition for competition for the distribution and dealership of Hyundai cars are uniform across the country. This observation of CCI seems to be doubtful. A buyer in Delhi would not go to Mumbai to purchase Hyundai car because of a number of practical difficulties, regarding the requirement of registration of car where the car is purchased and then in the state where the owner normally use the car: there are many procedural difficulties, there being vast difference between procedure in books and procedure in reality. Therefore people prefer to purchase a car where they normally use it. In our opinion the definition of DG of RGM was better than that of the CCI.

The DG has identified five types of vertical agreements namely, (i) Exclusive Supply Agreement & Refusal to Deal; (ii) Resale Price Maintenance; (iii) Tie-in arrangements for the sale of : (a) CNG kits; (b) Lubricants; and (c) Car Insurance. CCI proceeded to examine violation or otherwise of them.

5 (2010) 10 SCC 744.

(i) Exclusive Supply Agreement & Refusal to Deal: Clause 5(iii) of Dealership Agreement provides 'except with prior written permission, the dealer shall not invest in any new or existing business not relating to Hyundai dealership. Conduct of the OP pursuant to Dealership Agreement shows that OP not only sought explanation of the dealers as to why they are accepting work from competitors but also threatened to stop supplies. The CCI noted that clause 5 (iii) does not require exclusive dealership but only seeks prior permission from the OP. But is such permission in reality granted to the dealers? The OP has submitted a list of 100 dealers who deal in competing brands also. It is observed that clause 5(iii) of the Dealership Agreement does not result in imposition of de facto exclusivity. DG has not given a single case where a dealer has sought permission and is denied. Accordingly, it cannot be concluded that the OP imposes an exclusive supply obligation or refusal to deal on its dealers. The difference between the DG and CCI, in our opinion, is not based on who is right and who is wrong but their perception of law at different levels. The DG perceived the law at normative level; if it is necessary to seek permission to accept dealership of a rival, it is logical to say that such permission may be denied, if the permission must always be given requirement to seek permission would be redundant. If permission has never been denied it does not mean that it can never be denied. The CCI interpreted the clause at behavioural level. If such permission is never sought and denied, anti- competitive vertical agreement does not exist.

(ii) Resale Price Maintenance- the CCI agreed with the findings of the DG. It may be noted that the impugned agreements/ arrangements did not result into accrual of any consumer benefits; rather, the same resulted into denial of due benefits to the consumers as they were made to pay high prices. An agreement object of which is to establish a fixed or minimum resale price, as its direct or indirect object, may restrict competition. The CCI is also satisfied of the presence of AAEC. The Commission is of the opinion that the OP has contravened the provisions of section 3 (4)(e), read with section 3(1) of the Act.

(iii) Tie in arrangement for sale of CNG kit- The CCI first defined tie in arrangement with reference the CCI case, *Sonam Sharma* v. *Apple*.[6] There are three requirements of tie in arrangement as follows: (i) Purchase of a commodity is conditioned upon the purchase of another commodity. (ii) The seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product. (iii) The tying arrangement must affect a "not insubstantial" amount of commerce.

   (a) Tie in arrangement for CNG kit. According to the DG there are many CNG kit providers in Delhi and NCR National Capital Region, and the provider designated by the OP is costlier. OP does not force the consumer to install

6 2013 Comp LR 0346 (CCI).

the kit from the designated provider but in case the kit of a non- designated make is installed, the warranty is withdrawn. However the CCI was of the opinion that the OP may also have a legitimate interest in ensuring that alternative brands of CNG kits are not used, as the OP would be bearing the costs of warranty. Hence there is no violation of section 3 (4)(a).

(b) Lubricants and oils- The OP has designated lubes and oil suppliers who claim to market specialised lubes for Hyundai motors. In case of non-use of these oils warranty may be withdrawn. The CCI justified the arrangement on the same grounds which it gave for CNG kits. However in our opinion it would have been better if the CCI insisted on product specification, that whosoever supplies the product of that specification would be acceptable rather than designation of suppliers.

(c) Insurance of cars. The CCI also concluded that preferred insurance companies are only recommended but not insisted upon. It is also not part of Dealers Agreement that the dealer must insist on preferred insurance companies. Hence there is no tying arrangement in this case. The question whether dealers actually insist on insurance through preferred companies was not examined.

In conclusion the OP was found guilty of resale price maintenance. But penalty was imposed at the rate of 0.3 % of its average relevant turnover of the last three financial years, taking into consideration factors of maintenance proportionality, no supra-normal profits, putting competition law compliance programme and first time offender with no previous valid order.

IV ANTI-COMPETITIVE AGREEMENTS: BID RIGGING

Shri D. K. Shrivastava, Chief Material Manager Rail Coach Factory Kapurthala v. *M/s Daulat Ram Engg & Services P. Ltd.,*[7] is a reference made under section19 (1)(b) of the Act alleging violation of the provisions of section 3 of the Act. This reference has been filed by the Chief Material Manager, Rail Coach Factory, Kapurthala, Punjab. The Rail Coach Factory (hereinafter, the 'RCF') is the coach manufacturing unit of the Indian Railways. The OPs are manufacturers of Roof Mounted AC Package Unit (hereinafter, 'RMPU') for Linke Hofmann Busch (hereinafter, 'LHB') coaches (hereinafter, 'Item No. 1') and conventional AC coaches (hereinafter, 'Item No. 2'). RMPU is an item used in the AC Coaches manufactured by RCF. Items 1 and 2 are procured through tendering process according to specifications set by Research Design Standard Organisation Lucknow (RDSO). Earlier the items were procured according to specification R-22, which later was changed to eco-friendly R-407. On 5.12.2012 the IP floated tenders for item 1 at the old rates but

7 2017 Tax Pub (CL) 0946 (CCI); case no. 4/2014 decided on 28.11.2017.

for item 2 at 12% enhanced rate. The IP alleged that when tenders were opened it was found that there was an exorbitant increase in the quoted rates above and over the last purchased rates. IP alleged violation of sections 3 and 4 of the Act.

The equipment purchased by the Railways, a monopsony, is not procured by others. The Railways procure Air Conditioning (AC) equipment from certain category of vendors only: 5% from non RDSO registered vendors as development source, 15% from part II vendors subject to 25% Part II vendors in all and the rest from Part I vendors. The issue to be investigated by the DG was whether OPs have indulged in bid rigging. The DG examined whether there was (i) price pattern in bidding, (ii) quoting of exorbitant rates in bidding and (iii) collusive bidding. The DG found all the allegations correct with regard to certain OPs. The CCI noted the observation of the DG regarding collective increase and decrease in bid rates. The OPs contended that (i) this could happen because of market conditions. As the market conditions would be felt equally by all the OPs and therefore rates would increase or decrease for all of them equally. Mere parallelism due to market conditions does not imply collusive behaviour. Every intelligent supplier will be aware of the actions of other supplier in an oligopolistic market and they have right to guess the reaction of the other suppliers and react intelligently.

However, to establish contravention under the provisions of section 3(3) of the Act, there has to be some evidence of agreement or arrangement amongst the contravening OPs that unequivocally demonstrates that the conduct exhibited by such parallel movement in pricing was an outcome of collusion. In the absence of such direct evidence, it becomes imperative to know the prices of the products prevailing at the time of the issue of tender and cost implication due to change in refrigerant before a conclusion can be drawn that this behaviour was a product of collusion. But the RDSO has not calculated the production price of the products to be supplied to them. Therefore collusive behaviour cannot be implied.

While assessing whether rates quoted by the OPs were exorbitant, the Commission affirms DG's observation that in the absence of cost estimation, it is difficult to assess the standard cost of all types of RMPUs. The Commission observes that though the Informant has levelled allegation of collusion amongst the OPs, there is not enough evidence to show that the collective increase or decrease in rates by the OPs in the tender floated by the Informant and other production units or Zonal Railways are result of collusive bidding.

On similar grounds the CCI negated the second issue as well, which was 'Whether the instances of identical or similar pricing by OP-3, OP-4, OP-5, OP-6 and OP-7, as observed during investigation, amount to contravention of the provisions of sections 3(3)(a) and 3(3)(d) read with section 3(1) of the Act? Though in many cases of OPs there was a strong probability of collusive bidding but in the absence of definite proof benefit of doubt was given to them.

In re Cartelisation in Sale of Sugar Mills by the Uttar Pradesh State Sugar Corporation Limited (UPSSCL) and the Uttar Pradesh Rajya Chini Evam Ganna

Vikas Nigam Limited[8] (UPRCGVNL) is a case on cartelisation. It was taken *suo moto* by the CCI on the basis of the report of CAG. The Report indicated lack of competition in the bidding process of a number of companies in contravention of section 3 (3)(d) of the Act.

As per the CAG Report in pursuance of privatisation policy of the U.P. government 10 operating and 11 closed mills were sold to private operators.

M/s Wave Industries Private Limited ('Wave'), M/s PBS Foods Private Limited ('PBS Foods'), M/s Indian Potash Limited ('IPL'), M/s Nilgiri Food Product Private Limited ('Nilgiri'), M/s Trikal Food and Agro Private Limited ('Trikal'), M/s Giriasho Company Private Limited ('Giriasho'), M/s Namrata Marketing Private Limited ('Namrata'), M/s SR Buildcon Private Limited ('SR Buildcon') were the companies which appeared to have formed a cartel. For 10 sugar mills only three, [M/s Wave Industries Private Limited ('Wave'), M/s PBS Foods Private Limited ('PBS Foods'), M/s Indian Potash Limited ('IPL')], applicants submitted bids out of which management of two [Wave and PBS] was common.

The CAG report noted that Wave and PBS Foods were the only two bidders for the four mills at Amroha, Bijnore, Bulandshahr and Saharanpur. For the three mills at Khadda, Rohankalan and Sakoti Tanda IPL was the only bidder. IPL and Wave were competitive bidders for Jarwal Road and Siswa Bazar mills. All the three bidders *i.e.* Wave, PBS foods and IPL, submitted bids for Chandpur mill.

Bids received for three mills [Bijnore, Bulandshahar and Saharanpur] were below expected price but above 50% of expected price. A single bid was received for other three mills [Kadda, Rohankalan and Sakoti Tanda]. These six mills were taken to 'Swiss Challenge method' (SCM). But none of the bidders made competitive bidding against each other. Eventually, out of ten mills, five were sold to IPL, four to Wave and one *i.e.* Chandpur mill to PBS foods. In respect of the Chandpur mill, the CAG report noted that an unreasonably low bid being 1/10th of the expected price was made by Wave and the highest bidder, IPL withdrew its bid for unknown reasons.

According to CAG Report, UPRCGVNL sold eleven mills located at Baitalpur, Bareilly, Bhatni, Deoria, Ghughli, Shahganj, Barabanki, Chittauni, Ramkola, Lakhmiganj and Hardoi. Nine applicants submitted interest in response to (Expression of Interest cum Request for Proposal) EOI-cum-RFP for these mills. Of these, only three submitted financial bids in response to offer for submission of RFP by UPRCGVNL. Only one financial bid was received for each closed mill from Wave, Nilgiri and Trikal. Bid amount was just more than 50% of the expected price. In the SCM round, the bidders did not participate though initially they agreed, and allowed bid security to forfeit. The CAG report observed that the similarity in the bid/ expected price ratio of these bidders and the unusual withdrawals of the bids allowing the forfeiture of the substantial security deposits without any apparent reason reflected some prior arrangement/ understanding amongst the bidders in the original as well as

8 2017 Comp LR 613 (CCI).

in the SCM round. CAG further stated that some of the bidders have common management. Giriasho was a holding company of Namrata who together purchased 7 out of 11 mills. They had common address, e mail and contact number. Also, there were common directors in the (Special Purpose Vehicle) SPVs of Namrata, Giriasho and S R Buildcon as well as in the SPVs formed by Wave, Trikal, Nilgiri and S R Buildcon. There was also indication of sub-contracting as the Board Resolution dated 04.02.2011 of Trikal, authorized Sri Israrul Hasan Zaidi, the authorized signatory of Namrata to take possession of Bhatni mill purchased by it. All this raises a possibility of meeting of mind. The demand drafts submitted by the original bidders for purchasing the (Expression of Interest cum Request for Qualifications) EOI-cum-RFQ as well as submission of bid security amount had consecutive numbers and were issued by the same bank on the same date. Further, the address as well as the contact number mentioned on the letterhead of Nilgiri was that of PBS Foods which was found to be a related company of Wave.

As there was prima facie evidence the CCI directed the DG to investigate. The DG found that allegations of CAG were proved by evidence and both Wave and PBS were guilty of collusive bidding, thus violating sections 3(3) (a) and 3(3) (d). However the DG did not find any evidence of involvement of IPL in the bid rigging. The DG also examined as to why seven companies though initially interested in did not participate in bidding process. These seven companies gave the explanation that they did not participate in bidding as the reserve price was high and they had difficulty in arranging financial resources. The DG noted that no adverse inference can be drawn against these seven companies

The DG also examined as to why six out of nine companies, originally interested in bidding, did not submit bids. Six of these gave various reasons for not participating in bidding: inability to satisfy pre-qualification criteria, lack of financial resources and some failed to respond. The DG observed that one bid was received for each of the eleven mills divided among the three bidders. Since only one bidder had bid for each mill, all these mills were put to SCM. The DG noted that in SCM round also one bid was received for each of the mills. The original bidders initially accepted challenge bids for almost all mills but later withdrew in all except three mills. Each original bidder accepted challenge bid for one mill each as follows - Nilgiri accepted for Baitalpur mill for which challenge bid was made by IB Trading Pvt. Ltd.; Trikal accepted for Bhatni mill for which challenge bid was made by Shree Radhey Intermediaries and Wave accepted for Shahganj mill for which challenge bid was made by IB Commercial. Out of remaining eight mills, three mills were sold to Giriasho, four to Namrata and one to SR Buildcon which were the bidders for these mills in the SCM round.

The DG found that Nilgiri applied for four mills but withdrew from three, forfeiting security deposit, but not withdrawing from Baitalpur which was purchased by Dynamic Sugar wholly owned subsidiary of Nilgiri, through a Special Purpose Vehicle (SPV), with which a slump sale agreement [A sale in order to constitute a *slump sale* must satisfy the following quick test: (i) Business is sold off as a whole and as a going concern (ii) Sale for a lump sum consideration (iii) Materials available

on record do not indicate item-wise value of the assets transferred. Section 2(42C) Income Tax Act, 1961] was made, on non-interest bearing unsecured loan from V. K. Healthcare solutions. Later the entire equity was sold by Nilgiri to Canyon Financial Services. Similarly Trikal purchased Bhatni mill; withdrawing bids from other mills, forfeiting security deposit, through a SPV, making slump sale agreement, after obtaining non-interest bearing unsecured loan from V. K. Healthcare solutions. Later the entire equity was sold by Trikal to Canyon Financial Services. Similarly the Shahganj mill was purchased by Wave through its SPV - Mallow Infratech Pvt. Ltd., a 100% subsidiary company of Wave. The entire SCM bid price for purchase of mill was paid through unsecured loan from V.K. Healthcare Solutions. Subsequently, 100% equity shares of this subsidiary were sold in March, 2011 to Canyon.

The DG rightly found an interesting pattern in the three transactions involving Wave Trikal and Nilgiri. They secured loan from VK Healthcare and subsequently sold to Canyon. It was also observed (i) there was a common director of Wave and Nilgiri and of Wave and Trikal, (ii) the demand drafts for the initial EOI-cum-RFQ submitted by Wave, Nilgiri and Trikal bore consecutive numbers and were taken from bank account of Wave. (iii) Same was the case with the demand draft submitted for bid security of these companies.

Regarding relationship between the original bidders and the challengers, the DG found that Giriasho and Canyon held 86.42% and 13.58% shareholding respectively in Namrata. Thus, Namrata was found to be a fully controlled subsidiary of Giriasho. Further, on perusal of the bid documents and correspondence, it was found that Giriasho and Namrata had common address, phone numbers and email accounts. The DG also found that (i) a shareolder of Giriasho was a director of Canyon; (ii) Giriasho, Namrata and Canyon had a common registered office; (iii) VK Healthsolutions from which loan had been obtained and Canyon to which subsequently the SPVs were sold by Nilgiri, Trikal and Wave were a group company of Giriasho and Namrata against whom the acceptance of bids were withdrawn by Nilgiri, Trikal and Wave. (iv) Shri Israrul Hasan Zaidi, authorised signatory of Naamrata, was the person authorised by Trikal to receive possession of Bhatni mill; (v) Bidding companies as well as the SPV formed by the bidding companies had several common directors. Shri Laique Ahmad Khan was a common director of group companies of Giriasho and various SPVs and Canyon, there also were many such common directors (vi) Based on these DG concluded there was linkage between the original bidders, Wave, Trilkal and Nilgiri and challenger bidders, Giriasho and Namrata.

The DG further observed that (i) SR Buildcon was also found to be acting in concert with the companies of Wave group and Giriasho Group; there was a common director of SPV formed by SR Buildcon and SPV formed by Giriasho group; Trikal of Wave group allowed the bid to go in favour of SR Buildcon in the SCR challenge round. Thus there was collusive understanding among the bidders for mills put up for sale. There was a clear violation of section 3(3)(a) and 3(3)(d) of the Competition Act, 2002 by Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon as during the process of sale the prices of the mills were found to be directly/indirectly decided amongst the bidders by not bidding against each other which resulted in a collusive bidding.

Taking into consideration the Report of the DG, additional affidavits filed by the parties, replies of the OPs, two issues were framed by the CCI. (a) whether there was contravention of provisions of section 3 of the Act by Wave and PBS Foods in the process of bidding for ten operational sugar mills of UPSSCL and (b) whether there was contravention of provisions of section 3 of the Act by Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon in the process of bidding for eleven closed sugar mills of UPRCGVNL. The sale was completed in two phases. In the first phase ten operational mills were sold whereas in the second eleven closed mills. The entire sale process in respect of both phases comprised the following stages: (i) Publishing of advertisement in the newspapers; (ii) Receipt of EOI-cum-RFQ till the given date; (iii) Evaluation of EOI-cum-RFQ for sending RFP (request for proposal) and receipt of financial bid against RFP till the given date; (iv) In case recourse is taken to the SCM, then advertisement in newspapers; (v) Receipt of EOI-cum-RFQ again; (vi) Receipt of financial bid of challenger under SCM till the given date; (vii) Sale of individual mill.

It is evident that Wave placed bid for seven mills, IPL for six mills and PBS Foods for five mills. SCM was adopted where (i) the bid was less than expected price but above 50% of the expected price, (ii) or single bid was received even if it was above the expected price. Six mills at Khadda, Rohan Kalan, Sakoti Tanda and Bijnore, Bulandshahr and Saharanpur where the original bid price was less than expected price but above 50% of the expected price, SCM was resorted to. In the absence of challenge bid in SCM round, mills were sold to the original bidder. [It is quite interesting that for all the six mills there was no challenge bid in SCM round.]

Apart from (i) absence of challenge bids, there were other factors indicating collusive bidding such as (ii) sequential numbers on the demand drafts, stamp papers and letters for performance bank guarantee submitted by these companies during bidding process. (iii) Wave and PBS Foods had some common directors and shareholders.

However the OPs have denied collusive bidding on the following grounds (i) Mere lack of competition at the stage of bidding, does not infer collusive behaviour, when the process of bidding was open to any bidder, (ii) there is no finding that any one was prevented from bidding, (iii) there was no incentive to rig the bid as the mills were loss making mills, actually mills were a huge liability, (iv) there is no probative evidence of meeting of mind among the Directors of the Companies, (v) the issue of common directorship is irrelevant in the bidding process, (vi) common directorship, shareholding sequential number on stamp paper (vii) demand drafts and bank guarantees purchased from the same vendors/ banks are merely indicative of close relationship between the bidders but do not give rise to inference of bid rigging. [Interesting common directorship shareholding, sequential numbers indicate close relationship but not collusive behaviour].

We would prefer to agree with the DG rather than with the conclusion drawn by the CCI for more reasons than one. As we have maintained elsewhere.[9] Unfortunately

9 Vinod Dixit, "Anti-Competition Agreements: Little Done Undone" 121-142 in M. K. Sinha et.al. (ed.) *Emerging Competition Law*, Indian Law Institute, New Delhi, 2017.

the CCI and other Competition Dispute Resolution Forums cannot get rid of the hangover of the Indian Contract Act. Essential requirements of the Act are more often than not sought to be imposed on the requirements of the agreement under the Competition Act forgetting the fact that emphasis of the former is on defining legal contracts whereas that of the latter on defining illegal agreement: therefore requirement of meeting of mind cannot be the same under both the Acts. Agreement under the Competition Act includes any arrangement, understanding or action in concert. There is no mention of meeting of mind. As stated earlier do absence of challenge bids in all SCO rounds, sequential numbers and common director, if not individually but taken together not constitute collusive arrangement implying meeting of mid for the purposes of the Competition Act? Secondly, the CCI fails to distinguish between anti-competitive agreements and anti-competitive practices. Section 3 specifically mentions in case of horizontal agreements that 'any agreement ….or practice carried on or decision taken' will constitute horizontal anti-competitive agreement. Practices which are not normal and usual commercial practices may constitute anti-competitive practices. Thirdly, if several interpretations are possible the interpretation promoting the objectives of the Act must be preferred. The conduct of the OPs does not indicate normal commercial practices but abnormal anti-competitive practice or even agreement. Cases under the Competition Act should be decided on grounds of preponderance of evidence and on the basis of beyond reasonable doubt.

In case of eleven close mills, Wave was original bidder for 4, Nilgiri for 4 and Trikal for 3. Original bid for all the Mills was between 50-51% of expected price except in case of Chitauni mill it was 64%. Only one bid was received for each mill. In SCM round, six bidders *i.e.* IB Trading Private Limited, IB Commercial, Shree Radhey Intermediaries, Giriasho, Namrata and S. R. Buildcon, submitted challenge bids. Initially, Wave, Nilgiri and Trikal matched the challenge bids but later withdrew in case of all mills except one mill each. Wave accepted only Shahganj Mill, Nilgiri only Baitalpur and Trikal only Bhatni. The DG observed that SPV was formed by each enterprise to whom mills were finally sold. Nilgiri, Trikal and Wave for the purchase of mills took unsecured loan from the same company *i.e.* V.K. Health solutions and post-acquisition each of these SPVs transferred their 100% equity shares also to the same company *i.e.,* Canyon. V.K. Health solutions and Canyon were found to belong to the group of Giriasho and Namrata with Giriasho being the holding company of Namrata. Thus ultimately all the eleven mills were acquired by Giriasho. However through some strange interpretation CCI concluded that the behaviour was not collusive. Let us try to understand the logic of the CCI.

In addition all the companies being acquired by Giriasho, all these companies have many common directors. Further the demand drafts furnished by Wave, Nilgiri and Trikal had consecutive numbers and were purchased from the bank accounts of Wave, purchased from the same bank and had consecutive numbers. Giriasho and Namrata had same address and e mail address. (If all these companies are separate legal entities and acted independently of each other and their behaviour non- collusive, why demand drafts from the same account of Wave, from same bank and with consecutive numbers. Does it not mean that Wave knew the bids of Nilgiri and Trikal.)

Based on the foregoing the DG concluded that there was an understanding among the bidders *i.e.* Wave, Nilgiri, Trikal, Giriasho, Namrata and SR Buildcon to not bid against each other. They, thus, acted in a collusive manner and also directly/indirectly decided the prices of the mills in violation of section 3(3) (a) and 3(3) (d) of the Act.

Collusive behaviour was denied by the OPs on the following grounds: (i) There is no lack of competition at the original and SCM rounds (ii) Consecutive numbers of drafts were because Wave got them prepared for others as well. (iii) Liyaqat Ahmad and Rajendra Singh became common directors when SPV was transferred to VK Healthcare. (iv) decision to withdraw at challenging bid was business decision (v) as these companies were group companies their addresses etc. were same (vi) A mere lack of competition is not a ground for inference of violation of section 3 (3) of the Act (vii) there is no record of meeting of mind.

The question to be determined by the CCI is whether the afore-noted lack of competition in the bidding process for sale of ten operational mills of UPSSCL and eleven closed mills of UPRCGVNL was an outcome of any anti-competitive activity? In 1971 the U.P. government acquired a number of sick mills but over a time most these mills suffered huge losses and some of them closed down. Consequently under an enactment it was decided to sell these mills to private operators. However, due to court orders closing of mills and changing the use of land was prohibited. On the other hand, in case of closed mills there was uncertainty of the outcome of ongoing litigations. Under these circumstances there was, according to CCI, lack of enthusiasm among the prospective buyers. The CCI further observed that the allegation of cover bidding or entering into arrangement to share the mills is not sustainable unless it is established that the participating companies colluded with non-participating companies. According to the CCI there is no evidence of collusive bidding either in case of operating or closed mills. The Commission is of the considered opinion that the facts and evidences do not categorically support the conclusion of collusion or bid rigging in the instant case. Accordingly, the matter is herewith closed.

In this case we would prefer to agree with the DG rather than with the CCI primarily for the reason that the CCI has imposed the characteristics of a contract under the Contract Act on the agreement under the Competition Act. The scope of these two Acts is different: the centrality of the Contract Act is on defining Lawful Agreement whereas that of the Competition Act is on defining unlawful agreements. The framers of the Competition Act were alive to the fact that resourceful enterprises which enter into unlawful anti-competitive agreements would try not to leave any evidence of their unlawful activities. Precisely for that reason, on the one hand, the framers defined agreements to include arrangement or understanding: that is even in those cases where direct evidence of collusive behaviour is not forthcoming anti-competitive agreement may be construed if there is evidence of anti-competitive arrangement or understanding or concerted action. In case of horizontal agreements, an additional ground of anti-competition practice has been introduced. Section 3 (3) provides that in case of anti-competitive practice, 'practice carried on', or 'decision taken' would also attract the provisions of section 3 (3) even though there is no direct evidence of collusion, but practice or decision points to collusion.

In case of sale of ten operating Mills Wave placed bids for seven mills, IPL for six and PBS Foods for five mills. It is interesting to note that in the absence of challenge bids in the SCM round the mills were sold to original bidders. Apart from (i) absence of challenge bids, there were other factors indicating collusive bidding such as (ii) sequential numbers on the demand drafts, stamp papers and letters for performance bank guarantee submitted by these companies during bidding process (iii) Wave and PBS Foods had some common directors and shareholders. The sequence of events can well be construed as anti-competitive arrangement as was done by the DG.

In case of the eleven closed mills the same conclusion may be drawn. Wave was original bidder for 4, Nilgiri for 4 and Trikal for 3. Original bid for all the Mills was between 50-51% of expected price except in case of Chitauni mill it was 64%. Only one bid was received for each mill. In SCM round, six bidders *i.e.* IB Trading Private Limited, IB Commercial, Shree Radhey Intermediaries, Giriasho, Namrata and S. R. Buildcon, submitted challenge bids. Initially, Wave, Nilgiri and Trikal matched the challenge bids but later withdrew in case of all mills except one mill each. Wave accepted only Shahganj Mill, Nilgiri only Baitalpur and Trikal only Bhatni. The DG observed that SPV was formed by each enterprise to whom mills were finally sold. Nilgiri, Trikal and Wave for the purchase of mills took unsecured loan from the same company *i.e.* V.K. Health solutions and post-acquisition each of these SPVs transferred their 100% equity shares also to the same company *i.e.* Canyon. V.K. Health solutions and Canyon were found to belong to the group of Giriasho and Namrata with Giriasho being the holding company of Namrata. Thus ultimately all the eleven mills were acquired by Giriasho. Do both the transactions not amount to anti-competitive agreement?

V ABUSE OF DOMINANT POSITION

Shri Saurabh Tripathy v. *M/S Great Eastern Energy Corporation,*[10] is an information filed by Shri Saurabh Tripathy against Great Eastern Energy Corporation Ltd. (GEECL) alleging violation of section 4 of the Act. Though the case has not yet been finally decided: the matter has been referred to the DG for investigation, as an exception we are discussing the case, though normally we do not do so. We are doing so because the case promised to be important and that an appeal has been preferred to the CompAT against the order of the Commission and disposed of by the CompAT and commented by us in this issue.

GEECL is a company registered under the Companies Act and is engaged in exploration production and sale of Coal Bed Methane (CBM). It owns 100% interest in two gas blocs in Raniganj (south), West Bengal, Munargudy Tamilnadu, and 25% along with ONGC in Raniganj (north). The company delivers CBM gas to more than 31 industrial consumers through its own pipeline network in Asansol-Durgapur industrial belt, which includes steel plants, steel rolling mills, glass, chemical and

10 Case no. 63/2014.

food industries. The IP is an employee of SRMB Srijan Ltd. (SRMB), a leading rolling mill having units in Durgapur and Bardhhaman. The fuel used in reheating is furnace oil, coal, gas etc. From coal the GEECL shifted to cleaner fuel CBM. It is alleged by the IP that OP is a dominant producer of CBM in the region, and it has imposed unfair and discriminatory price of CBM in the Gas Sale and Purchase agreement (GSPA), The CCI directed the DG to investigate. As per the IP, OP is dominant in the RM of supply of CBM in Asansol-Raniganj-Durgapur belt, and has imposed unfair terms in the GSPA with buyers such as SRMB. Some of the unfair terms and conditions in the GSPA are as follows. The agreement will remain in force for 25 years and the seller has the right to change the terms and conditions. The buyer at his own cost shall make arrangement to receive gas at gas metering and regulating station: In case of defect the seller may at a week's notice or in emergencies without notice may stop supply of gas. As to whose fault it is because of which gas supply is stopped shall be decided by the seller alone. Even in case of stoppage of gas supply the buyer is liable to pay for minimum guaranteed offtake (MGO) of gas. The buyer is liable to pay loss suffered by the seller for stoppage of supply and if within 7 days payment is not made gas supply would be stopped and contract is liable to be terminated. It was alleged by the IP that the consumers in Asansol – Raniganj –Durgapur region do not consider any other fuel as a substitute of natural gas. In the case of *Faridabad Industries Association* v. *M/S Adani Gas Ltd.,*[11] the CCI considered natural gas as a distinct product and industrial consumers different from other consumers. Therefore, the RPM is 'the market for the supply and distribution of natural gas to the industrial consumers.' According to the CCI Asansole - Raniganj –Durgapur region is isolated from other regions as condition for supply in this region are homogeneous and different from conditions in the neighbouring region. In this region gas is supplied through pipeline, and GEECL's Raniganj (south) is the only supplying option for CBM. Thus RGM is 'Asansole-Raniganj-Durgapur region'.

In the aforesaid RM the issue of the dominance of GEECL has to be examined. GEECL is the first producer of CBM in India and is ahead of other producers. In 2011-12 GEECL is the only feasible supplier of CBM in the RM. GEECL was having 100% market share during 2010-11, 88% during 2011-12 and more than 70% market share during 2012-13. Therefore, GEECL is the dominant player in the RM. Regarding abuse of dominant position, the CCI then proceeded to examine the allegations that the terms of GSPA, as stated earlier, are unfair and discriminatory. On careful analysis of the terms it appears that the terms are tilted in favour of the seller rather than the buyer. Hence the CCI ordered the DG is to investigate the matter.

VI CARTELIZATION

Delhi Jal Board v. *Grasim Industries,*[12] is a case on cartelization. In case no. 3/2013 Delhi Jal Board is IP. Grasim Industries (GIL) is OP1, Aditya Birla Chemicals

11 2014 CompLR 185 (CCI).

12 2017 CompLR 864 (CCI).

(ABCL) OP2, Gujrat Alkalies and Chemicals (GACL) OP3, Kanoria Chemicals and Industries (KCIL) OP4. It is alleged the OPs have violated section 3 of the Act. In case no. 4/2013 the same IP alleged violation of section 3 of the Act by all these four OPs. OP1, 2 and 4 are private enterprises whereas OP3 is an enterprise promoted by the state of Gujrat.

IP is a statutorily constituted body under Delhi Water Board Act, 1998, for water supply and sewage disposal. OPs are companies, which supply water purifying poly aluminium Chloride and Liquid Chlorine to the IP. Most commonly used water purifier is poly aluminium chloride (PAC) and as these companies alone manufacture PAC according to standard laid down by the Bureau of India Standards (BIS), they alone respond to tender and e-tender. Since 2006-7 onward the OPs collusively are quoting almost similar prices with marginal differences. The IP alleged that all the participants knew that whatever price thy offer would have to be accepted by the IP. Between 2006-7 and 2011-12 there were three bidders: they quoted almost the same price that is Rs. 9300 per metric ton (PMT) except in 2008-9. Because of the collusive behaviour of the bidders the IP had to pay more prise and the OPs kept on increasing the price continuously every succeeding year.

In case of reference no. 4/2013 the IP alleged cartelization in supply of liquid chlorine as they were the only supplier of the standard product (according to standard prescribed by BIS) but in this case instead of GACL, a company promoted by government of Punjab was also made a party. They quoted almost the same price and at the time of negotiation they negotiated in similar manner.

The CCI after prime facie finding OPs' conduct in violation of the provision of section 3 in both cases directed the DG to investigate. The DG gave the report in two parts the first related to PAC and the second to liquid Chlorine. In Part I the DG concluded that there was an understanding between ABCIL, GIL, and GACL for all the tenders floated by DJB from 2009-10 to 2014-15 and in concerted manner they artificially jacked up bid prices without offering any real competition. In Part II the DG found contravention of section 3 by the OPs except by KCIL during 2009-10 to 2014-15 without offering any real competition.

After considering the report of the DG, replies, objections and submissions of the parties, the Commission analysed the cases. (1) First the CCI disposed of the preliminary objections. It is not required by law to give parties right of rebuttal at the stage of forming opinion whether a prima facie case exists. (2) In response to another objection the CCI observed that though at the stage of forming prima facie opinion the information was available for the period 2009-10 to 2012-13 the DG was asked to investigate thoroughly hence information is up to 2014-15. (3) It was also argued that there cannot be any collusion between GIL and ABCL as they constitute a single entity. Citing a number of precedents it was contended that both the companies GIL and ABCL belong to Aditya Birla group and it was already known to DJB and being part of the same economic group there would be no confidentiality in tendering decisions between them. The CCI disposed of this objection by emphasising the importance of competition in the bidding process. The CCI pointed out that the cases cited by the Aditya Birla companies were out of context and do not relate to

transparency in bidding process. If the two companies being part of a single entity decide to submit two bids, and not one they must compete with each other. Further the idea of group companies has relevance only in case of sections 5 and 6, but not in case of section 3. The objection was rejected.

After disposing of the preliminary objections the CCI proceeded to decide the cases on merit. First the CCI analysed the case 3/2013. The DG has shown that the OPs quoted almost similar rates and between 2009-10 and 2014-15 the increase in rates was almost uniform for all of them. In terms of basic prices, taxes and freight they displayed similarity in quotations. Though different suppliers' production facilities were located at different distance from Delhi, consequently there must be difference in freight, yet quotations were almost similar. As to why production cost of PAC was increased after 2012-13 by GIL, no satisfactory answer was given by GIL. ABCIL and GIL also charged higher basic price from DJB than from other customers. Even on some occasions they charged below cost of production from other customers.

The DG Proceeded to determine the cost of production of PAC from GIL and ABCIL but replies of their representative were evasive and misleading. The DG noted that ABCIL, GIL and GACL have a huge variation in cost of production, fixed cost of production, transport cost, taxes and policy of profit margin: thus similar price year after year cannot be a coincidence. Further GACL remained at L3 position consecutively five time but did not suffer any production problem despite capability to supply entire quantity at L1 position. The difference between the negotiated price and bid price of GACL is much more than bid price of GACL and bid price at L2. That means GACL had sufficient cushion in bid price but never utilised it to become L2, despite sufficient capacity of production, sufficient even to become L1. It happened five times, it cannot be coincidence. The DG also noted a pattern of bid rotation among ABCIL, GIL and GACL. DG also noted that GIL charged more from DJB than its distributors charged from other local bodies. Circumstances indicate that both GIL and ABCIL, sister concerns shared information: representatives of both took direction from the same person. In view of this the DG concluded that ABCIL, GIL and GACL had understanding in bidding between 2009-10 and2014-15. This amounts to contravention of section 3 (3)(d) of the Act. But DG did not find violation of section 3 (3)(d) of the Act by KCIL.

The CCI observed that parallelism itself cannot amount to collusive behaviour unless reasons are given that parallelism is not the result of collusive behaviour. The Commission is constrained to note that despite all the three bidders i.e. ABCIL, GIL and GACL having huge variation in variable cost of production, fixed cost of production, transportation cost, taxes as well as policy on profit margin, close margin in bid prices quoted by them in DJB's tenders year after year cannot be a matter of coincidence. The OPs argued that, it is not proved there is AAEC but the CCI rightly pointed out that for a horizontal agreement under section 3(3) of the Act once the agreement is proved, it is presumed that there is AAEC unless rebutted by the OPs. The only argument given by the OPs that supply of PAC was not stopped or disrupted, does not amount to rebuttal that there is no AAEC. Under section 19 (3) one of the grounds to rebut AAEC is 'accrual of benefit to consumers' but accrual of benefit

does not depend merely on continuous supply but on competition also. In view of this the OPs (ABCL, GIL and GACL) has violated the provision of section 3 (3) (d) read with section 3 (1) of the Act.

In reference 4/2013 the IP alleges that GIL, ABCIL, PACL and KCIL are guilty of violating the provisions of section 3(3) of the Act. The CCI at the outset notes that Liquid Chlorine (LC) is a buy product of production of caustic soda, whereas PAC is a primary product. LC is a toxic product and its exposure is dangerous to humans and environment: it has to be transported in special cylinders and cannot be stored for long. The manufacturer disposes the by-product immediately at a price offered by the market.

Barring PACL, other bidders (GIL and ABCIL) did not give any estimate of cost of production. Therefore, cost of production, transport cost and taxes cannot be compared. The DG took into consideration three factors. (a) As it is by-product of caustic soda and is toxic it is disposed of at the earliest even at through away price. (b) The demand for LC by Jal Boards in inelastic, and (c) LC market is segmented by location.

Comparison of bids reveal that price quoted were close in range especially by ABCIL and PACL, and over time price quoted converged on each other, ABCIL was always the lowest bidder followed by PACL. Though the general trend during 2011-12 and 2012-13 indicated that price of LC decreased, the price quoted by the bidders increased. In succeeding years this anomaly continued. Analysis conducted by the DG on price parallelism reveal that price quoted by ABCIL and PACL were in close range and sometime even identical. Similarly, price quoted by GIL and ABCIL were similar and in 2013-14 they failed to qualify on this ground. However, there are additional grounds to support collusive nature of parallelism. (a) In comparison to bid prices in 2009-10 the price of LC increased in 2010-11 and 2011-12, though prices should have decreased because of high production and low demand. (b) It is apparent from the minutes of the meeting of the Technical Committee that not only the bid prices were similar but negotiated prices were also similar. (c) In seven tenders ABCIL was the lowest bidder and PACL the second, yet the supplied quantity was divided half and half between these two companies. The third lowest bidder GIL never supplied LC though it was the second lowest in 2010-11. (d) Both ABCIL and GIL were not facing any production constraint. But still they independently submitted to DJB that they would not be able to supply more than 1500 MT.

However, the OPs were able to rebut the findings of DG that OPs acted in a concerted manner. Therefore, the CCI did not find any collusion between the OPs in reference 4/2013. Therefore, penalty was imposed only in reference no 3/2013.

Another case on alleged bid rigging is *Director Supplies and Disposals Haryana* v. *Shree Cement ltd.,*[13] IP is the central agency for procuring all stores required by various government departments, boards and corporations of Haryana Government. Shree Cement Ltd. is OP1, Ultra Tech Cement Ltd. is OP2, Jaiprakash Associates

13 2017 SCC Online CCI 2.

OP3, J.K. Cement Ltd. OP4, Ambuja Cement Ltd. OP5, ACC Cement Ltd. OP6 and J.K. Lakshmi Cement OP7. IP alleged the OPs are guilty of bid rigging and violating the provisions of section 3 of the Act.

The IP invited tender for supply of cement in August 2012 in which the OPs participated. OPs formed a cartel, (a) quoted high rates in tenders, (b) quoted substantially lower quantities to be supplied so that all of them may get their tender accepted at the exorbitant rates, (c) the OPs quoted different basic price for supply at the same destination for different categories and (d) the OPs quoted rates in such a manner that all got lowest bidder status in at least some of the destinations.

The DG in his report concluded that the OPs have colluded in respect of the tender of 2012 and thus violated the provisions of section 3 (3) (d) read with section 3 (1) of the Act. (a) The DG noted that in comparison to 2011 the increase in 2012 in quotation for L1 of grey cement was increased on an average of 45.38-50.69%, though the wholesale index rate increased only by 13.32% during this period. (b) In 2009 also there was a sudden jump in bid quotation by the OPs disproportionate to the WPI. But in the years 2010 and 2011 there was no such disproportionate increase in WPI. Thus increase in quotation price was disproportionate to WPI. The trend indicates price parallelism collusive behavior. (c) In comparison to 2011 all the OPs offered lower quantities in tender of 2012. (d) Though different basic rates may be logical but OPs quoted different basic rates for same destinations. But no rational or logical basis of calculation of different basic price for supply to the same destination could be given by the OPs. (e) It was observed that during the years when there was no allegation of collusion two parties had bagged more than 100 destinations out of 120 destinations, some parties won only a few destinations, there were parties which were unable to emerge at L1 position. This is indicative of competitive bidding; those who bid non-competitive rates bagged no or few destinations. However, the pattern changed in 2009 and 2012, a number of bidders acquired L1 position and no bidder acquired nil destination. In 2012 destination distribution among OP1-OP7 respectively was 30: 12: 26: 21: 12: 6: 16 suggesting meeting of mind. (f) Lastly there were frequent calls and SMSes between high ranking officers of OPs between 6.7.12 and 16.8.12. Though initially in their affidavits they denied such conversation but later they had to concede but were evasive about the details. On the basis of these facts the DG concluded that there was cartelization.

The CCI began by observing that in 2012 when the tenders for supply of two grades of cement, ordinary Portland and pozzolana Portland, to be supplied at 30 destinations the HPPC headed by the Finance Minister Haryana observed that rates are considerably (35-42%) higher than quoted in August 2011. The HPPC observed that (a) Bid rates were considerably higher than those quoted in 2011, (b) Quantities to be supplied were lower in comparison to 2011 (c) bids were tendered in such a way that all bidders acquired L1 position (d) Different basic prices were quoted for the same destination. After taking into consideration the report of the DG, replies of OPs and IP the CCI made following issues for decision, (a) Whether bid prices were higher than in earlier years and such increase was justified on commercial considerations. (b) Whether lower quantities were offered to accommodate all the bidders or it was

done for commercial reasons. (c) Whether bids were so arranged that all could acquire L1 position (d) whether the call record point to collusive bidding.

Issue I- The DG observed that bids quoted at L1 bid was considerably higher than in previous year and disproportionate to WPI. The Commission noted after comparing the bids between 2009- 2012 that bids price for the year 2012 were exceptionally high in comparison to previous years. Different OPs have given different reasons for increase in price but they were found not to be reliable. The OPs also could not give any plausible explanation as to why they quoted different basic price for same destination. In 2012 tenders all OPs maintained a uniform difference of Rupees twenty for four categories of cement at different destinations. It was further observed that though in 2009-2011 the OPs quoted higher quantities that they offered to supply but in 2012 they all considerably reduced the quantity that can be supplied by them, though they have unutilized capacity in their plants in 2012-13. It appears it was done to accommodate all the OPs in collusive manner. The reasons given by the OPs, as to why in 2012 they offered to supply lesser quantity, are not plausible as all the OPs have sought to justify lower bid quantity to uncertainty in allocation and difference between applied and allotted quantity in previous years. The reasons given are not plausible because uncertainty of allocation did not result in quoting lower quantities in the past. It appears that reduced tender quantity in 2012 was the result of meeting of mind.

Regarding acquiring of L1 position the CCI noted that in previous years all OPs could not get L1 position as the bidding was competitive, the bidders who have competitive advantage got most of the L1 positions but in 2012 all the OPs were able to acquire at least one L1 position, suggesting collusive behavior. In the years 2008, 2010, and 2011 only few tenders acquired L1 position: there were many tenderers who could not get even one L1 position. It was further observed by the DG that ex-factory price plus taxes for each category of cement shall be the same, the difference would be regarding freight charges. As the bid prices did not reflect differences in freight charges, the OPs could not offer any plausible reason for the variation over and above difference in freight charges.

Regarding a large number of telephonic calls among the officials of the OPs and sms exchanged between them were not for social and personal reasons, the frequency and duration indicate otherwise and appear to be for anti- competitive purposes. The Commission concluded that the OPs have entered into anti-competitive agreement. The CCI finds the OPs guilty of violating provisions of section 3 (3) (d) of the Act read with section 3 (1) and imposed a penalty.

VII ANTI-COMPETITIVE AGREEMENTS: ASSOCIATIONS

Sandeep P M v. *All Kerala Chemists and Druggist Association,*[14] is a case on alleged violation of section 3 (3)(b) of the Act. Sudeep P.M. is IP1, Sundaran IP2,

14 Manu/co/71/2017: case no 54/2015 decided on 31.10.2017.

XYZ (confidentiality granted by the Commission) IP3 and Giri Nair IP4. These IPs gave an application for being treated as intervener in *P.K. Krishnan* v. *AKCDA,*[15] but the CCI treated the application as a separate information. The IPs are wholesale stockiest. They alleged that All Kerala Chemists and Druggist Association (AKCDA) and its district level associations insist on mandating No Objection Certificate (NOC) before appointing any stockiest in contravention of section 3 of the act, despite cease and desist orders earlier passed by the Commission. The only change they introduced after cease and desist order is that now instead of written approvals they require verbal ones.

The DG placed reliance on a show cause notice issued by AKCDA to IP1 for indulging in anti-association activities when he was appointed a stockiest of Cipla and an officer of Cipla testified that post appointment of IP1, sales of Cipla declined in Calicut as Cipla was being boycotted by the members of the Association. IP2 and IP3 alleged that AKCDA accepts money in cash for issuing NOC and NOC letter is written as congratulatory letter. IP4 alleged that due to pressure from AKCDA Cedilla Healthcare and German Remedies stopped supply to him. A number of other stockiests affiliated to AKCDA confirmed the allegation made by the IPs in their depositions. The DG also confronted the statement of witnesses with those of IPs and various whole sale distributors. They all substantiated the deposition of the IPs. In addition, the DG Report produced a number of electronic, documentary and verbal evidence which pointed to the involvement of AKCDA in sticking to the practice of giving NOC to dealers who seek appointment as medicine dealers. The DG also identified certain individuals who were found guilty under section 48 of the Act. The DG also identified the role of certain pharmaceutical companies which facilitated the practice of AKCDA on insisting on NOC.

The CCI found AKCDA, its District Associations guilty of violating the provisions of section 3 and certain of its office bearers guilty of violation of the provisions of section 48 of the Act and cease and desist order and fines were imposed at the rate of 10% of average turnover of the preceding three years.

The most interesting thing in this case is that there was no direct evidence of collusion in this case but on the basis of a large number of indirect evidence and on preponderance of probabilities the CCI found evidence sufficient to find violation of the provisions of section 3 of the Act.

T.G. Vinayakumar v. *Association of Malayalam Movie Artists,*[16] is a case on alleged violation of the provisions of section 3 by an association. (1) T.G. Vinaykumar the IP, is a director and writer in Malyalam film industry. (2) Association of Malyalam Movie Artists (AMMA) OP1, is an association of Malyalam film actors, formed with the objective of protecting promoting and developing the status of actors. (3) Film Employees Federation of Kerala (FEFKA) OP2, is an association of directors, writers,

15 Case no. 28/2014.

16 2017 CompLR 303 (CCI).

lyricists etc. of Malyalam films. (4) Sri Mammooty OP3, Sri Mohanlal OP4, Sri Dileep OP5, are Malyalam film actors. (5) FEFKA Directors Union, OP6, is a sub union of OP2 and is an organization of Malyalam film directors. (6) FEFKA Production Executive's Union, OP7, is a sub union of OP2 for the welfare of Malyalam film production executives. IP alleges that the OPs have violated the provisions of sections 3 and 4 of the Act.

In 2004 the IP had a dispute with OP1, OP3, OP4 and OP5. In 2007 the IP took an initiative to make low budget films with new actors. OP3, OP4 and OP5 felt threatened because of this move of the IP. In 2008 OP5 after entering into an agreement with a film producer insisted that the IP as the Director of the film be removed which was opposed by the IP, thus antagonizing OP5. Subsequently on many occasions the OPs tried to dissuade many film makers, directors, and actors etc. not to work with the IP. Based on these facts the IP alleged that the OPs entered into anti-competitive agreement violating the provisions of section 3 and as they have dominant position in the industry section 4 was also violated. As there was no prima facie evidence of violation of section 4, the DG was directed to investigate the violation of the provisions of section 3, though there was not sufficient prima facie evidence against OP3, OP4 and OP5.

The DG in the Report stated that on the basis of the minutes of meetings of the General Council of OP2 it is inferred that OP2 took disciplinary action against certain actors and also asked its members not to cooperate with the films in which late Sri Thilakan is acting because Thilakan was acting in a film in which the IP was associated. A letter also revealed that artists were coerced not to cooperate in the films of IP. These facts were further reinforced by the deposition of a number of witnesses. On the basis of these evidence the DG concluded that OP2 has imposed a ban on its members they should not work with the IP, thereby violating the provisions of section 3 (1) read with section 3 (3) (b) of the Act.

Similar evidence was also found against OP 6, on the basis of documentary evidence that action was taken against those who cooperated with the IP. The DG found OP6 guilty of violating the provisions of section 3 (1) read with section 3 (3) (b) of the Act. On the basis of other documentary evidence, the DG also found OP7 guilty of violating the provisions of section 3 (1) read with section 3 (3)(b) of the Act. The DG, under section 48 also found the following individual responsible for anti-competitive practices-

(i) Shri Innocent, President, OP-1
(ii) Shri Edavela Babu, Secretary, OP-1
(iii) Shri Sibi Malayil, President, OP-2
(iv) Shri B Unnikrishnan, General Secretary, OP-2
(v) Shri Siddique, President, OP-6
(vi) Shri Kamaluddin (also known as Kamal), General Secretary, OP-6
(vii) Shri Girish Vaikom, President, OP-7; and
(viii) Shri K. Mohanan (also known as Seven Arts Mohan), General Secretary of OP-7.

After considering the Report of the DG, the replies of the parties the Commission framed the following issues:

Issue 1: Whether the Commission has jurisdiction to analyse the conduct of OP-1, OP-2, OP-6 and OP-7 (hereinafter, collectively referred to as the Opposite Parties/OPs)?

Issue 2: If the answer to the above question is in affirmative, whether OP-1, OP-2, OP-6 and OP-7 have contravened the provisions of section 3 of the Act?

Issue 3: If the answer to issue 2 is in affirmative, then who are the persons responsible, under section 48 of the Act for anti-competitive conduct?

The OPs have raised a preliminary objection that OP2 is a trade union and their activities are governed by the provisions of Trade Unions Act. One of the functions of a trade union is to take disciplinary action against its members in case of dispute among them. The Trade Unions Act has a non obstante clause and the Competition Act is not an Act in derogation of the provisions of the Trade Unions Act. In support of this contention the OPs cites many cases. But the CCI concluded that the CCI has jurisdiction if a trade union indulges in any activity in derogation of the provision of the Act. As the present case involves issues that have bearing on the contents of the Act the Commission has jurisdiction.

Issue 2- The CCI on the basis of two meetings, one of the executive committee held on 5, April 2010, the other of general body held on 27 June 2010 drew certain conclusions. The records of the first meetings revealed that late Sri Thilakan might have been removed from 'Christian Brothers' because he acted in a film of the IP but may be also because he expressed his grievance in public: This shows the possibility of nexus between OP1 and OP2. The minutes of the second meeting clearly show that OP1 asked a Sri Captain Raju to explain as to why he acted in a film of the IP in spite of contrary orders of OP2 through its secretary Sri Edavela Babu. The CCI held that OP1 and OP2 connived to out the IP.

The evidence of Sri Haris shows that a financer refused to finance him unless he stalls his project with the IP. Similarly, the testimony of several witnesses revealed the anti-competitive behaviour of OP1 and OP2. A collective reading of statements, evidence and material on record clearly show that OP1 and OP2 are guilty of anti-competitive activities.

Regarding the conduct of OP3, OP4 and OP5, the CCI exonerated them as there was not sufficient evidence, prima facie as well as in the report of the DG. On the basis of the record the CCI found OP6 guilty of anti-competitive behaviour. In its meeting of 25 February 2010 "it was decided not to cooperate with the film 'DAM 999' in which Sri Thilakan handles a role". There were records of other meetings as well pointing to involvement of OP6 in anti- competitive behaviour. Similarly, OP7 was also involved in perpetuating the ban imposed by the OP 2 against the IP.

The Commission concluded that OP1, OP2, OP6 and OP7 have contravened the provisions of section 3 (1) read with section 3 (3) (b) of the Act. The commission, under section 48, also found the following office bearers of the associations of violating the provisions of section 3 (3) of the Act:

1. Sri Innocent, the President of OP1

2. Sri Edavela Babu, the Secretary of OP1
3. Sri Sibi Malayil, the President of OP2
4. Sri Unnikrishnan the General Secretary of OP2
5. Sri Mohanan, General Secretary of OP7

However, the Commission did not find the following liable as they did not hold the office at the relevant time:

1. Sri Siddique the President of OP6
2. Sri Kamaluddin the General Secretary of OP6
3. Sri Girish Vaikam the President of OP7

Resultantly a penalty at the rate 5% of average income was imposed on OP1, OP2, OP6 and OP7. On the five guilty individuals a penalty at the rate 3% of their income was imposed.

VIII COMBINATIONS

Combination notice given by Bharti Airtel Ltd.[17] is proposed combination envisaging acquisition of 100 percent shares of the consumer mobile business currently run by Tata Teleservices Limited ("TTSL") and Tata Teleservices (Maharashtra) Limited ("TTML") ("Tata CMB") by Airtel ("Proposed Combination"). The Notice was filed with the Commission pursuant to execution of a binding term sheet, by and between Airtel, TTSL, TTML and Tata Sons Limited on 12.10.2017 ("Acquisition Agreement"). Considering the facts on record, details provided in the Notice given under section 6(2) of the Act and assessment of the Proposed Combination on the basis of factors stated in section 20(4) of the Act, the Commission is of the opinion that the Proposed Combination is not likely to have an appreciable adverse effect on competition in India and therefore, hereby approves the same under section 31(1) of the Act.

In *Combination notice given by Reco Diamond Private Limited,*[18] *a* notice was received by the Commission under section 6(2) of the Act given by Reco Diamond (P) Ltd., the Acquirer. The said notice was given to the Commission pursuant to execution of Share Purchase and Shareholders Agreement (SPSHA) on 27.08.2017, by and between, inter alia, Reco Diamond and DLF Cyber City Developers Limited ("DCCDL"). In accordance with SPSHA, Reco Diamond, a subsidiary of GIC Realty of Singapore, proposes to acquire 33.34% equity shares of DCCDL. As a part of the Proposed Combination, DCCDL will carry out internal reorganization whereby certain subsidiaries of DCCDL will no longer be part of the DCCDL group. Both the acquirer and the acquired are in real estate building business.

For the purpose of assessment of the Proposed Combination, the Commission considered the market for leasing of commercial real estate. As regards the geographic

17 Combination registration no. c-2017/10/531.

18 Combination registration no. c-2017/09/527.

dimension of the market, based on the location of projects of DCCDL and that of the portfolio companies of GIC Realty, the Commission observed that Parties' activities overlap in the cities of Delhi, Gurgaon, Chennai and Hyderabad. However, in view of the fact that the Proposed Combination is unlikely to cause an appreciable adverse effect on competition ("AAEC") in any of the potential markets that could have been identified, the Commission decided to leave the exact delineation of relevant market open. The Commission noted that 100 percent foreign direct investment under the automatic route has been permitted in construction led development projects on residential and commercial premises. The Indian real estate companies are receiving funding from foreign investment houses and investment funds and the Proposed Combination also involves the same. Accordingly, the Commission noted the overall presence of GIC Realty in the Indian real estate sector and held that the Proposed Combination is not likely to cause significant change in competition dynamics in the real estate market. Based on the aforesaid, the Commission is of the opinion that the Proposed Combination is not likely to cause an AAEC in any of the real estate markets in India.

IX COMPAT: DOMINANT POSITION

Coal India Limited v. *Competition Commission of India,*[19] is a case on abuse of dominant position. The appeal is against the order of CCI of 2014 in *Bijay Poddar* v. *Coal India Limited,*[20] discussed and commented in the Annual Survey of Indian Law[21] holding that Coal India Limited (CIL) through its subsidiaries is, in the RM of 'sale of non-coking coal under the Spot e-auction Scheme (the Scheme) in India', in a dominant position and has imposed unfair conditions on the bidders under the Scheme and has violated the provisions of section 4 (2) (a) (i) of the Act. In the case before the Commission it was alleged that under the Scheme, the buyer would forfeit a sum of Rs. 500/- per ton if the bidder fails to lift the coal, but Coal India and its subsidiaries, would not pay any penalty if they fail to supply coal and further that earnest money was refunded after a delay of 30-60 day through a cumbersome process. It was contended that the forfeiture clause was arbitrary and illegal and when CIL fails to supply coal buyers/bidders suffer losses. CIL was able to do so as in the RM it abuses its dominant position.

The Competition Appellate Tribunal, after considering all material facts decided to dismiss the appeal. It emphasized that the behaviour which may be justified as competitive for a non-dominant enterprise may become exploitative for a dominant enterprise. Competitive market may be an escape route against a non-dominant enterprise but no such escape route exists in case of a dominant enterprises.

19 Manu/TA/06/2017.

20 2014 CompLR 185 (CCI).

21 Vinod Dixit, "Competition Law" 184-5 L *ASIL* (2014).

CCI has righty defined RPM as 'sale of non-coking coal from e-auction scheme' as the appellant has not been able to rebut the argument of CCI that coal sold through e-auction scheme is different from imported coal in terms of quality, size quantity and specification. The CCI rightly held that forfeiture clause is discriminatory hence violative of section 4 (a) (i).

Another case on abuse of dominant position is *Anand Prakash Agrawal* v. *Dakshin Haryana Bijli Vitaran Nigam.*[22] It is an appeal against the order of the CCI that Dakshin Haryana Bijli Vitaran Nigam (DHBVN) has not abused its dominant position. DHBVN is a statutory body responsible for distribution of electricity. The Appellant alleged that the DHBVN is dominant in the RM and is charging more Fuel and Power Purchase Cost Surcharge Adjustment (FSA) from those who consume more electricity than from those who consume less, thereby charging discriminatory price from different consumers. But CCI did not find it to be abuse of dominant position.

The CompAT dismissed the appeal on many grounds: (1) As Electricity Regulatory law is comprehensive, all grievances can be addressed under the Regulatory law. The CCI lacks jurisdiction. (2) Section 4 of the Act clearly establishes that if unfair or discriminatory price is charged by a dominant enterprise it amounts to abusing its dominant position. However, if there is a justification for discriminatory pricing it would not amount to abuse. The true purpose of the supply of electricity is to supply electricity to everybody: to the poor it ought to be supplied at subsidized cost hence different rates are provided for different consumers on the principle that those who consume more may afford more to pay. It must be remembered that section 19 (4) (k) provides that 'social obligation and social cost' is a relevant factor to determine whether an enterprise has abused its dominance. It is a social obligation of DHBVN to supply electricity to the poor at lower cost. Hence supplying electricity at lower cost to those who consume less electricity does not amount to abuse of dominance. However, it is difficult to agree with the CompAT that CCI lacks jurisdiction in this case because the Electricity Regulatory law is comprehensive, and all grievances can be addressed under the Regulatory law, in view of section 60 of the Competition Act which provides that, "provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force." That means even if the Electricity Regulatory law provides a complete remedy the CCI has jurisdiction if there is any competition issue.

X COMPAT ON SECTION 26 (8)

Saurabh Tripathy v. *Competition Commission of India,*[23] is a case on the question whether an order under section 26 (8) is appealable or not. The present case involves

22 Appeal no. 33/2016 decided on 16.02.2017.

23 Appeal no. 16/2017.

two questions, the delay in filing appeal and whether the order passed by the CCI in *Saurabh Tripathy* v. *Great Eastern Energy Corporation Limited,*[24] is an order under section 26 (8), hence non-appealable or an order under section 27 and hence appealable. Section 26 (8) provides that "if the report of the DG referred to in sub section (3) recommends that there is contravention of any of the provisions of the Act, and the Commission is of the opinion that further inquiry is called for it shall inquire into such contravention in accordance with the provisions of this Act". The sub section provides for additional inquiry by the DG. But the investigation by the DG does not affect the rights of the parties, therefore it is not appealable. Section 27 refers to passing of final orders by the Commission, hence appealable.

Regarding delay in filing the appeal the Appellant argued that as the certified copy was received late there was delay in filing the appeal. The ComPAT agreed with him that in case of non-delivery of the certified copy at the registered address of the appellant there should have been a substituted delivery. As there was no substituted delivery delay was condoned.

Regarding the second substantive question, the CompAT decided that the Commission's order to the DG was for further investigation/inquiry and therefore it was an order under section 26 (8) and not under section 27. As order under section 26 (8) does not lead to any positive action effecting the rights of the parties, it is not appealable in accordance with the provisions of section 53A (1)(a). The order, for further investigation by the DG, passed by the CCI was an order under section 26 (8) and not a positive order under section 27. Therefore, there cannot be an appeal against this order. After receiving the Report of the DG opportunity will be given to the parties to react against or for the Report. The appeal is dismissed.

XI NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Hyundai Motors Limited v. *Competition Commission of India,*[25] is an appeal against the order of CCI in *Fx Enterprises Solutions India Pt. Ltd.* v. *Hyundai Motor India Ltd.,*[26] which has been commented in this survey. As the facts, arguments and order in the case have already been discussed in this survey they need not be repeated.[27] NCLAT set aside the order of the CCI on two specific grounds: (1) The CCI improperly defined the RPM and RGM as it has not properly understood the importance of section 19 (6) and (7) of the Act. The RPM and RGM have been defined without taking into consideration the importance of these two clauses. (2) The CCI should not have been unduly influenced by the language of the Dealers Agreement in determining tie in and resale price maintenance clauses but hard evidence of violation of the provisions of section 3 (4) of the Act should have been determining factors. This decision will

24 Case no. 63/2014.

25 Appeal no. 6/2017.

26 *Supra* note 1.

27 *Id.* at 1-3.

further dilute the provisions of the Act for two reasons. It seems the Tribunal meant that factors given in section 19 (6) (7) favourable to the Appellant should be given more prominence in comparison to those which are against them. Secondly, the Tribunal decisively diluted the implications of the Act in favour of the corporates in as much as incorporation of anti-competitive agreement alone will not make the behaviour of the Appellant anti-competitive there must be further evidence that the Appellant has actually implemented them. The reasoning appears to be flawed. The question to be asked is as to why the anti-competitive terms were included in Dealers Agreement if they were not invoked. The reason is simple, they need not be invoked if they effectively foreclose the option of the dealer to violate the anti-competitive terms of the Dealers Agreement.

XII SUPREME COURT: ANTI-COMPETITIVE AGREEMENTS

Excel Corporation v. *CCI,*[28] is a case on anti-competitive agreements under section 3 of the Act. It is an appeal against the order of the CompAT, as well as a civil appeal against the CompAT by the CCI on certain issues. The Bench was constituted by Sikri and Ramana JJ., the judgement was delivered by Sikri J. All these Civil Appeals arise out of the common judgment and order dated October 29, 2013 passed by the Competition Appellate Tribunal. The Food Corporation of India informed the CCI of alleged violation of section 3 (3) of the Act by M/s Excel Crop Care Limited, M/s United Phosphorous Ltd, (UPL), and M/s Sandhya Organic Chemicals, these three Appellant, it was alleged, between 2007-2009 were guilty of bid rigging in relation to supply of Aluminium Phosphide tablets (APT) of 3 grams. CCI after considering the report of the DG, replies of OPs and IP these three Appellant found them guilty of violating section 3(3) of the Act and imposed a penalty @ 9% of the average total turnover of these companies during the preceding three years. On appeal the CompAT affirmed the order of the CCI except that penalty of 9% should be levied on the turnover of the supplied product and not on total turnover. These appeals question the validity of the order of the CompAT on the aforesaid aspect. The DG in his report pointed out that between years 2002-2009 the appellants quoted identical price for supply of APT, except in 2007. In the years 2005 and 2008 all the parties abstained from submitting the bid. In 2009 the representatives of all the three companies made common entry in the office of FCI and the entries for all were made by only one of them. The CCI accepted the report of the DG and found the explanations given by the appellant of common entry, identical prices and simultaneous abstaining from bidding, unsatisfactory and unconvincing. A penalty @ of 9% at the total average turnover during the three preceding years was imposed. On appeal the CompAT agreed with the order of the CCI but modified it to the extent of imposing it only on the turnover of the relevant product that is APT.

28 Manu/SC/0588/2017.

The following principles of law were laid down by the Supreme Court in this case:

1. The Competition Act came into force on 20th May 2009. The tender were floated by FCI and agreement was entered into before the commencement of the Act but transactions under the agreement took effect after section 3 came into effect. Therefore the agreement shall be tested on the touchstone of section 3.

2. No doubt, clause (d) of sub-section (3) of section 3 of Act, uses both expressions 'bid rigging' and 'collusive bidding', but Explanation thereto refers to 'bid rigging' only. However, it cannot be said that, intention was to exclude 'collusive bidding'.

3. Whether CCI was barred from investigating the matter pertaining to the tender floated by FCI in March, 2011 because of reason that FCI in its complaint dated 4th February, 2011 given to CCI had not complained about this tender? Scope of section 26 is wide enough to empower the CCI to cover all necessary evidence to find out violation of section 3.

4. The Court also justified the conclusion of the CCI, on the basis of the facts of the case, in finding that section 3 has been violated.

5. On imposition of penalty the Court agreed with CompAT in to hold that penalty can be imposed only on the turnover of the relevant product. This is because the purpose of imposing penalty is not to destroy the enterprise.

We have continuously commenting in successive surveys that the requirements of the Contract Act to construe an agreement must not be imposed on the Competition Act as there is world of difference between the scope of these Acts. The essence of the Contract Act is to define a legal agreement whereas that of the Competition Act in defining an illegal agreement. Hence under the Competition Act it is difficult to find direct proof of meeting of mind. The required proof is based on preponderance of probability: the conduct of the party may lead to inference of meeting of mind. This is what has been done by the CCI, the CompAT and the Supreme Court in this case.

However, the Court also decided that penalty should be imposed on the turnover of the relevant product that is the product or service which is subject matter of anti-competitive agreement on the basis of the doctrine of proportionality (as well on grounds of articles 14 and 21), and not on the turnover of all the product or services produced or provided by the enterprise. This was done, according to the Supreme Court on grounds that purpose of penalty is deterrence and not destruction of the enterprise. This approach may create complications and contradictions in certain circumstances. (a) Assuming enterprise X produces products A, B and C, the anti-competitive agreement relates only with reference to product C, then penalty may be imposed only on the turnover of product C, because, according to the Supreme Court, penalty on turnover of all the products will amount to destroying the enterprise. On the other hand, if enterprise Y produces only product C, the penalty shall be imposed on its turnover of entire production but then it shall not be destructive according to the Court. (b) If enterprise X in the aforementioned illustration produces product C in a small quantity in comparison to product A and B, will penalty on the turnover of product C have deterrent effect? In our opinion it would be far better if the question

whether the penalty should be imposed on the entire product or only on the relevant product should be left to the discretion of the court. The question should be decided on the consideration whether penalty on entire production or on relevant product will have deterrent effect.

XIII CONCLUSION

One of the most important decisions of the Government of India was to abolish Competition Appellate Tribunal and confer its jurisdiction to National Company Law Appellate Tribunal. It is difficult to understand the logic of this move particularly for two reasons. Firstly, that The National Appellate Tribunal is woefully understaffed and secondly, in this age of specialization it is difficult to understand the logic of abolishing a highly specialised tribunal and confer its jurisdiction to a non-specialised body.

The case on the sale of sick sugar mills of U.P. is especially disappointing in as much as the pattern of behaviour clearly pointed out collusive behaviour yet the decision was contrary to what was expected. Similarly, the decisions of the Supreme Court and National Company Law Appellate Tribunal commented in this survey of Competition Law are disappointing. Though there are some exceptions, but the overall trend is to tilt the interpretation of the Competition Act in favour of the Corporates rather than in favor of the consumers.

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